The Environmental Assessment of Plans and Programmes

Jonathan Robinson and David Elvin Q.C.[1]

Strategic environmental assessment ("SEA"), namely the environmental assessment of plans and programmes which exist to provide the framework for detailed decision making, was required to take effect within the Member States of the EU by July 21, 2004. It fills the gap not covered by environmental impact assessment Directive 85/337/EEC in requiring the transparent assessment of the likely environmental effects of the hierarchy of plans and programmes which have a strategic role in directing not only development but other interventions in the environment. As the Director General of the Environment Directorate General of the Commission has stated[2]:

> "The Strategic Environmental Assessment (SEA) Directive is an important step forward in European environmental law. At the moment, major projects likely to have an impact on the environment must be assessed under Directive 85/337/EEC. However, this assessment takes place at a stage when options for significant change are often limited. Decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector or geographical area. The SEA Directive ... plugs this gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they can be taken into account while plans are actually being developed, and in due course adopted. The public must also be consulted on the draft plans and on the environmental assessment and their views must be taken into account.
>
> Whilst the concept of strategic environmental assessment is relatively straightforward, implementation of the Directive sets Member States a considerable challenge. It goes to the heart of much public-sector decision-making. In many cases it will require more structured planning and consultation procedures. Proposals will have to be more systematically assessed against environmental criteria to determine their likely effects, and those of viable alternatives. There will be difficult questions of interpretation, but when properly applied, these assessments will help produce decisions that are better informed. This in turn will result in a better quality of life and a more sustainable environment, now and for generations to come."

This article considers issues arising from the introduction of SEA at EC and national level following the adoption of EC Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment[3] ("the SEA Directive"). The Environmental Assessment of Plans and Programmes Regulations 2004 (S.I. 2004 No. 1633) were issued for consultation by ODPM in February 2004[4] and made on June 28, 2004 ("the Regulations"). They apply to England.[5] Scotland,

[1] The views expressed in this article represent only the personal views of the authors. An earlier version of part of this article was given by Jonathan Robinson as "Anticipating the effect of Strategic Environmental Assessment" at *Planning law: Analysing Reform, Europe and Caselaw*, White Paper Conference, London, March 21, 2002. That paper was drawn on by the Commission in producing its 2003 Guidance (see Appendix III, *Bibliography*). See also [2000] J.P.L. 876.

[2] In the Foreword to the Commission's Guidance on SEA issued in 2003, referred to below. For the application and scope of SEA prior to the coming into force of the SEA Directive, see the ICON Final Report "*SEA and Integration of the Environment into Strategic Decision-Making*" (May 2001) (European Commission Contract No. B4–3040/99/136634/MAR/B4).

[3] OJ L 197, 21.7.2001, p.30.

[4] The Draft Regulations, dated January 30, 2004 form Annex B to the Consultation Paper—"*The Draft Environmental Assessment of Plans and Programmes Regulations 2004—A Consultation Paper*".

[5] Reg. 3 of the Regulations.

Wales and Northern Ireland are preparing separate legislation to implement the SEA Directive.[6]

References in this article to the 2004 Act are to the Planning and Compulsory Purchase Act 2004 which received the Royal Assent on May 13, 2004.

Finally this article considers briefly the recently agreed Protocol on SEA to the Espoo Convention, which may in time require the European Community to amend the SEA Directive.

(1) THE SEA DIRECTIVE (2001/42/EC)

At EC level the European Parliament and Council of Ministers adopted the SEA Directive on June 27, 2001. The SEA Directive establishes a procedure, closely based on the EIA Directive, requiring the environmental assessment of plans and programmes in a number of sectors, including town and country planning and land use. The phrase "strategic" does not appear in the Directive although that term is often applied to the Directive.[7] In 2003 the Commission issued guidance on the SEA Directive "*Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment*"[8] ("the Commission Guidance").

The objective of SEA is set out in Art.1:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

Paragraph 5 to the preamble to the SEA Directive adds:

> "(5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision-making. The inclusion of a wider set of factors in decision-making should contribute to more sustainable and effective solutions."

The SEA Directive applies to "plans and programmes" and, significantly, not in terms to policies. Like the EIA Directive, the SEA Directive then prescribes a category for which assessment is mandatory, and a category in respect of which Member States have a degree of discretion.

Article 2(a) of the SEA Directive defines "plans and programmes" as follows:

> "(a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
> - which are subject to preparation and/or adoption by an authority at national, regional, or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
> - which are required by legislative, regulatory or administrative provisions".

[6] The draft Scottish regulations which were published for consultation are in almost identical form to the English Regulations. They were published with a consultation paper in December 2003—Scottish Executive Paper 2003/31 "*Strategic Environmental Assessment—A Consultation on Proposed Legislative Measures to introduce Strategic Environmental assessment in Scotland*". That consultation paper also announces the intention of the Scottish Executive to introduce a Bill in due course to give wider effect to SEA and to apply it not only to plans and programmes but to "strategies": see s.3 and paras 4.53–4.58.

[7] Indeed, it is used by the Commission in its December 2003 Guidance: see *e.g.* para.1.1.

[8] ISBN 92–894-6098–9. Available at *http://europa.eu.int/comm/environment/eia/sea-support.htm*.

Plans and programmes

Despite possible ambiguities considered further below, this definition of plans and programmes has a clear core meaning. There can be little doubt that it covers all elements of the development plan. Local planning authorities are without doubt "authorities" for the purposes of the definition, and are "required" by "legislative provision" to adopt unitary development plans and local plans. The Greater London Authority Act 1999 similarly requires the Mayor of London to adopt a spatial development strategy. Similar considerations will apply to the Local Development Frameworks and other forms of development plan under the 2004 Act.[9]

In spite of this clear core meaning, the definition leaves room for debate on several points. First, it is notable that the concepts of "plan" and "programme" themselves are not defined by the Directive. Neither is any assistance in the interpretation of these words to be found in the recitals. The other language versions use similarly open-ended terminology. The Regulations (see below) do not assist since they simply adopt the definition used in the SEA Directive.[10]

The ECJ is likely to give the terms a wide interpretation. In *Aannemersbedrijf P.K. Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland*[11] the ECJ considered that the broad scope and purpose of the EIA Directive justified interpreting the concept of "project" under that Directive widely. The objective of the present Directive is stated no less broadly in its Art. 1, and the ECJ is likely to adopt a similarly broad approach to interpretation. On this basis the Court may well interpret the terms as covering any formal statement which sets out an intended course of future action. Although Arts.3(2) and (4) further clarify which plans and programmes the SEA Directive applies to, in particular by limiting it to plans and programmes which "set the framework for future development consent", there are nevertheless likely to be cases in which the question of whether the SEA Directive applies will turn on the definition of "plans and programmes". Is, for example, a Development Brief required by the provisions of the development plan itself a "plan"?

The Commission Guidance notes[12] the possible "broad range of meanings" for the term "plans and programmes" and that since both are treated in the same way there is no need to draw a rigorous distinction. The Guidance continues:

> "In identifying whether a document is a plan or programme for the purposes of the Directive, it is necessary to decide whether it has the main characteristics of such a plan or programme. The name alone ('plan', 'programme', 'strategy', 'guidelines', etc) will not be a sufficiently reliable guide: documents having all the characteristics of a plan or programme as defined in the Directive may be found under a variety of names."

Paragraphs 3.5 and 3.6 of the Commission Guidance seek to provide some further assistance as to the meaning of "plans and programmes", but do so in a manner which merely serves to emphasise the width of the concepts:

> 3.5 The kind of document which in some Member States is thought of as a **plan** is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas, or giving criteria which should be taken into account in designing new development . . ..

[9] See the new definition of "development plan" found in section 38 of the 2004 Act. See also para. 4.3.1 of draft PPS 12 "Local Development Frameworks" (Oct 2003).
[10] See reg. 2(1) which mirrors article 2(a) and reg. 5(2) and (3) which mirror article 3(2).
[11] [1996] E.C.R. I–5403.
[12] Para. 3.3.

> 3.6 In some Member States, **programme** is usually thought of as the plan covering a set of projects in a given area, for example a scheme for regeneration of an urban area, comprising a number of separate construction projects, might be classed as a programme. In this sense, 'programme' would be quite detailed and concrete . . . But these distinctions are not clear cut and need to be considered case by case. Other Member States use the word 'programme' to mean 'the way it is proposed to carry out a policy'—the sense in which 'plan' was used in the previous paragraph . . .."

This clearly raises the possibility that at least some forms of policy guidance may amount to plans or programmes since at least some policies might be considered to have the characteristics of one or the other. For example, regional policy guidance (under the 2004 act this will become regional spatial strategy) can be quite specific in its policies and guidance and may closely resemble the type of policy which appears in a development plan. Indeed, development plan policies frequently repeat or modify the policies found in national and/or regional policy and the only distinction between them under the current law is that policy as such does not have a specific statutory role save as a material consideration whereas the development plan has a specific role under s.54A and 70(2) of the Town and County Planning Act 1990. Under the 2004 Act that distinction will be eroded since, in England, regional spatial strategy ("RSS") will form part of the development plan.[13] Since, in any event, national and regional policy currently forms the basis of development plan policies,[14] the distinction in national law between the development plan and national/regional policy, and the role which each plays in the development control process, can often be more apparent than real. Indeed, para. 1.6 of Draft PPS 1 states:

> "Planning operates in the public interest to ensure that the development and use of land takes place to meet these broad objectives. This is done through the structure of national policies and regional and local plans, which provide the framework for planning for sustainable development and for development to be managed effectively. Regional plans build on and reflect national policies, and local plans deliver strategic policies as well as local policies for their areas. . ."

The boundary between national/regional planning policy and development plan policy as plans or programmes is not therefore a clear one and leaves scope for argument as to whether at least some forms of regional or national policy ought to be considered "plans" within Art. 2(a), given the broad approach required.[15]

"Plans and programmes" include modifications to plans and programmes.[16] Modifications presumably include both partial modification and complete replacement of the plan or programme.

Authority

A second question raised by the definition in Art.2(a) is what is meant by "an authority". The words "at national, regional or local level" may suggest that the term covers only branches of Government. But it could be argued that the term applies to any body which is an emanation of the State in accordance with the Court's case law on direct effect: "a body, whatever its legal form, which has been made responsible,

[13] Section 38(3)(a). Under section 1(5) the Secretary of State may prescribe parts of existing RPG as RSS. Para. 1.2 of ODPM SEA Guidance (October 2003), referred to below, considers RPG to fall within the scope of the SEA Directive.

[14] See ss. 12(6), 31(6), 36(9) of the Town and Country Planning Act 1990, reg. 20 of The Town and Country Planning (Development Plan) (England) Regulations 1999 S.I. 1999 No. 3280 and PPG 12 (1999) paras 1.4, 1.5. Under the 2004 Act, see section 5(3) with regard to RSS and section 19(2) with regard to local development documents.

[15] There is a distinction between national and regional policy to the extent that national policy is not expressly required, even by an administrative provision whilst RPG might be regarded as "required" by PPG 11. See, further, below.

[16] Art. 2(a) and para. 3.19 of the Commission Guidance. See also the parallel point in relation to EIA in the *Kraaijeveld* case.

pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals". For the ECJ to apply those now familiar concepts in interpreting the term "authority" would provide a large measure of legal certainty.[17] It would also accord with the likely requirement to adopt a broad interpretation of the provisions of the SEA Directive.[18]

Legislative, regulatory or administrative provisions

A third question which arises from the definition of plans and programmes in Art.2(a) is what is meant by "legislative, regulatory or administrative provisions".

It appears clear that the terms "legislative" and "regulatory" provisions will cover instruments laying down legal requirements, including both primary and delegated legislation. However, the scope of the term "administrative provisions" is less clear. The ECJ will have regard to the terms used in the other language versions. This equal authenticity of all language versions is particularly important here, as the structure of the different versions varies significantly, the Dutch and German texts omitting entirely as a distinct third category what is rendered in the English version as "administrative provision".[19] That term has been transposed directly into reg. 2(1) of the Regulations.

The extent of the effect of the provision will depend not only whether the Guidance constitutes an administrative provision but also what is meant by "required". That term could be interpreted as covering only provisions which impose a legal requirement that a plan or programme be adopted. But a possible wider interpretation would include also guidance which exhorts an authority to adopt a plan or programme or which stipulates the preparation/adoption of a plan or programme as a matter of good practice or policy. This broader interpretation is supported by at least one other language version.[20]

An example where this would be significant is a development brief adopted by a local planning authority, as envisaged in the development plan. The development plan itself would appear clearly to be a "regulatory or administrative provision". Does a statement in the development plan that a development brief will be adopted "require" the development brief, even though planning permission could lawfully be granted without a development brief having been adopted?

Although the ECJ will of course give the definition an autonomous Community law meaning, it is likely to take as its starting point the meaning of the relevant terms in the national legal systems. If the terms used connote, under the relevant national systems, delegated legislation made by the Government, then the ECJ may adopt that limited interpretation of the term "administrative provisions". There is certainly scope for reading the purpose of the provision as covering a whole range of "requirements", but with the intention that the requirement has a binding character and simply reading the third category as ensuring that nothing should turn on the precise origin of the requirement

[17] See the Commission Guidance at paras 3.11–3.13.

[18] This could be significant in advising privatised utilities, which can for certain purposes fall within the definition of "emanation of the State": see *e.g. Foster v British Gas* [1991] 1 Q.B. 405, 427–428. Although utilities may be unlikely to adopt plans for town and country planning or land use, they may well adopt plans for other sectors also covered by the SEA Directive, such as "energy, industry, transport ... water management or telecommunications". The question whether plans adopted by a privatised utility in such areas fall within the SEA Directive falls outside the scope of this article, and would appear to turn on difficult questions not only about the meaning of "authority" but also about the meaning of "set the framework" and "development consent".

[19] The German version refers to plans and programmes, "die aufgrund von Rechts-oder Verwaltungsvorschriften erstellt werden müssen" and the Dutch version to those "die door wettelijke of bestuursrechtelijke bepalingen zijn voorgeschreven". These appear to correspond more with what is rendered in English as "legislative" or "regulatory" provisions rather than administrative. The French and Italian versions, on the other hand, corresponds to the three English categories—"exigés par les dispositions législatives, réglementaires ou administratives" and "previsti da disposizioni legislative, regolamentari o amministrative."

[20] The Italian version uses the term "previsti" ("foreseen") where the English version uses "required". This text suggests an even wider meaning to the term, not apparently supported by any other language version of the SEA Directive, that a plan or programme will be within the Directive if it is "foreseen" by an administrative provision.

(i.e. whether legal, regulatory or administrative). There may, for example, be administrative directions which have legally binding effect issued under legal provisions[21] or administrative provisions which are legally binding through the creation of a legitimate expectation.

Nonetheless, there is likely to be debate as to whether "required" does imply a legal obligation and thus whether the term covers measures adopted administratively but which are not legally binding. This debate is fuelled by para.3.16 of the Commission Guidance referred to below which supports (without detailed analysis) the view that a requirement may exist even if it is not legally binding. If a legal requirement were not necessary then, for example, under English planning law there would be an issue whether circulars or planning policy guidance (or the replacement planning policy statements proposed by ODPM[22]) adopted by the Secretary of State constitute an "administrative provision". If such Guidance requires an authority to adopt a plan or programme, there will be an issue whether that plan or programme falls within the definition in Art. 2(a). If, for example PPG 11[23] constitutes an "administrative provision", then RPG adopted in accordance with the procedures provided for in PPG 11 may require assessment under the SEA Directive. Indeed, Para.1.2 of ODPM's "*The Strategic Environmental Assessment Directive: Guidance for Planning Authorities*" (October 2003) ("the ODPM Guidance"), considers RPG to fall within the scope of the SEA Directive which suggests an acceptance that it is "required" under an administrative provision, although there no basis is given for that acceptance.

On that basis a distinction may arise from RPG, or another form of plan or programme, which is required by another policy document and national policy generally which generally is not so required. However, national policy plainly is recognised by statute as having a role to play in the formulation of the development plan[24] (both pre- and post-2004 Act) and it may be argued that national policy is thus by implication "required." The difficulty with such an argument is that statute requires national policy to be taken into account in formulating development plan policies but does not require either any specific content in national policy nor, indeed, that there should be any such policy at all. If there were no relevant national policy, there would be nothing which was required to be taken into account. It therefore seems that a valid distinction does exist between regional policy (both pre- and post-2004 Act) which might be considered to be "required" by administrative provisions (subject to the issues considered above) and national policy generally which is not required to be produced by statute or otherwise[25] but which, if it is issued, is then required to be taken into account.

The Commission Guidance refers to "administrative provisions" in para.3.16:

> "3.16. **Administrative provisions** are formal requirements for ensuring that action is taken which are not normally made using the same procedures as would be needed for new laws and which do not necessarily have the full force of law. Some provisions of 'soft law' might count under this heading. Extent of formalities in its preparation and capacity to be enforced may be used as indications to determine whether a particular provision is an 'administrative provision' in the sense of the Directive. Administrative provisions are by definition not necessarily binding, but for the Directive to apply, plans and programmes prepared or adopted under them must be required by them, as is the case with legislative or regulatory provisions."

[21] E.g. under section 40 of the Environment Act 1995.

[22] Of which a number, including drafts of PPS 1, 6, 7, 11 and 12, have already been issued for consultation.

[23] See e.g. PPG 11 section 1, paras 2.1–2.2, 16.1, 16.10.

[24] See ss. 12(6), 31(6), 36(9) of the Town and Country Planning Act 1990, reg. 20 of The Town and Country Planning (Development Plan) (England) Regulations 1999 S.I. 1999 No. 3280. See section 5(3) of the 2004 Act with regard to RSS and section 19(2) with regard to local development documents.

[25] Draft PPS1 does not seem to change the current position: see e.g. para. 1.6 and Annex B para.s 1 and 2. However, it goes give slightly greater formal recognition to the role of national policy in the plan-led system in comparison to the equivalent parts of the most recent PPG 1 (1997).

The Commission's view, therefore, is that "required" in this context does not mean that there must be a legal requirement or obligation to prepare or adopt a plan or programme, but required in a non-binding administrative sense. If this is correct, it does raise the difficult questions identified above.

Exclusions

Three categories of plans and programmes are excluded entirely from the scope of the SEA Directive.[26] These are:

(1) plans and programmes the sole purpose of which is to serve national defence or civil emergency;
(2) financial or budget plans and programmes[27]; and
(3) certain plans and programmes under the Community funding regimes of the Structural Funds and European Agricultural Guidance and Guarantee Fund, for the present programming round.

When SEA is required

The SEA Directive does not require assessment of every plan or programme which falls within the definition in Art.2(a). Like the EIA Directive, it defines a category of plans and programmes for which assessment is compulsory, and a category in relation to which Member States enjoy a degree of discretion.[28]

Compulsory SEA

The compulsory category is defined in Art.3(2). This provides that:

> "Subject to para.3, an environmental assessment shall be carried out for all plans and programmes,
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annex I and II to Directive 85/337 EEC, or
> (b) which, in view of the likely effects on site, have been determined to require an assessment pursuant to Art.6 or 7 of Directive 92/43/EEC".

The list of applicable sectors in this definition is wide. The express inclusion of "town and country planning or land use" means that this width is likely to be of little importance to planning lawyers. But those advising on, say, telecommunications, countryside issues or transport may well have to confront difficult questions about whether plans or programmes in these sectors "set the framework for development consent for projects", and so fall within the scope of the SEA Directive. The fact that the UK has implemented the EIA Directive in a way which treats planning permission as the "development consent" under that Directive, will not be conclusive that other consents in the areas of, say, telecommunications or transport do not constitute development consents for projects. In the area of planning/land use it is now established that the concept of "development consent"[29] is not limited to a grant of planning permission. As the ECJ held, in the context of the approval of new conditions on an

[26] See articles 3(8) and (9).
[27] See Commission Guidance paras 3.24, 3.25. The Commission draws a fine distinction between these plans and programmes, which are excluded, and plans which allocate resources which are said to be included.
[28] See the useful summary of the application of the Directive at Appendix 1 of the October 2003 ODPM SEA Directive Guidance.
[29] For the definition in the context of the EIA Directive, see article 1(2) which defines it is "the decision of the competent authority or authorities which entitles the developer to proceed with the project."

old mining permission, in *R (Delena Wells) v Secretary of State for Transport, Local Government & the Regions*[30] at paras 46 and 47[31]:

> "46. It would undermine the effectiveness of that directive to regard as mere modification of an existing consent the adoption of decisions which, in circumstances such as those of the main proceedings, replace not only the terms but the very substance of a prior consent, such as the old mining permission.
>
> 47. Accordingly, decisions such as the decision determining new conditions and the decision approving matters reserved by the new conditions . . . must be considered to constitute, as a whole, a new consent within the meaning of Art. 2(1) of Directive 85/337, read in conjunction with Art. 1(2) thereof."

With regard to plans and programmes in the planning context, the definition in para.(a) has three elements:

- A plan must be "prepared for" the relevant sector. There would appear to be little room for doubt that any document which falls within the definition of plan and programme under Art.2(a), and is prepared for a purpose within the planning system, will be "prepared for . . . town and country planning or land use".
- The plan or programme must "set the framework for future development consent of projects". This is more problematic. The context suggests that the phrase "development consent" is to have the same meaning as in Art.1(2) of the EIA Directive, namely "the decision of the competent authority or authorities which entitles the developer to proceed with the project". Whilst there may, as noted above, be room for argument whether other types of decision constitute a development consent, it is clear that a grant of planning permission does: that is the basis on which the EIA Directive has been implemented in the planning system. More difficult is the question of what is meant by "set the framework". There seems little room for doubt that the development plan does so, given s.54A. But what of other instruments which, whilst not having the statutory force of s.54A, must be taken into account as material considerations? Does the fact that they must be taken into account, when relevant, in determining a planning application, mean that they "set the framework" for development consent, and so are subject to compulsory assessment under Art.3(2)(a)? The wording of para.1 of Annex II supports the view that they do. It envisages that different plans may set the framework for consents in different degrees, suggesting that more than one plan or document may simultaneously "set the framework". In the Commission Guidance,[32] "set the framework" is explained in these terms which support the view that the answer is unsurprisingly one of degree –

  > "The words would normally mean that the plan or programme contains criteria or conditions which guide the way the consenting authority decides an application for development consent. Such criteria could place limits on the type of activity or development which is to be permitted in a given area; or they could contain conditions which must be met

[30] Case C–201/02 [2004] Env.L.R. 528.

[31] See also *R. v North Yorkshire CC ex parte Brown* [2000] A.C. 397. The scope of "development consent" is also under consideration in the context of pollution consents under Part I of the Environmental Protection Act 1990 and the replacement regime under the Pollution Prevention and Control Regulations 2000. So far, this issue has been the subject of an inconclusive challenge that was dismissed prior to final decision (*R. v Environment Agency & Others ex parte Horner* dismissed by Sullivan J. in July 2003 since the IPC permit under the 1990 Act under challenge was now academic since it had been replaced by a PPC consent) and a new challenge that has not yet been determined (*R (Edwards) v Environment Agency & Others* CO/5702/2003). In those cases the argument is that a consent that involves the authorisation of certain discharges is also a development consent as it is a prerequisite to carrying on the process or activity in question.

[32] Paras 3.23–3.28.

> by the applicant if permission is to be granted; or they could be designed to preserve certain characteristics of the area concerned (such as the mixture of land uses which promotes the economic vitality of the area). . .
>
> . . . Whether particular criteria or conditions set the framework in individual cases will be a matter of fact and degree in each case: a single constraining factor may be so significant that it has a dominant influence on future consents. On the other hand, several rather trivial or imprecise factors may have no influence on the granting of consents."

- The plan must "set the framework" for development consent for projects "listed in Annex I and II to Directive 85/337/EEC". Note that the reference is to projects "listed" in the Annexes to that Directive, not just those projects requiring assessment under that Directive.

Art. 3(2)(b) defines a second category of plans and programmes requiring compulsory assessment. These are plans and programmes which are determined to require assessment pursuant to Art.6 or 7 of the Habitats Directive 92/43/EEC. Those articles require an "appropriate assessment" of

> "any plan or project not directly connected with or necessary to the management of a [Special Area of Conservation or Special Protection Area] but likely to have a significant effect thereon".

In relation to any plan requiring assessment under the Habitats Directive, the practical effect of the SEA Directive is to define more precisely what is required for an "appropriate assessment".[33] It is less clear whether the requirements of the SEA Directive would apply to any project requiring assessment under the Habitats Directive. There seems no reason in principle why something which constitutes a project for the purposes of the Habitats Directive should not simultaneously be a plan or programme for the purposes of Art.3(2).

It has been assumed so far that a Member State has no discretion under Art.3(2): if a plan or programme falls within para.(a) or (b) of that article, assessment is compulsory. But an argument can be made for the view that some discretion remains.

Article 3(1) requires assessment only of plans and programmes "referred to in paras 2 to 4 which are likely to have significant environmental effects". It might be argued that a plan, which, though falling within Art.3(2), is not likely to have significant environmental effects, need not be made subject to assessment. It could be argued that recital 10 supports this view, in providing that those plans and programmes described in Art.3(2) "should as a rule be made subject to systematic environmental assessment". The words "as a rule" imply that assessment is not compulsory in all cases. This argument is, however, weak. First, the better interpretation of the relationship between articles 3(1) and (2) appears to be that Art.3(2) defines a category of plans which are irrebuttably presumed to be likely to have significant environmental effects for the purposes of Art. 3(1). Secondly, the words "as a rule" in recital 10 do not imply any discretion under Art. 3(2), but merely reflect the fact that Art. 3(3) creates limited exceptions to the obligation in Art. 3(2).

Discretionary SEA

Certain plans and programmes are subject to assessment at the discretion of the Member States. Articles 3(3) and (4) define three categories of plans and programmes in respect of which Member States have discretion as to whether to require assessment:

[33] Strictly the two obligations continue to run in parallel and there are legal requirements for both an SEA and an appropriate assessment. This may give rise to circumstances where duplication could be avoided: see article 4(3) and, further, below.

> "minor modifications" to plans and programmes under the compulsory category in Art.3(2), considered above;
>
> plans and programmes under Art.3(2) which "determine the use of small areas at local level"; and
>
> "plans and programmes other than those referred to in para.2, which set the framework for future development consent of projects".

The terms "minor modifications" and "small areas at local level" are not defined, and are likely to prompt debate.[34] Although it might be argued that a local plan determines the use of small areas at local level such an interpretation would be unlikely to find favour with the ECJ, given the central role of local plans in the current system of land use control in the UK. There appears to be more room for debate about whether a Development Brief envisaged by a Local Plan would fall within this exception.

The third category is potentially very wide and covers "plans" which set the framework for development consent of "projects", a broad category which is not further defined. Given the cross references to the EIA Directive at other points, the term "projects" is likely to be interpreted in accordance with Art. 2(2) of that Directive as meaning[35] –

> "the execution of construction works or of other installations or schemes; other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".

The fact that this category is potentially very wide is, however, likely to be of limited significance in the planning context. This is because the vast majority, if not all, plans and programmes in the planning context which set the framework for development consent for projects will, because of the breadth of Annexes I and II of the EIA Directive, set the framework for development consent for projects listed in those Annexes, and so be subject to compulsory assessment in any event under Art.3(2). The category in Art.3(4) is likely to be much more significant, and to raise a number of difficult questions, in areas other than planning.

The screening mechanism

The provisions prescribing how plans subject to discretionary assessment are to be screened are closely modelled on the EIA Directive. The overall criterion to be applied is whether the plan or programme is "likely to have significant environmental effects". In determining this, Member States may consider plans case by case, or specify types of plans or programmes, or combine both of these approaches.

In any event, whether screening is done case by case or by specifying types, Member States must take into account the criteria in Annex II. These relate, on the one hand, to the characteristics of the plan, and on the other to the characteristics of the effects and the area likely to be affected.[36]

Under the Common Position,[37] it appeared clear that the fact that assessment would be carried out of plans at another level in a hierarchy of plans was a factor which Member States could take into account in deciding whether to assess a particular plan. The text of the final Directive, however, includes a new sentence at the end of Art. 4(3), which casts some doubt on this. It provides that:

> "(3) Where plans and programmes form part of a hierarchy, Member States shall, with a view to

[34] See Commission Guidance at para. 3.36—"A general definition of 'minor modifications' would be unlikely to serve any useful purpose." ODPM Guidance at para. 2.9 does not provide further guidance.
[35] See para. 3.29 of the Commission Guidance.
[36] See Commission Guidance at paras 3.48–3.61.
[37] See article 4(3) of the Common Position EC No. 25/2000 OJ C137/11, 16.5.00.

> avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with the Directive, at different levels of the hierarchy. For the purpose of, *inter alia*, avoiding duplication of assessment, Member States shall apply Art.5(2) and (3)."

Articles 5(2) and (3) relate not to whether assessment is required, but to the content of the Environmental Report, suggesting that duplication of assessment is to be avoided not by deciding not to assess plans at different levels in a hierarchy, but rather by limiting the scope of assessment. The Commission[38] considers that this provision is intended to avoid duplication[39]:

> "In some circumstances, there may be more than one plan or programme dealing with the same broad subject matter but over a different geographical area or in different degrees of detail. For example, a land use plan may set out a vision for the development of an entire region; there may be a series of more detailed land use plans for the constituent parts of the region which set out in greater detail how the development of these areas is foreseen; whilst at municipal level there may be still more detailed plans which provide a very comprehensive framework for the development of the area. Article 4(3) combined with Art. 5(2) and (3) is intended to ensure that duplication of assessment is avoided in this kind of situation."

However, care will need to be taken to ensure that the material already assessed is up to date, fully relevant and covers the issues in the later plan or programme which would justify the avoidance of duplication of assessment.[40] There would have to be appropriate incorporation and referencing of the earlier assessment material.[41]

The environmental authorities defined by the Member State must be consulted when plans are screened case by case, or when types are specified for screening purposes.

Member States are required to make available to the public "their conclusions" when determining whether plans or programmes require assessment. A change from the Common Position, reflecting a European Parliament amendment, is an express requirement that the conclusions include, in relevant cases, the reasons for not requiring assessment of a plan or programme. Furthermore, given that the Member State is required to take into account detailed criteria, there is an argument that a duty to state "conclusions" includes a duty to state how those criteria have been taken into account in reaching that decision.

Procedure: the environmental report and consultation

The provisions in the SEA Directive requiring the supply of environmental information and consultation are also closely based on the EIA Directive. Where assessment is required, an "environmental report" is to be prepared.[42] The definition of "environmental report" in Art.2(c) refers to

> "the part of the plan or programme documentation containing the information required in Art. 5 and Annex I."

Article 5 and Annex I[43] requires that the environmental report must "identify, describe and evaluate"

[38] Commission Guidance, paras 4.5–4.7.

[39] This may plainly be relevant where parts of the development plan may duplicate already assessed provisions of RPG, RSS or the Mayor's spatial strategy (the London Plan).

[40] Commission Guidance, paras 4.6, 4.7.

[41] Commission Guidance para. 4.7 states "In order to form an identifiable report, the relevant information must be brought together: it should not be necessary to embark on a paper-chase in order to understand the environmental effects of a proposal. Depending on the case, it might be appropriate to summarise earlier material, refer to it, or repeat it. But there is no need to repeat large amounts of data in a new context in which it is not appropriate."

[42] See the guidance as to the form and content of the report in s.5 of the Commission Guidance.

[43] See Commission Guidance paras 5.19–5.30 and ODPM Guidance, Chapter 3 "Stages of SEA".

the likely significant effects on the environment of implementing the plan or programme. Significantly, the report must deal with "reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme".[44] The report must include an outline of the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken.[45]

The SEA Directive does not prescribe who is to prepare the report. This will be a matter for national transposing legislation.[46] The SEA Directive does, however, require that the environmental authorities defined by the Member State be consulted when deciding on the scope and level of detail of the information which must be included in the report.[47]

Article 12(2) requires that environmental reports should be of a suitable standard[48]:

> "Member States shall ensure that environmental reports are of a sufficient quality to meet the requirements of this Directive and shall communicate to the Commission any measures they take concerning the quality of these reports."

The Commission Guidance suggests that the requirement as to reaching the standard under Art. 12(2) can be met by a proper transposition and application of the SEA Directive. On that basis, the Art. 12(2) obligation appears to add nothing of substance. ODPM appears to have proceeded on this basis since the Regulations do not contain any direct transposition of Art. 12(2).

As in the case of EIA, the quality of the information must be primarily a matter for the rational judgment of the decision maker[49] although, unlike EIA, in most cases the decision maker will also be the authority responsible for the SEA. This approach is supported by the Commission[50]:

> "In most cases, it will be the individual authority that has to decide before it adopts a plan or programme whether a specific environmental report is of sufficient quality or, if not, what action needs to be taken to rectify the deficiencies. This might include amending or augmenting the environmental report or even repeating part or all of the SEA procedure. In identifying what makes for satisfactory quality, the authorities responsible for the plan or programme will need to pay close attention to the requirements of the Directive as set out in Art. 5 and Annex I. They will also need to pay close attention to the results of consultation with the environmental authorities and the public under Art. 6. They will need to bear in mind that a defective report may call into question the validity of any acts or decisions taken in pursuance of it."

The SEA Directive does not expressly require the environmental report to be contained in one document.[51] As is noted above, it is defined as "the part of the plan or programme documentation containing the information required in Art. 5 and Annex I".

The draft plan or programme and the environmental report are to be made available to the environmental authorities defined by the Member State, and the public. The Member State is required to "designate" the environmental authorities to be consulted, and "identify" the public to be consulted.

[44] Article 5(1). Contrast the less stringent provisions of the EIA Directive which only requires that the environmental information provided under Annex IV 2 should include an "outline of the main alternatives studied by the developer." See Commission Guidance at paras 5.6, 5.11–5.14.

[45] Annex I (h).

[46] See below. Reg. 12(1) of the Regulations requires that the environmental report shall be prepared by the responsible authority or that such authority should secure the preparation of it.

[47] See article 5(4).

[48] See Commission Guidance para. 6.3.

[49] See e.g. *R. v Rochdale B.C. ex p. Tew* [2000] Env LR 1 and *R. v Rochdale B.C. ex p. Milne* [2001] Env LR 22.

[50] Commission Guidance para. 6.4. Section 6 deals with the quality issue generally.

[51] See the Scottish consultation paper 2003/31 at para. 4.24. Neither the Commission Guidance (see para. 5.4) nor the English consultation paper suggests there need be a single document (see paras 1.13–1.15 and comments on reg. 12). A model structure for a report is set out in ODPM Guidance at D4.

The distinction between the words designate and identify may imply that the environmental authorities are to be identified in the transposing legislation, whereas the public can be identified administratively, on a case by case basis.

The detailed arrangements for consultation are to be determined by the Member State. The environmental authorities and public are, however, to be given "an early and effective opportunity within appropriate time-frames to express their opinion".[52] Consultation is an "inseparable part" of the SEA process.[53] A Member State is required to consult other Member States, if the implementation of a plan or programme is likely to affect the other Member State, or if the other Member State requests. The detailed provisions on transboundary consultation[54] are again closely based on the EIA Directive, which is in turn closely based on the provisions of the Espoo Convention (1991).

Procedure: decision-making

The authority is required to take into account the environmental report and the results of consultations "during the preparation of the plan or programme and before its adoption". Like the EIA Directive, therefore, the SEA Directive would not constrain the discretion of the authority in adopting a plan which it considered appropriate. Annex I (g) does require the environmental report to describe the "measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment". This appears to presuppose that measures to as fully as possible offset significant effects will be envisaged. To suggest, however, that this implies an obligation to take measures to offset significant adverse effects would sit ill with the objective in Art. 1 of the SEA Directive: namely to provide for a high level of protection of the environment by requiring assessment, but not by requiring particular measures to be taken.

Finally, the plan or programme which is ultimately adopted is to be made public . The authority must also publish a "statement summarising how environmental considerations have been integrated into the plan or programme". The statement must also summarise how the results of consultation have been taken into account, and the reasons for choosing the plan or programme in the light of the reasonable alternatives dealt with.[55]

Monitoring

Article 10 requires Member States to "monitor the significant environmental effects of the implementation of plans and programmes". The purpose of this is "inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action".[56]

This is likely to be a powerful provision, when combined with administrative law requirements as to rationality and the Art.12(2) requirement as to quality. They are express requirements not included in the EIA Directive. Although the article does not impose any requirement to take remedial action, it appears to be reasonably arguable that an authority would be acting irrationally if, faced with adverse effects not foreseen in the original environmental report, it did not at least give reasoned consideration to taking remedial action. Its decision as to whether to take action could well itself then be reviewable.

[52] See Commission Guidance, section 7, and ODPM Guidance Chapter 3, D5 and D6.

[53] See the article 2(b) definition of "environmental assessment" and Commission Guidance para. 7.4. Compare the comments as to the importance of public consultation in the context of EIA in *Berkeley v Secretary of State* [2001] 2 A.C. 603 at 615–616.

[54] See article 7.

[55] See article 9.

[56] See Commission Guidance s.8 and ODPM Guidance, Chapter 3 Stage E. This reinforces the general concern that an SEA should be of suitable quality: see article 12(2), above.

Entry into force

Turning, finally, to entry into force, Member States are required to adopt national legislation to implement the SEA Directive by July 21, 2004. This will require amendments to procedures in relation to the preparation of development plans.[57] As the scope of the SEA Directive, as seen above, is wider than development plans, it will also require the establishment of procedures for other forms of "plans and programmes", in the area of town and country planning and many other areas.

It contains a fairly elaborate transitional provision, bringing plans within its scope in two categories:

> All plans "of which the first formal preparatory act is subsequent to" July 21, 2004.
>
> Any plan which is adopted after July 21, 2006, even though the first formal preparatory act took place before that date.[58] A limited derogation is provided from this second category: Member States may, on a case by case basis, decide that assessment of a particular plan is "not feasible". The Member State must inform the public of this decision.

The transitional provision gives rise to a couple of issues. First, there is no definition of "first formal preparatory act" and none is proposed in either the draft English or Scottish transposing regulations.[59] It is clear that this concept must have an autonomous meaning in Community law. It would also appear that as the provision is not, as it might have been, phrased as a derogation, the Community principle that derogations are to be construed narrowly does not apply to it. What approach is the ECJ likely to take, therefore, to the term "formal act"?

There is no recital setting out the reason for the transitional provision. Nor is any assistance to be derived from para.20 of the Interinstitutional Agreement on Common Guidelines for the Quality of Drafting of Community Legislation: this encourages transitional provisions to be "drawn up in precise terms" but does not set out their purpose, in such a way as to assist in their interpretation. However, both legal certainty and good administration are general principles of EC law with which Directives must comply.[60] The purpose of the transitional provision appears to be to pursue these principles, and the ECJ is likely to approach its interpretation in the light of that purpose.

One approach, which appears attractive at first sight, would be to equate "formal" act with an act required by legislative, regulatory or administrative provision. This would echo the definition in Art.2 of the SEA Directive of those plans which fall within the scope of the SEA Directive. However, such a narrowing of the term "formal" would produce odd results. There may well be plans, for example, which are themselves "required" but for which no act is prescribed other than their adoption. In such a case the first formal preparatory act would also be the last, emptying the transitional provision of any substance in relation to such plans, and leading to precisely the administrative inconvenience and legal uncertainty which the transitional provision appears intended to avoid. "Formal act" must, therefore, be wider than merely acts required by legislative regulatory or administrative provision.

Another approach would be to equate "formal" act with an act having legal effects within national law. This would, however, produce inappropriate results. For example, the plan may be preceded by elaborate and time-consuming procedures, such a public consultation, but which may not be considered to produce legal effects in the legal system of the Member State in question. If, as a

[57] See Draft PPS 1 para. 4.3.1. The current draft of the proposed Town and Country Planning (Local Development) (England) Regulations 2004, issued in October 2003, does not deal with SEA. It appears to be intended that the Regulations and the new Local Development Regulations should simply sit side by side, as in the case of the current development control provisions of the TCPA and the EIA Regulations.

[58] Reflecting a tightening of the Common Position on the basis of a European Parliament amendment.

[59] Neither the English nor Scottish consultation papers, nor the ODPM Guidance, offer detailed guidance on the approach to this question although it is open to consideration in the consultation process.

[60] See *Craig and De Burca* (3rd ed.) pp.380–387.

consequence, the plan was not excluded by the transitional provision from the scope of the SEA Directive, the result would be to require a repeat of those procedures, contrary to the apparent aim of the transitional provision.

It therefore seems unlikely that the Court will consider that the question of whether an act is "formal" will turn rigidly on whether the act in question is required by national law or on whether it produces legal effects in national law. It is more likely that the Court will consider that the question requires a judgment to be taken in each case taking into account a number of factors, such as the nature of the act in question, the nature of the steps which precede that act, and the apparent aim of the transitional provision, namely to pursue legal certainty and good administration.[61] It seems unlikely that such formal acts are required to have legal effect.

It may be difficult to draw the line between an act which is the first formal preparatory act and something which falls short of it. For example, a number of planning authorities engage in informal, non-statutory consultation prior to issuing the first draft of a development plan by issuing an informal consultation document, or "issues paper." Although it might be argued that such a document is not "formal" it may nonetheless have been formally adopted or approved by the authority for consultation and be the result of the scoping of development plan issues which could properly be said to be preparatory to the plan.

A further issue is the scope of the Member State's power to derogate from the requirement to assess plans in the second category, i.e. plans whose first formal preparatory act predates July 21, 2004, but which are adopted after July 21, 2006. This derogation must be exercised on a case by case basis: a Member State which purported in its transposing legislation to exclude a category of plans adopted after July 21, 2006 would have exceeded its discretion.

It is also clear that, as a derogation, this provision must be construed narrowly. The Court is therefore likely to require a high threshold to be passed before a Member State can lawfully decide that assessment is not "feasible". Furthermore, the fact that national legislation prevents assessment in these circumstances would not in itself suffice: the principle of supremacy of Community law requires national legislation to give way to the requirements of the SEA Directive. Whether something is feasible must be determined on an objective basis, independent of the requirements of national law.

It is, nevertheless, not obvious in what situations a Member State will lawfully be able to invoke this derogation. A strict test of physical impossibility would be too high: it is hard to imagine a situation in which it is physically impossible to subject a plan to assessment. It therefore seems likely, having regard to the apparent purpose of the transitional provision, that the Court will require a Member State to demonstrate that to subject a plan to assessment would cause high degree of legal uncertainty, or lead to a serious infringement of the principle of good administration. Only in these circumstances will a Member State be able to decide that it is not feasible to subject a plan in the second category to assessment.

(2) TRANSPOSITION OF THE SEA DIRECTIVE—THE SEA REGULATIONS 2004

Draft Regulations dated January 30, 2004 were issued for consultation, accompanied by a Consultation Paper (February 2004) which refers to the policy guidance issued in October 2003,[62] in advance of legislation, although that guidance is concerned only with the application of the SEA Directive

[61] See Commission Guidance at para.s 3.64–3.66 which appears to adopt the arguments in the paper referred to in Footnote 1.
[62] "*The Strategic Environmental Assessment Directive: Guidance for Planning Authorities*."

Directive and not directly with any transposing legislation. The Regulations were made, in a form closely reflecting the draft, on June 28, 2004. The Regulations closely follow the SEA Directive as a result of which the issues considered to arise in the context of the SEA Directive, outlined above, apply equally to the parallel provisions of the Regulations.[63]

The teeth of the Regulations are found in reg.8 which will prohibit the adoption, or submission for adoption to the legislative procedure, of plans and programmes which require SEA until the requirements of Part 3 of the Regulations (relating to Environmental Reports and consultation procedures) have been met and account has been taken of the Environmental Report and consultation responses. It also prohibits the adoption of plans and programmes which are determined to be not likely to have significant environmental effects until that determination has been made.

Commentary on the Regulations

Regulation 1 makes provision for the coming into force of the Regulations on July 20, 2004. The Directive required that transposing provisions be in force by July 21, 2004.

Regulation 2 contains relevant definitions including:

> "the responsible authority" which is used in the Regulations to mean in relation to a plan or programme –
>
> > "(a) the authority by which or on whose behalf it is prepared; and
> > (b) where, at any particular time, that authority ceases to be responsible, or solely responsible, for taking steps in relation to the plan or programme, the person who, at that time, is responsible (solely or jointly with the authority) for taking those steps."
>
> ""plans and programmes" are defined as in Art. 2(a) of the SEA Directive as –
>
> > "plans and programmes, including those co-financed by the European Community, as well as any modifications to them, which—
> >
> > > (a) are subject to preparation or adoption by an authority at national, regional or local level; or
> > > (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case,
> > > (c) are required by legislative, regulatory or administrative provisions."

It is important to note the general provision in regulation 2(2) which seeks to ensure interpretation consistent with the SEA Directive and provides –

> "Other expressions used both in these Regulations and in the Environmental Assessment of Plans and Programmes Directive have the same meaning in these Regulations as they have in that Directive."

Since the Regulations simply follow the broad definition of "plans and programmes" given in Art. 2(a) of the SEA Directive, the same issues arise with respect to the term under the Regulations as occur in respect of the Directive: see the discussion under *Plans and Programmes,* above. The question of "authority" in Art. 2(a) is not further clarified except for the particular case of "responsible authority" which does not, in any event, assist with the meaning of "authority". The ODPM Guidance does not

[63] And in the case of the proposed Scottish regulations which (The Environmental Assessment (Plans and Programmes)(Scotland) Regulations 2004) are almost identical to the English Draft Regulations. See Scottish Executive Paper 2003/31 "*Strategic Environmental Assessment—A Consultation on Proposed Legislative Measures to introduce Strategic Environmental Assessment in Scotland*".

greatly assist in the resolution of these issues since its purpose is only to deal with the land use context. It does, however, as has been noted, express the view at para.1.2 that current RPG falls within the scope of the SEA Directive.

Regulation 3 applies the Regulations only to plans or programmes relating solely to England or "to England (whether as to the whole or part) and any other part of the United Kingdom," but not plans or programmes relating solely to Scotland, Northern Ireland or Wales.[64]

Regulation 4 designates as consultation bodies primarily the Countryside Agency, English Heritage, English Nature and the Environment Agency. Provision is made for consultation bodies where Scotland, Northern Ireland or Wales are concerned. Where the designated body is, for the purposes of a particular plan or programme, a "responsible authority" then in relation to that plan or programme such body shall not act as a consultation body.

The obligation to carry out SEA

Regulation 5 and 6 contain the key provisions requiring the responsible authority to carry out, or to secure the carrying out of, SEA of plans and programmes in accordance with Part 3 of the regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure:

> Reg. 5—where the first formal preparatory act is *subsequent to July 21, 2004* (the date by which the SEA Directive must be implemented) and the plan or programme is of the description set out in either reg. 5(2) or (3). The plans and programmes described in reg. 5(2) and (3) where SEA is required are:
>
> (a) A plan or programme which
>
> (i) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and
> (ii) sets the framework for future development consent of projects listed in Annex I or II to the EIA Directive
>
> (b) A plan or programme which, in view of the likely effect on sites, has been determined to require an assessment pursuant to Art. 6 or 7 of the Habitats Directive.
>
> Reg. 5(4)—where the first formal preparatory act of a plan or programme, other than a plan or programme of the description set out in paragraph (2) or (3), is subsequent to 21st July 2004 and –
>
> (a) the plan or programme sets the framework for future development consent of projects and
> (b) has been the subject of a determination under regulation 9(1) or a direction under regulation 10(3) that it is likely to have significant environmental effects.
>
> Reg. 6—where a plan or programme, of which the first formal preparatory act is *on or before 21st July 2004*, has not been adopted or submitted to the legislative procedure for adoption before 22nd July 2006 and is such that, had the first act in its preparation occurred after 21st July 2004 –
>
> (a) the plan or programme would have required an SEA by virtue of regulation 5(1); or
> (b) the responsible authority is of the opinion that, if a determination under regulation 9(1) in respect of the plan or programme had been made after 21st July 2004, it would have determined that the plan or programme was likely to have significant environmental effects

[64] As has already been noted the Scottish regulations are in almost identical form to their English counterpart.

unless the responsible authority decides that such assessment is not feasible and informs the public of its decision.

The use of "secure the carrying out" is not found the SEA Directive which simply requires that an SEA be carried out. The phrase indicates that the authority is not required to carry out the SEA process itself but may, for example, commission independent contractors e.g. to conduct the consultations on scoping and the report, and the prepare and draft the report. The extent to which the various aspects of the SEA process may be delegated is unclear: whilst clearly some matters, such as the decision whether or not to require SEA, must be for the authority itself it is not clear to what extent matters which go beyond the mechanics of carrying out research and drafting of the report, or the consultation process are permitted. For example, the phrase might allow private sector consultants to scope the report, or determine the mode and extent of public consultation.

The broad scope of the subject matter of the plans and programmes, and the question of "setting the framework" has already been discussed in the context of Art. 3 of the SEA Directive: the Regulations do not resolve the questions as to the meaning of "first formal preparatory act" considered earlier.

Exclusions

Regulation 5(5) provides that SEA is not required for: plans or programmes the sole purpose of which is to serve national defence or civil emergency; financial or budget plans or programmes; or certain plans or programmes co-financed under Council Regulations (EC) No. 1260/1999 or No. 1257/1999.

Regulation 5(6) provides that an SEA need not be carried out for:

(1) a plan or programme of the description set out in regulation 5(2) or (3) which determines the use of a small area at local level; or

(2) a minor modification to a plan or programme of the description set out in either of those paragraphs,

unless it has been determined under regulation 9(1) that the plan, programme or modification, as the case may be, is likely to have significant environmental effects, or it is the subject of a direction under regulation 10(3).

Co-financed plans

Regulation 7 implements Art. 11(3) of the SEA Directive by requiring SEA of relevant plans and programmes co-financed by the EC to be carried out in conformity with the specific provisions in the Community legislation concerned.

Prohibition unless SEA carried out

Regulation 8 prohibits the adoption or submission for adoption to the legislative procedure, of plans and programmes which require SEA until the requirements of Part 3 of the Regulations have been met and account has been taken of the Environmental Report and consultation responses. It also prohibits the adoption of plans and programmes which are determined to be not likely to have significant environmental effects until that determination has been made.

Determinations and directions

Regulation 9 provides for responsible authorities to make determinations of which of the plans and programmes referred to in reg.5(4) and (6) are likely to have significant effects on the environment and,

thus, whether SEA is required.[65] These decisions are made on a case by case basis. In reaching its decision, the authority must take into account the criteria specified in Schedule 1 and consult the consultation bodies.[66] The criteria in Schedule 1 correspond exactly to those set out in Annex II to the SEA Directive. Reasons must be given where the responsible authority determines that an SEA is not required.[67]

Regulation 10 confers power on the Secretary of State at any time before the adoption of a plan, programme or modification or its submission to the legislative procedure for the purpose of its adoption to:

(1) require the responsible authority to send him a copy of any determination under reg. 9(1) with respect to the plan, programme or modification, the plan, programme or modification to which the determination relates and, where reg. 9(3) applies, the statement of reasons given[68];

(2) direct that a plan, programme or modification is likely to have significant environmental effects, whether or not a copy of it has been sent to him in response to a requirement under reg. 10(1).[69] Before issuing such a direction, the Secretary of State must take into account the criteria specified in Schedule 1 and consult the consultation bodies[70] and, following the decision, he must send to the responsible authority and consultation bodies a copy of the direction and a statement of his reasons for giving it.[71]

On the making of a direction by the Secretary of State, any determination under reg. 9(1) will cease to have effect or, if none had been made, the responsible authority shall cease to be under any duty imposed by that regulation.[72]

The effect of these powers is thus to enable the Secretary of State either to "call-in" the decision as to whether an SEA is required before the responsible authority reaches a decision or to review a determination under reg. 9(1) after it has been made—providing he acts prior to adoption.

Regulation 11 sets out the publicity requirements for determinations and directions under regs 9 and 10 which enable the public to have access to copies of such documents and to any statements of reasons made in compliance with the Regulations.

Environmental Reports and the consultation process

Part 3 of the Regulations sets out in Regulations 12 to 15 the requirements of the environmental report and SEA process before the adoption of the plan or programme.

Regulation 12 sets out at 12(2) and (3) the essential requirements of the environmental report, including such of the information referred to in Schedule 2 as may reasonably be required, corresponding with Art. 5 and Annex I of the SEA Directive. The core obligations in reg. 12(2) are to:

> "... identify, describe and evaluate the likely significant effects on the environment of—
>
> (a) implementing the plan or programme; and
> (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme."

[65] See article 3 of the SEA Directive which, at 3(5) allows for both case by case determinations and/or by specifying types of plans or programmes.
[66] Reg. 9(2).
[67] Reg. 9(3).
[68] Reg. 10(1). The authority is required to supply the material within 7 days: reg. 10(2).
[69] Reg. 10(3).
[70] Reg. 10(4).
[71] Reg. 10(5).
[72] Reg. 10(6).

The question of duplication at different levels in the hierarchy is dealt with by reg. 12(3)(d) and (4) which allows the responsible authority, when deciding what information should reasonably be included in the report, to take account of

> "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment".[73]

The information required by Schedule 2 may be provided by reference to relevant information obtained at other levels of decision-making or through other Community legislation,[74] which will include, presumably, information provided through EIA.

There is provision to consult the consultation bodies in determining the scope and level of detail of the report.[75]

Regulation 13 sets out the consultation procedures to be followed in respect of the environmental report and the draft plan or programme in the case of both the consultation bodies and the public. The consultation period must be of such length as will "ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents."[76]

Regulation 14 deals with transboundary consultations by an English responsible authority and Regulation 15 deals with the procedure to be followed where plans or programmes of other Member States are received by the Secretary of State the implementation of which "is likely to have significant effects on the environment of any part of the United Kingdom".

Post-adoption

Part 4 of the Regulations sets out in Regulations 16 and 17 certain post-adoption requirements as to:

(1) the public availability of information with regard to adoption[77]; and
(2) monitoring the significant environmental effects of the implementation of each plan or programme with the purpose of identifying unforeseen adverse effects at an early stage and being able to undertake appropriate remedial action[78].

(3) PROTOCOL TO THE ESPOO CONVENTION ON THE ASSESSMENT OF PLANS & PROGRAMMES

Looking to the future, the agreement[79] of a Protocol on SEA to the Espoo Convention (the Kiev Protocol) may require the European Community to amend the SEA Directive.

The influence of the European Community and its Member States is evident in the text. This draws heavily on the SEA Directive, in requiring compulsory assessment of a category of plans and programmes prepared by a public authority for specified sectors and which "set the framework" for "development consent" for specified projects, and in requiring Contracting Parties to screen other plans which set the framework for development consent for other projects. It requires the

[73] Reg. 12(3)(d).
[74] Reg. 12(4).
[75] Reg. 12(5) and (6). A consultation period of five weeks is provided for.
[76] Reg. 13(3).
[77] Reg. 16.
[78] Reg. 17.
[79] Available at www.unece.org/env/eia/sea–protocol.htm. The Protocol was signed at Kiev on 21.5.03.

preparation of an Environmental Report, consultation of the public and of environmental authorities, and the taking into account of the Report and of the results of consultation in the final decision on the adoption of the plan or programme.

However, although the SEA Directive was clearly the starting point for negotiations, there are numerous small differences between the Protocol and the SEA Directive. Most significantly, however, the Protocol goes beyond the requirements of the SEA Directive in requiring Parties to endeavour to ensure that environmental concerns are considered and integrated to the extent appropriate into the preparation of their proposals for policies and legislation that are likely to have significant effects on the environment. In doing so Parties are required to "consider the appropriate principles and elements of this Protocol".

As the Protocol occupies a field in respect of which there are already binding rules at European Community level, most of the Protocol falls within the external competence of the Community, and falls in the first instance to the Community rather than the Members States to implement. The practical significance of this is that the Commission will now have to consider preparing a proposal to amend the SEA Directive. Whether amendment is necessary depends on whether the differences between the Directive and the Protocol are considered to be substantial, or merely of form. It is notable that although the Protocol obligation requiring the integration of environmental concerns into policies goes beyond the Directive, it requires Parties only to "endeavour to ensure" integration, and even this duty is qualified by the words "to the extent appropriate". The Commission and Member States may take the view that these loose requirements are already met at Community level by the requirement of Art. 6 EC that "environmental protection requirements must be integrated into the definition and implementation of Community policies".