Banbridge, Newry and Mourne Area Plan 2015

1.0 The Purpose

1.1 The purpose of this paper is to review, in light of the judgment by Weatherup J in the Judicial Review of the draft Northern and Magherafelt Area Plans, the Department's previous approach, which was to attempt to complete an environmental assessment for the Draft Banbridge Newry and Mourne Area Plan 2015 ("dBNMAP") at a late stage in the preparation process by building on the environmental appraisal which had already carried out. As part of this review the judgment, advice and guidance available then and further advice, in particular legal advice, now available have all been carefully reviewed and considered.

2.0 Legislation

2.1 **European Legislation – Directive 2001 / 42 / EC**

Council Directive 2001 / 42 / EC on the assessment of certain plans and programmes on the environment ("the Directive") was published in July 2001 and is considered to apply to the process for preparing, examining and adopting Area Plans in Northern Ireland. One of the main objectives of the 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.

2.2 Article 4(1) places a general obligation on Member States to carry out an environmental assessment during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.

2.3 The Directive makes it clear that the obligation referred to in Article 4(1) shall apply to the plans and programmes of which the first preparatory act is subsequent to 21st July 2001.

2.4 Plans and programmes of which the first formal preparatory act is before that date and which are adopted or submitted to the legislative procedure more than 24 months thereafter, shall be made subject to the obligation referred to in Article 4(1) unless Member States decide on a case by case basis that this is not feasible and inform the public of their decision

3.0 **Northern Ireland Legislation**

3.1 The Directive has been implemented in Northern Ireland by the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 ("the 2004 Regulations") which came into operation on 22 July 2004.

3.2 The general obligation on a Member State is to carry out an environmental assessment during the preparation of a plan or programme and before its adoption or submission to the legislative procedure, unless the Member States decides on a case by case basis that it is not feasible to do so and

informs the public of its decision. [Per Regulations 5 & 6 of the Regulations and Articles 3, 4 and 13 of the Directive]

4.0 The Development Plan Process

The current development plan preparation process in Northern Ireland is regulated by the Planning (NI) Order 1991(and subsequent amendments) and the Planning (Development Plan) Regulations (NI) 1991. The process consists of six key stages. These are set out in Appendix 1 and shown in Figure 1. Within each of these key stages there are many other discrete and inter-related tasks which must also be carried out. These are also shown at Appendix 1 in Figure 2. Further detail of what is involved in these tasks is provided in the development plan checklist at Appendix 2.

5.0 History of Banbridge, Newry and Mourne Area Plan 2015

5.1 Work on dBNMAP commenced in April 2000. An Issues Paper was published in March 2001 and a Draft Plan published along with an Environmental Report on 22 August 2006.

5.2 As detailed above, the plan making process and its environmental appraisal was marked by a number of key stages. The following gives some of the highlight stages for dBNMAP:

- Following the launch of the dBNMAP in April 2000 PS established the dBNMAP Co-ordinating Committee which

included representatives from the two councils and all key consultees. The group had the opportunity to influence the emerging content of the Issues Paper.

- Early in 2001 the District Councils and key consultees including Roads Service, Water Service, Rivers Agency, EHS and IDB were invited to comment on a pre- publication draft of the Issues Paper.

- Following the publication of the Issues Paper in March 2001, CTA facilitated a public and community consultation exercise. This consultation included an invitation to the public and community organisations to submit comments in writing to Planning Service a number of representations were received.

- During 2002 and early 2003 settlement appraisal work was carried out by Planning Service (PS) in conjunction with Environment and Heritage Service (EHS) and Landscape Service.

- In late 2002 comments were also sought from Roads Service, Water Service, EHS (Water Management Unit) and Rivers Agency in relation to potential development sites identified by PS.

- Spring/Summer 2003 PS created maps showing settlement development limits, housing zonings, Local Landscape Policy Areas and ATCs. Mapping for SLNCIs, Historic Parks

and Gardens and other rural designations were also prepared.

- During late autumn 2003, PS consulted Roads Service, Water Service, Rivers Agency, EHS Natural Heritage, EHS Built Heritage, Landscape Service and NIHE on major development plan proposals including housing zonings, draft settlement development limits and some environmental designations.

- In February 2004, the same consultees were asked for their comments on industrial / employment and town centre proposals.

- May 2004 PS consulted with Roads Service, Water Service, Rivers Agency, EHS Natural Heritage, EHS Built Heritage, EHS WMU, Landscape Service and InvestNI on industrial zonings.

- As detailed in the foregoing PS began the process of preparing a strategic environmental appraisal in accordance with paragraph 41 of PPS 1, from an early stage of the plan making process. From the outset, in all aspects and matters of environmental issues and considerations, PS consulted with, relied on and liaised with EHS, having regard to its specialised knowledge and expertise in this sphere. In the course of preparing dBNMAP PS worked not only in consultation, but in conjunction with EHS throughout the entire Plan making process, in relation to both information

gathering and the formulation of policies and proposals. Information provided by EHS was used by PS to inform the basis of the countryside assessment process. Specifically this included an environmental assets appraisal contributing to the identification of environmental protection designations, the identification of Greenbelts and Countryside Policy Areas through development pressure analysis and a settlement appraisal contributing to the identification of detailed development limits and zonings.

This is indicative that by late 2003 / early 2004 the draft Plan was at an advanced stage with many preliminary decisions having been taken on major proposals. During this period the draft Plan was targeted for publication in May 2004. During 2004, a number of factors impacted on this goal, including a request from the Councils for further consultation on draft maps, delays in receiving consultee responses to draft proposals circulated in autumn 2003 and reduced staff resources in the Plan team as a result of workload pressures on the operations side of the Agency business. In addition, PS became aware of the full extent and complexity of objections to the draft Magherafelt Area Plan (5,300 objections). It was also mindful of its experience with the draft Ards and Down Area Plan, where a very large number of objections had been received. Based upon these experiences, it was apparent to PS that the publication of dBNMAP was likely to stimulate a substantial and complex volume of representations and objections.

5.3 PS sought legal advice (in respect whereof legal professional privilege is not waived) on whether the provisions of the Directive and the 2004 Regulations applied to emerging plans. The advice received was to the effect that even if the Directive and the EAPP Regulations did apply, it was open to PS to consider making a determination under Regulation 6(2) that an environmental assessment in accordance with the requirements of that legislation was not feasible. Notwithstanding this advice, PS was mindful of the importance of environmental assessment in the plan making process. On the basis of its understanding of the requirements of the Directive and 2004 Regulations at that time and also the best advice available to it, PS determined that it was in the best interests of the environment, the public interest and good practice, to build upon the environmental appraisal work which had already been carried out and to produce an environmental report which aspired to comply with the requirements of the Directive. In deciding to proceed in this way, PS took into account the existing UK and EU guidance, legal advice and the views of an environmental consultant appointed to advise PS on the preparation of an environmental report.

5.4 Accordingly, PS determined to continue with and build on the process of environmental appraisal of the Draft Plan proposals. At that time, PS believed that the process would result in an environmental report which would comply with the requirements of the Directive and 2004 Regulations. The

steps then taken included the preparation of a scoping report which was issued to consultees in July of 2005 and an environmental report which was subsequently published along with dBNMAP on 22nd August 2006.

6.0 The Judicial Challenge to the Draft Plan

6.1 On 11th December 2006 leave was granted to Murdock Group Ltd to bring a Judicial Review against the publication of the dBNMAP . The grounds of challenge were similar to those in the existing challenges to the draft Northern Area Plan ("dNAP") and draft Magherafelt Area Plan (dMAP") (as set out below) which at this time were in the course of being heard by the court. Specifically, the dNAP hearing had just been completed (1st December 2006) and the dMAP hearing was scheduled for the following month (25th January 2007). Given that the Murdock grounds of challenge were substantially the same, the substantive hearing of that case was adjourned until after the conclusion of the other two cases. It remains adjourned.

7.0 The Judicial Review Challenges to dNAP and dMAP

7.1 The Judicial Review challenges to dNAP and dMAP were extremely complex and comprised of three key strands, as follows:

a) Ineffective Transposition of the Directive by the 2004 Regulations in relation to:

- the designation of Department of Environment as ‘Consultation Body’ for the purposes of environmental assessment.
- the absence of appropriate timeframes in the Regulations.

b) The manner in which the process of environmental assessment was carried out, in particular the sequencing of its conduct and the preparation of the draft plan;

c) The content of the published environmental reports.

7.2 A conjoined judgment dealing with both cases was handed down by Mr Justice Weatherup on 7th September 2007. His ruling can be summarised as follows:

(a) The designation of the Department of the Environment for Northern Ireland ("the Department") as a consultation body under Regulation 4 of the 2004 Regulations does not properly transpose Article 6(3) of the Directive, in that the Department cannot be both the responsible authority and the consultation body.

(b) The absence of appropriate time frames in Regulation 12 of the 2004 Regulations does not properly transpose Article 6(2) of the Directive.

(c) The environmental reports prepared for the two plans are not in substantial compliance with Schedule 2 to

the Regulations (and Article 5 and Annex 1 of the Directive).

(d) The sequencing of the environmental reports and the draft Plans in each instance was not in compliance with Regulations 11 and 12 of the 2004 Regulations and Articles 4 and 6 of the Directive.

7.3 The Department then reviewed with its legal advisors the consequences of the judgment. In light of all the circumstances, Planning Service took the view that, taking into account the judgment and its implications, it was not feasible to comply fully with the Directive and the 2004 Regulations in the preparation of either the draft Northern or the draft Magherafelt Area Plans. Accordingly, the Minister for the Environment made non-feasibility determinations for each plan on 6 November 2007.

7.4 A remedies hearing was held on the 8 November 2007 and judgment was handed down on the 13 November 2007. The judgment is at Appendix 5.

7.5 In his final judgment Weatherup J. refused to quash either of the draft Area Plans or their associated environmental reports. He indicated that in reaching this decision he took into account the non-feasibility determinations issued by the Department which were relevant in both cases, subject to the outcome of any future judicial challenge. In regard to remedies on grounds (a) and (b) above, the Applicants

sought to have the Regulations quashed by the Court. Weatherup J refused to quash the regulations and instead made the following declarations –

- the designation of the Department of Environment (DOE) as 'the consultation body' under Regulation 4 of the 2004 Regulations does not properly transpose articles 5.4 and 6.3 of the Directive, where DOE is also the responsible body that promotes the plan or programme;

- the absence of appropriate timeframes in Regulation 12 of the 2004 Regulations does not properly transpose the requirements of article 6.2 of the SEA Directive.

The Department has appealed this aspect of the judgment.

8.0 Consideration of the Feasibility of Conducting an Environmental Assessment of dBNMAP in Accordance with the Directive

8.1 The Guidance on Feasibility Determination

The European Union guidance is contained in "Implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment", September 2003. (Appendix 3)

8.2 The relevant generic guidance for all relevant sectors in UK on Strategic Environmental Assessment for the UK is contained in “A Practical Guide to the Strategic Environmental Assessment Directive”, September 2005.In addition, Office of the Deputy Prime Minister (as was) produced “The Strategic Environmental Assessment Directive: Guidance for Planning Authorities” in October 2003 (applied to English and Welsh Local Authorities). The Department for Communities and Local Government (DCLG) has provided the following guidance for Authorities: The SEA Directive: Advice for Planning Authorities on Retrospective Application, DCLG 2005. (Appendix 4).

8.3 Although guidance is not exhaustive or prescriptive in relation to a decision on feasibility, the following aspects are considered of direct relevance:

a) In European Commission guidance[1], it states that *“The second sentence of Article 13(3) is intended to ensure that an environmental assessment complying with the Directive will normally be carried out for plans and programmes of which the first formal preparatory act was before 21st July 2004 but which will not be adopted until after 21st July 2006.* ***This implies that only minor or non- significant work would have been done on the plan by July 2004 in order to carry out a meaningful assessment.*** *It would not be feasible to carry out an*

[1] Implementation Of Directive 2001/42 On The Assessment Of The Effects Of Certain Plans Programmes On The Environment.

environmental assessment of a plan whose first preparatory act was before July 2004 and which was at a very advanced stage at that date. The focus of this provision is not so much on how long before July 2004 was the starting date of the plan or programme, but on whether the planning process of relevant plans or programmes is at a stage at which a meaningful environmental assessment can be carried out."

b) DCLG guidance states that *"The criteria to be taken into account when reaching this decision could include the nature and number of statutory steps still to be taken before adoption would normally take place, the expense and disruption of having to go back to the beginning of the plan preparation process and the extent to which SEA at this stage was unlikely to add value. These criteria must all be weighed against the environmental protection objectives of the Directive. In Communities and Local Government's view an authority's argument that it is not feasible to carry out SEA is likely to carry considerable weight if, as at 21 July 2004, an inquiry or examination in public had already commenced or was about to commence".*

8.4 The DCLG guidance also states that "The reference to "meaningful" SEA suggests that an authority should consider against the background of the environmental protection objectives of the Directive and, in the light of the stage reached, whether an SEA would add value to the plan, i.e.

by identifying significant environmental effects that would result in the plan needing to be amended."

8.5 The Judgment

The judgment of Mr. Justice Weatherup has been the subject of careful and extensive consideration. Furthermore, detailed legal advice has been obtained in relation to the judgment and the non-feasibility provisions contained in the Directive and the 2004 Regulations. The judgment comments at length in paragraphs 45 – 49 on the need for concurrent preparation of the Environmental Assessment and the Draft Plan:

> Paragraph 45 – Article 4.1 provides that the environmental assessment (which includes the preparation of the environmental report and the carrying out of consultations) shall be carried out "during the preparation of a plan".
>
> Paragraph 46 in quoting the Commission's guidance in relation to Article 4.1 – "As a matter of good practice the environmental assessment of plans and programmes should influence the way the plans and programmes themselves are drawn up."
>
> Paragraph 47 – The scheme of the Directive and the Regulations clearly envisages the parallel development of the environmental report and the draft plan with the former impacting on the development of the latter

throughout the periods before, during and after the public consultation. In the period before public consultation the developing environmental report will influence the developing plan and there will be engagement with the consultation body on the contents of the report. Where the latter becomes largely settled, even though as a draft plan, before the development of the former, then the fulfilment of the scheme of the Directive and the Regulations may be placed in jeopardy. The later public consultation on the environmental report and draft plan may not be capable of exerting the appropriate influence on the contents of the draft plan.

Paragraph 49 – Once again the environmental report and the draft plan operate together and the consultees consider each in the light of the other. This must occur at a stage that is sufficiently “early” to avoid in effect a settled outcome having been reached and to enable the responses to be capable of influencing the final form. Further this must also be “effective” in that it does in the event actually influence the final form. While the scheme of the Directive and the Regulations does not demand simultaneous publication of the draft plan and the environmental report it clearly contemplates the opportunity for concurrent consultation on both documents.

8.6 The judge goes on to state [paragraph 51] that *"It is apparent that when the development of the draft plan had reached an advanced stage before the environmental report had been commenced there was no opportunity for the latter to inform the development of the former. This was not in accordance with the scheme of Articles 4 and 6 of the Directive and the Regulations."* Weatherup J also states that *"the sequencing of the environmental reports and the draft plans was not in compliance [with] Regulations 11 and 12 and Articles 4 and 6 of the Directive."*

8.7 In relation to feasibility he states [paragraph 50] *"The interim measures provide a "feasibility" test for environmental assessment when the development of a plan had commenced before the operative date. Clearly it would be a matter of fact and degree as to whether the plan had reached the stage where an environmental assessment was required. It must be borne in mind that there should be parallel development of the plan and the environmental aspects and that the stage has not been reached where elements of the plan may become sufficiently settled without being subjected to the appropriate environmental examination."*

8. 8 PS officials have given careful consideration to all aspects of the judgment, with the benefit of legal advice, in conjunction with the three instruments of guidance mentioned in paragraphs 8.4 – 8.6 above.

8.9 PS has reviewed the approach which it adopted during the period 2004 to 2006, taking particular account of the advice and guidance available then together with the further advice (in particular legal advice) now available. In doing so, PS considers the core issue to be whether the development of the draft Plan had reached such an advanced stage in July 2004 that there was the absence of any real opportunity for parallel development of the environmental assessment and the draft plan such as to enable the assessment to inform and impact upon the content of the draft plan. PS has now considered the following issues:

8.10 What are the implications of the dNAP and dMAP judgment for dBNMAP?

8.10.1 The judgment of Weatherup J on dNAP and dMAP is relevant to the present proceedings concerning dBNMAP since the grounds of challenge are substantially similar and dBNMAP was under preparation during the same period as the other Area Plans.

8.10.2 The Directive and the 2004 Regulations anticipate that if the plan promoting body is to make a determination that it is not feasible to carry out an environmental assessment, it must do so based upon the state of the particular plan on the date when the Directive/Regulations came into force, namely July 2004.

8.10.3 The consequence of the judgment is to raise a doubt over the validity of the Department's earlier decision that it would be possible to carry forward the environmental appraisal work already completed and to conduct an environmental assessment which complied with the requirements of the Directive and the 2004 Regulations.

8.11 **In terms of plan stages, how advanced was the Plan?**
The Department considers that the dBNMAP was at a very advanced stage in July 2004, when the Directive came into effect. Figure 2 of Appendix 1 illustrates the full extent of the plan process that had taken place by July 2004 (further detail is contained in Appendix 2). As Figure 2 illustrates the bulk of the stages and processes required to formulate the draft plan had already taken place. At this time, a round of internal consultation with key consultees on housing zonings, draft settlement limits, industry/employment, town centre proposals and some environmental designations had taken place. Extensive consultation with the district councils was almost complete with 14 out of 15 council consultation papers having been presented and discussed. Work was well advanced on preparing the consultation draft of the plan including the text. There only remained a final round of consultation and any subsequent amendment, publication of the draft plan, the plan inquiry stage and the consideration of the inquiry report prior to the final adoption of the plan.

8.12 PS began the process of preparing a strategic environmental appraisal in accordance with paragraph 41 of PPS 1, from an

early stage of the plan making process and continued to work not only in consultation, but in conjunction, with EHS throughout the entire Plan making process, in relation to both information gathering and the formulation of policies and proposals.

Information provided by EHS was used by PS to inform the basis of the countryside assessment process. Specifically this included:

- An Environmental Assets Appraisal that seeks to establish and evaluate the environmental assets and resources of a plan area, for example, important landscapes, wildlife habitats and archaeological and historic features. It also facilitates defining development plan designations such as Areas of Townscape Character.
- A Landscape Assessment that defines the main landscape character areas of the plan area and the variations between them and where appropriate, that identifies landscapes that are vulnerable because of their limited capacity to absorb further development.
- A Development Pressure Analysis that seeks to identify areas where significant development pressure has occurred and/or where local rural character is under threat of significant change. Combined with the landscape assessment this information informs the designation of Green Belts and Countryside Policy Areas.
- A Settlement Appraisal which in conjunction with an assessment of development needs of a Plan area, provides the basis for identification of limits of development and, where appropriate, land use zonings.

Not only did EHS have an integral role in supplying important environmental information used in the Countryside Assessments, it was consulted upon and helped to formulate all of the policies and designations within DBNMAP which either could have an impact upon the environment or related to environmental protection.

8.13 Weatherup J. states that “it must be borne in mind that there should be parallel development of the plan and the environmental aspects and that the stage has not been reached where elements of the plan may become sufficiently settled without being subjected to the appropriate environmental examination.” Given that the draft plan was at an advanced stage without any work having started on an environmental assessment which was in accordance with the Directive, it would not have been possible to have parallel development of the draft plan and the environmental assessment. The development of the draft plan had reached such an advanced stage that there was no opportunity for such an environmental assessment to inform the development of it. Furthermore, when the draft plan had reached the advanced stage that it was at it in July 2004, it could be said to be substantially ‘settled’. Taking into account the judgment, the draft plan was at such an advanced stage in July 2004 that it is now clear that the only viable alternative would have been either to withdraw the plan and restart the process from a much earlier stage or to issue a non-feasibility determination.

8.14 The implications of going back to the beginning of the plan preparation process?

8.15 As indicated above, the draft plan was at an advanced stage by July 2004. An extensive amount of work had already taken place over a period of four years from April 2000 to July 2004 in developing dBNMAP to its then current stage.

8.16 The implications for withdrawing the DBNMAP and commencing afresh the process of preparing both it and an environmental assessment may be summarised as follows:

8.16.1 **Planning Framework**. Loss of a planning framework within the plan area which informs the general public, statutory authorities, developers and other interested bodies of the policy framework and land use proposals which will be used to guide development decisions within their local area. Development plans are of critical importance in this respect as they apply the regional policies of Government (such as Planning Policy Statements and the Regional Development Strategy) at the appropriate local level. Without the draft plan, planning decisions will be taken on an ad-hoc case by case basis through development control, based upon outdated Plans i.e. Banbridge Area Plan 1983-1998; Banbridge District Rural Area Subject Plan 1986-1998; Newry Area Plan 1984-1999; Mourne Area Plan Settlement Proposals 1984-1999; and Newry and Mourne District Rural

Area Subject Plan 1986-1999. Planning on this basis cannot apply appropriate or up to date regional planning policy and consequently does not provide a sustainable or appropriate way forward for the strategic planning of the Region.

8.16.2 **Financial Resources**. A massive waste of money, time and resources for individuals, commercial organisations, voluntary groups, community groups, pressure groups, NGOs, professional associations, central government and local government who have been involved in the plan process thus far. It is estimated that the cost to Planning Service in preparing the dBNMAP to its current stage has been in the order of £2-2.5 million. Further use of money, time and resources would be required in any new plan process. It is estimated that the cost to PS of re-running the plan from Issues Paper stage to Draft Plan stage would be in the order of £1.33 million.

8.16.3 **Public Involvement**. If dBNMAP were withdrawn then the aspects of the draft plan which were being brought forward and shaped by public involvement could no longer be implemented (until the plan is replaced). In these circumstances and in the absence of an up to date planning framework for the area, there would be detriment to individuals and organisations who were involved in the plan process thus far. If dBNMAP were withdrawn, the clear implication is that the level of certainty that the Draft Plan,

particularly those elements which are not subject of objection, has provided would be removed. This would have an effect in that individuals and companies who have taken investment decisions on the basis of the draft Plan would be disadvantaged.

8.16.4 **Economic and Development Implications**: The loss of 135 and 145 hectares of additional housing and industrial land respectively, as wells 82 hectares of additional land zoned for mixed use or designated as development opportunity sites will undoubtedly have a negative effect on the local economy. Also Developers and local businesses will face greater uncertainty in relation to decisions about issues such as land purchases, business expansion and business relocation and this may impact on investment decisions.

8.16.5 The loss of potential employment land would have most impact in Newry where InvestNI has indicated that they require 40 hectares of land to meet the needs of their client companies to 2015 and they also require that investors are provided with a choice of sites in Banbridge. Consequently, if the proposed additional land was not available, this would seriously restrict potential economic and industrial development in the Plan area particularly in Newry City. DBNMAP aims to promote Newry as a main hub and regional gateway in accordance with the Strategic Planning Guidance set out in the RDS. It also aims to promote Banbridge as a main hub, Warrenpoint as a local hub and Dromore as a growth centre related to the Belfast

Metropolitan area. These objectives would be seriously undermined if DBNMAP were to be quashed. There are obvious negative implications of this for local employment creation and economic development.

8.16.6 **Administrative and Resource Implications**: There would be significant delay and uncertainty in the processing and determining of planning applications affected by the withdrawal of the plan. It would also be difficult for PS to marshal the necessary staff in the short term to reformulate the plan without having a severe detrimental effect on other existing business priorities. The outcome would undoubtedly be to delay other area plans at various stages of preparation across Northern Ireland. It is also likely that there would not be the resources to commence replacement area plans for those plans that are reaching their end date in the next few years, such as the Fermanagh Area Plan 2007 and the Derry Area Plan 2011. Delay in the provision of up to date plan coverage can impact upon the regional economy and the provision of services to meet the socio-economic and demographic needs of society.

8.16.7 **Environmental implications**: All of the proposed environmental designations and policies contained in the draft plan would have no effect until a further draft plan is published. This is significant as the Draft Plan introduces 4 new policies:

-Policy CVN 1 on biodiversity aims to protect habitats which are identified as priorities in the Northern Ireland Biodiversity Strategy and other areas of major importance for flora and fauna.

-Policy CVN 2 aims to protect the 175 Sites of Local Nature Conservation Interest designated in the Draft Plan.

-Policy CNV 3 aims to protect the character and appearance of the Area of Significant Archaeological Interest designated at the Dorsey.

-Policy CNV 4 aims to protect the intrinsic environmental value and character of the 183 Local Landscape Policy Areas designated in the Draft Plan.

-The Draft Plan also designates 26 Historic Parks, Gardens and Demesnes and 35 Areas of Townscape Character.

PS would not be entitled to rely upon the prematurity principle when determining planning applications in order to protect these environmental features. PS considers that such an outcome would manifestly frustrate and undermine the purposes and objectives of the Directive, which are to enhance and fortify environmental protection and sustainable development. This possibility is all the more real as a result of the publication of dBNMAP. Publication will have alerted the public and developers to areas where development may be

resisted or restricted for environmental reasons. The result is that, if the Plan were withdrawn, developers or other individuals may have the opportunity to remove or destroy the very environmental assets which are subject of protection in the draft plan. Withdrawing dBNMAP could therefore result in significant environmental damage.

8.16.8 **RDS Implications**. If dBNMAP were to be quashed, the site specific housing allocations and development limits which have been certified by the Department for Regional Development as being in general conformity with the RDS, would no longer exist and development decisions would be made on the basis of the extant plans. Development on the basis of the extant plans would not only be at odds with the plan, monitor and manage approach of the RDS but it would also have significant environmental implications due to unnecessary development of greenfield land. Within the Banbridge and Newry & Mourne Districts a total of 350 ha of land with housing potential have been de-zoned. The vast majority of this de-zoning has occurred in the Newry & Mourne District with smaller amounts of de-zoning primarily in the towns of Gilford and Rathfriland and in the village of Lawrencetown in Banbridge District. In Newry & Mourne 150 ha of land has been de-zoned in Newry and the district towns of Warrenpoint, Kilkeel, Crossmaglen and Newtownhamilton. Villages in Newry & Mourne account for 119 ha of land de-zoned with 9 ha of land de-zoned within small settlements. If the 350 ha of de-zoned land were to developed it would result in the potential for an additional 7,000 to 8,750 dwelling units

in the Plan area assuming a density of 20 and 25 dwellings per hectare respectively. This would lead to a loss of a significant amount of Greenfield land and urban sprawl thus compromising the development of compact sustainable forms and the redevelopment of brownfield land.

8.16.9 The dBNMAP set a new direction for the future development of the Banbridge, Newry and Mourne Area and has been assessed by DRD as being in general conformity with the RDS. Therefore, the loss of the DBNMAP would result in planning decisions being made without the benefit of a draft plan that is in general conformity with the RDS as a material consideration. In effect planning policy would revert to the Banbridge Area Plan 1983 – 1998, Banbridge District Rural Area Subject Plan 1986 – 1998, Newry Area Plan 1984 – 1999, Mourne Area Settlement Proposals 1984 – 1999 and Newry and Mourne Rural Area Subject Plan 1986 – 1999. These are not in general conformity with the RDS and well past their end dates by almost 10 years. The result would be planning decisions that are contrary to the direction set in the RDS. This will set back and hinder the implementation and delivery of this important Government policy document which was endorsed with unanimous cross party support by the previous devolved administration.

8.17 To what extent will SEA at this stage add value?

The DCLG Guidance (Appendix 4) envisaged the prospect of retrospective environmental assessment in order that draft

plans might ‘catch up’ to ensure that a directive compliant environmental assessment has been carried out. Indeed it states that *“Where a retrospective SEA has to be carried out the authority will need to subject earlier stages of plan preparation to SEA, drawing upon any environmental appraisal or wider sustainability appraisal work that has been carried out.”* However**,** in light of the judgment it would appear that retrospective environmental assessment is not possible for draft plans and that the environmental assessment process would need to be repeated from a much earlier stage.

8.18 PS acknowledges that if the plan making and environmental assessment process were repeated, there might possibly be a different outcome in terms of the Draft Plan and Environmental Report. Nevertheless, notwithstanding that the environmental assessment carried out for dBNMAP may not be Directive compliant (for the reasons set out in the dNAP and dMAP judgment), it was still a detailed environmental assessment which satisfied and even exceeded the previous guidance contained in Paragraph 41 of PPS 1: “*The Department will carry out a strategic environmental appraisal in respect of all its development plans. This appraisal will identify the main environmental concerns of direct relevance to the plan area. It will assess the probable environmental impacts of the plan’s policies or proposals. The appraisal process will help to pinpoint those options most likely to be environmentally beneficial. Where consequences adverse to the environment are anticipated*

possible mitigation measures may be considered. The appraisal will be published with the development plan." PS therefore considers that even if the environmental assessment of dBNMAP is not Directive compliant, it ensured the consideration of environmental concerns during the preparation of the draft plan to a high level.

8.19 To what extent are the environmental protection objectives of the Directive achieved?

The Department considers that the environmental assessment process which was followed for the dBNMAP has integrated environmental considerations into the plan making process. It is considered that the attempt to complete a Directive compliant environmental assessment went further than the PPS 1 Environmental Appraisal process in meeting the environmental objectives of the Directive.

8.20 Furthermore, as stated above, to withdraw the draft plan and go back to a much earlier stage of the process would risk undermining the purposes and objectives of the Directive.

8.21 The Environmental Report for DBNMAP

At paragraph 34 of the Judgment, it was found that for dNAP and dMAP there had not been substantial compliance with the requirements of Schedule 2 of the EAPP (NI) Regulations 2004. In relation to DNAP, parts of paragraphs 2, 3,4,6,8 are not addressed and there is an inadequate Non

Technical Summary for the purposes of paragraph 10. Similarly, DMAP was found to be non compliant in respect of paragraphs 2, 6, 8 and 10.

8.22 The Environmental Report for dBNMAP addresses some of the content issues which were points of concern in the judgment.

- The evolution of the environment in the absence of the plan is addressed.(para 2)
- The environmental characteristics of the areas likely to be significantly affected are treated in the same manner as in DNAP. (para 3)
- There is no specific reference to Nature 2000 sites in the environmental problems section as in DNAP. (Para 4)
- The likely significant effects on the environment are dealt with in a similar manner to DNAP.(para 6)
- The reasons for selecting the alternatives are essentially the same as in DNAP. (para 8)
- The non technical summary provides a summary of the information provided under the specified headings of Schedule 2.(para 10)

Planning Service considers that the content of Environmental report for dBNMAP has significantly improved and is more likely to be closer to “substantial compliance” than was the case with the reports for dNAP and dMAP.

9.0 CONCLUSION

9.1 Having taken account of the judgment, its implications, legal advice and all of the circumstances set out above, the Department is of the view that, it would not be possible to comply fully with the Directive and the 2004 Regulations (as found in the judgment) without commencing afresh the entire process of plan preparation and environmental assessment. Accordingly, the Department considers that it is not feasible to comply with the Directive and the 2004 Regulations and considers that a non-feasibility determination is both appropriate in the circumstances and also in the public interest. The Department also considers that in the absence of a Directive compliant environmental assessment, the assessment already prepared and expressed in the environmental report which was published along with the draft Plan in August 2006, represents a reasonable approach to environmental assessment for the draft Plan. Furthermore, the Department does not consider that it would be in the public interest, for the reasons detailed in this consideration, to withdraw the draft plan and restart the Plan and environmental assessment process. In summary form, the reasons of the Department are the following:

(a) The development of the draft Plan had reached such an advanced stage that there was no real opportunity for the environmental report to significantly influence the final shape and content of the Plan.

(b) According to the judgment, it appears that ‘catching up’ through retrospective environmental assessment is no longer possible and instead the plan and environmental

assessment process would need to be repeated from the start.

(c) The implications of withdrawing the draft Plan and restarting the Plan and environmental assessment process are such that, bearing in mind the implications set out above, it would not be in the wider public interest or the interests of environmental protection to do so.

(d) The environmental assessment already undertaken and published along with the draft Plan in August 2006, while possibly not Directive compliant, represents a reasonable approach to environmental assessment for the Plan and environmental protection.

(e) The purposes of the Directive include the achievement of a high level of environmental protection.

9.2 Under Article 13(3) of the Strategic Environmental Assessment Directive (2001/42/EC) and Regulation 6 of the 2004 Regulations and in light of the judgement delivered on 7 September 2007, the Department considers, for the reasons outlined above, that it is appropriate and in the public interest to make a non-feasibility determination in respect of the draft Banbridge, Newry and Mourne Area Plan at this stage. The Department is conscious that the Directive authorises Member States to “decide on a case by case basis that [compliance with the obligation in Article 4(1)] is not feasible…”.

APPENDIX 1 - **THE DEVELOPMENT PLAN PROCESS**

Development plans apply the regional policies of the Department at the appropriate local level and inform the general public, statutory authorities, developers and other interested bodies of the policy framework and land use proposals that will be used to guide development decisions within their local area. Development plans are prepared under Part III of the Planning (NI) Order 1991 and the Planning (Development Plans) Regulations (NI) 1991 and as amended. Planning Policy Statement (PPS) 1- General Principles, paras 35 to 42 of PPS 1 sets out the Department's approach to development plan preparation.

The development plan preparation process consists of six stages (refer to Figure 1). The initial stage involves information gathering, research and analysis which together with consultations with the local council, government bodies, statutory undertakers, community and voluntary groups and the public inform the preparation of the Issues Paper (Stage 2).

The Issues Paper sets out a series of strategic, general and local issues to focus debate on issues that need to be addressed in the Draft Plan. The Issues Paper is subject to a non statutory 14 week consultation period for the receipt of representations. In addition to this, the Department also undertakes a comprehensive and wide ranging public and community consultation exercise to ensure that all sections of the community, including disadvantaged and under represented groups have been provided with the opportunity to input into the development plan preparation process.

Stages 1 and 2 together with results of public consultation inform the preparation of the Draft Plan (Stage 3). This involves further survey and analysis, policy formulation and development and extensive consultation. Furthermore, SEA, EQIA and any other regulatory impact assessment such as rural proofing also need to be undertaken throughout the course the draft plan preparation. On average, this stage of the plan preparation process takes approximately 2 yrs to complete. The Draft Plan along with the SEA and EQIA are subject to a statutory public consultation period of 8 weeks.

The post draft plan stages of the plan process (Stage 4 to 6) consist of the Public Inquiry, consideration of the PAC Report and adoption of the plan. Preparation for and the time taken for public inquiries is often complex and lengthy, particularly due to the scale, complexity and volume of objections received in relation to recent plans. The Department recently introduced Independent Examinations which allows more flexible procedures for considering objections to development plans.

Following consideration of the PAC report of recommendations, the Department may adopt the Plan in whole or in part, with or without modification. The current development plan process, on average, takes 75 months from the Notice of Intention to plan adoption.

Figure 1: Development Plan Preparation Process

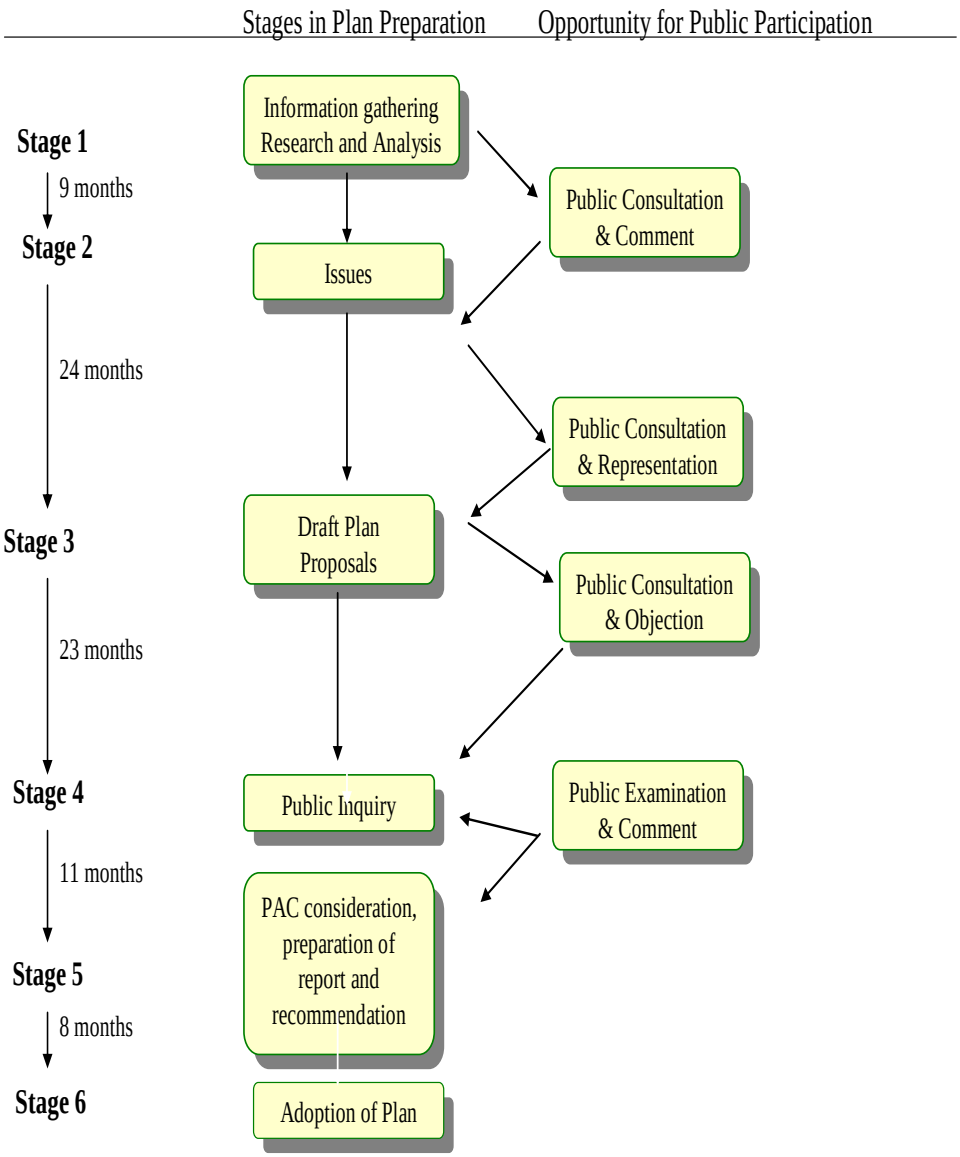

FIGURE 2: DEVELOPMENT PLAN PREPARATION PROCESS			
No.	**TASK**	**Duration (Months)**	**Banbridge Newry and Mourne Area Plan 2015**
			☑ = Complete at July 04
			√ = Complete since July 04
			O = On going
A	**Initiation to Issues Paper**		x = Not started
1	Directorate Business plan clearance	0.75	☑
2	PID and clearance	0.75	☑
3	Notification of Intention	0.75	☑
4	Identification of Need for Consultants	3	☑
5	Issues Paper Background Research	7.25	☑
6	Issues Paper Community Consultation Process (Stage 1)	6.25	☑
7	Issues Paper Stakeholder Consultation Process (On going and inc Council Consultation)	7.25	☑
8	Preparation of Draft Issues Paper	2.5	☑
9	SEA (including publication and 5 week consultation on Scoping Report)	9.5	√
10	Publication of Issues Paper	1	☑
B	**Post Launch of Issues Paper to Publication of Draft Plan**		
1	Public Participation	3.5	☑
2	Consider Written Representations	1	☑
3	Use of Consultants / Receipt and Clearance of Consultants Report	3	☑[1]
4	Draft Plan Survey and Analysis		☑
4.1	Co-ordinating Groups		☑
4.2	Devise Plan alternatives		☑
4.3	Consultation		☑
4.4	Housing	9	☑
4.5	Transport	3	☑
4.6	Employment / Offices	3	☑
4.7	Retail	9	☑[1]
4.8	Countryside Assessment	9	☑
4.9	Settlement Appraisal	9	☑
4.1	Open Space	3	☑
4.11	Public Utilities	3	☑
4.12	Community facilities	3	☑
5	Initial Draft Plan for Internal Consultation		☑[2]
5.1	Technical Supplements	13	√
5.2	Draft Plan Proposal	6.5	√
6	Preparation of Final Draft Plan	4	√
6.1	Screening for EQIA	1	√
6.2	Assessment of effects SEA/ EQIA	2	√
6.3	Clearance	1	√
7	Publication of Draft Plan / Environmental Report/ EQIA	3.5	√
7.1	Exhibition and Formal Launch	1	√
C	**Draft Plan to Adoption**		
1	Consultation Period following publication of the Draft Plan		√
1.1	Period of Receipt of Representations (inc SEA and EQIA)	1.5 or 2	√
1.2	Classification of Objections	8	O
2	Public Display of Representations / Counter Objection Period	2	√
2.1	Classification of Counter Objections	2.5	√
2.2	Preparation for Public Display of Counter Objections	1	√
3	Independent Examination		x
3.1	Consider objections	5	x
3.2	Preparation of Rebuttal Statements	10	x
3.3	Pre Inquiry Meetings and exchange of evidence		x
3.4	Independent Examination (Strategic Issues)	1	x
4	Post Independent Examination		x
4.1	Consideration of PAC Report and effect of changes on SEA/EQIA	2	x
4.2	Preparation of Plan Adoption and SEA Statement	2	x
4.3	Adoption, Publication and Launch of Plan	1	x
Comments			
1. Retail study completed later in process			
2. The 1st consultation draft of BNMAP was produced in Autumn 2003, the 2nd in May 2005			

Appendix 2- Checklist for Development Plan Process

Checklist for Development Plan Process
A: Initiation to Issues Paper
1. Directorate Business Plan ▪ Directorate Business Plan sets the start of the plan process and includes a broad allocation of staff and resources. Appropriate training will need to be factored into the Directorate Training Plan (including GIS training needs for P&T staff at PTO and HPTO level); ▪ **The Corporate Business Plan is cleared by Management Board and the Minister.**
2. PID and Clearance ▪ Prepare PID – budget (including consultants), human resources, training plan and draft timetable; ▪ **Management Board clearance**; ▪ HQ GIS Unit set up settlement projects based on statutory plan(s). Development Plan Team responsible for quality assurance of these projects.
3. Notification of Intention ▪ Draft Notification of Intention to prepare development plan; ▪ **Submit to HQ for clearance** ▪ **Arrange with Graphics Unit for publication in Belfast Gazette and Local Press for Two Successive Weeks (refer to Planning (Development Plans) Regulations(Northern Ireland) 1991);*** ▪ Letter to Council; ▪ Letter to consultees. * Retain copies of advertisement
4. Identification of need for Consultants* ▪ Preparation of project approval document by Divisional PPTO for the use of consultants; ▪ **Approval from Director of Corporate Services through Grade 6 Planning Manager;** ▪ **Initiate procurement process in liaison with Central Procurement Division in accordance with guidance on the use of consultants;*** ▪ **Prepare consultants brief. Identify responsibilities throughout the plan process, including the possible participation at any future independent examination, if required;**

- **Evaluate tenders;**
- **Appoint consultants.****

* Refer to Departmental Guidance on the Use of External Consultants.
** The appointment of consultants may take place at various points in the plan process depending on work scheduling. This is the earliest likely stage and highlights the key tasks to be followed.

5. SEA / AA / EQIA / Non Statutory Assessments

SEA

- Preparation of SEA Scoping Report (GIS Unit prepare relevant maps);
- **HQ clearance of Scoping Report**;
- **Consult EHS with Scoping Report (5 weeks). This fulfils statutory requirements. Refer to SEA Guidance;**
- **Public consultation on SEA Scoping Report** (refer to A10 for advertisement);
- Consider need for transboundary consultation and notify ROI where necessary.

AA

- Initiate Appropriate Assessment with assessors and appoint liaison officer. (Given level of scientific expertise required, AA will, where possible, be undertaken in liaison with EHS or alternatively consultants)

EQIA

- Initiate EQIA/consult Section 75 groups through community consultation.

NSA

- Initiate non statutory assessments.

*Assessments are iterative processes which should be taken into account throughout the plan preparation process. Only key stages are identified in this checklist.

6. Issues Paper Background Research

- Survey and analysis for each topic area;
- Identify technical supplement topic areas, initiate consultation and survey work and initiate drafts;
- Draft summary report for Issues Paper.

7. Issues Paper Community Consultation Process
(Refer to A4 for procurement process)

- Initiation meeting with consultants and agreement with consultants on Public Consultation process;
- Initiate the Public Consultation exercise to agreed timescale.

8. Stakeholder Consultation Process (On-going)

- Set up Co-ordinating group;
- Commence Council consultation;
- Consult key consultees.

9. Preparation of Draft Issues Paper

- Data analysis (including result of community and Council consultation, key consultees, representations and background

research);
- Preparation of working Draft Issues Paper (GIS Unit prepare Issues Paper Map(s));
- Consultation with HQ and key consultees;
- Review responses;
- Preparation of final Draft of Issues Paper;
- Consult Council with Draft Issues Paper (courtesy only).

10. Publication of Issues Paper

- **Seek approval of Management Board;**
- Prepare submission to Minister and Press Release;
- **Clear with Press office and SPAD;**
- **Advise Minister of Issues Paper and Press Release**;
- Send to printers (GIS Unit forward final map(s) to GDU. Plan Team responsible for final proofing of Issues Paper Map(s) provided by GDU or Printers);
- Arrange public meetings with appointed consultants;
- Arrange launch of Issues Paper;
- Arrange for Issues Paper to be placed on Planning Service website;
- Send copy of Issues Paper for inclusion in Freedom of Information Publication Scheme;
- Distribution of Issues Paper to local politicians and all local government departments;
- Draft advertisement for launch of Issues Paper and SEA Scoping Report;
- **Submit to HQ for clearance;**
- **Arrange with Graphics Unit for publication in Belfast Gazette and Local Press for Two Successive Weeks (refer to Planning (Development Plans) Regulations(Northern Ireland) 1991).***

* Retain copies of advertisement

B: Post Launch of Issues Paper to Publication of Draft Plan.

1. Public Participation

- **Receipt of representations to the Issues Paper (representations received after the 14 week period will be accepted with a caveat that they will only be considered if time permits);**
- Public meetings held and chaired by consultants and attended by Planning Service staff;
- Allow period for community groups attending to submit written comments to consultants;
- Consultation Report produced by consultants outlining the main issues expressed, locational issues raised and summarising main comments submitted during Stages 1 and 2 of the process to agreed timescale;
- Discuss findings of the Consultation Report with consultants;
- **Log/acknowledge/classify written representations on the Issues Paper;***
- Representations with a mapped component plotted by Plan Team in a format compatible with Representations database;

- Consider all written representations;
- Arrange for the final consultants report to be placed on the Planning Service web-site;
- Prepare draft of Public Participation Technical Supplement.

*Development plan database should allow for this part of the process to be dealt with electronically.

2. Use of Consultants in accordance with Departmental Guidance on the Use of External Consultants. (Refer to A4 for procurement process)

- Arrange induction meeting with consultants on topic based research;
- Brief consultants and agree timescales for project completion;
- Management of process – progress meetings and input as required (GIS Unit to provide any spatial data, including OSNI map base, requested by consultants. If data provided, consultants must enter a third party agreement and sign Digital Data Licence);
- Receipt and clearance of consultants report;
- Evaluation of consultants upon project completion.

3. Draft Plan Survey & Analysis

i) Co-ordinating Group

- Exchange of information, specific requests for data as required;
- Update on relevant stages of the Plan.

ii) SEA

- Consideration of consultation responses to Scoping Report and public consultation.

* Refer to SEA Guidelines (to be published shortly)

iii) EQIA

- Consideration of relevant available data, for example Census / EHS / NIHE / Area Plans etc).

* Refer to Practical Guidance on EQIA

iv) Appropriate Assessment (Given the level of scientific expertise required, AA will, where possible, be undertaken in liaison with EHS or alternatively consultants)

- Appropriate Assessment Phase liaise with assessors as required.

v) Rural Proofing

- Data gathering and analysis / Review of policy;
- Assess rural impact of proposed policies on various rural attributes – set out in Planning Service Guidelines on Rural Proofing;
- Consider options / alternatives;
- Formal consultation on chosen options.

* Refer to Guidance on Rural proofing

vi) Anti-poverty and Social Inclusion Strategy for Northern Ireland

- In line with Government's Anti-poverty and Social Inclusion Strategy for Northern Ireland, identify where deprivation occurs, then attempt to facilitate development and create a land use framework that will allow investment to take place. The Plan should seek to apply the Strategy through specific Plan proposals.

vii) Transport

- In conjunction with Roads Service and based on relevant Transport Plans, identify all major transport schemes with a land use implication;
- Consider opportunities for the integration of transport and land use;
- Identify key site requirements for all transport modes;
- Relevant guidance is contained in PPS 3 – Access, Movement and Parking and PPS 13 – Transportation and Land Use.

viii) Industry, Employment & Offices

- Various assessments of existing and required provision in consultation with District Councils, Department of Enterprise, Trade and Investment, the business community, Invest Northern Ireland, private sector investors and local enterprise;
- Consideration in regard to New TSN;
- Consult council on main survey findings and options;
- Relevant guidance is contained in:
  - A Planning Strategy for Rural Northern Ireland - Policy IC 16:
    Office Development;
  - Policy IC 17: Small Office and Business Development;
  - PPS 4 – Industrial Development;
  - PPS 4 (Draft) – Industry, Business and Distribution.

ix) Retail / Commerce

- Various assessments of existing retail patterns and floor space provision, town centre health checks, and examination of future retail need;
- Consultation with Valuation and Lands Agency for baseline survey data;
- Consideration of consultants reports where available;
- Consult council on main survey findings and options;
- Relevant guidance in:
- PPS 5 – Retailing and Town Centres;
- PPS 5 (Draft) – Retailing, Town Centres and Commercial Leisure Developments.

x) Countryside Assessment

- Request information on all relevant environmental designations from consultees;
- Establish baseline data on countryside resources;
- Development Pressure Analysis – from annual rural housing monitor / HQ GIS Unit / Systems Analyst (IT Section);
- Consider NI Landscape Character Assessment (LCA);
- Co-ordinate consultation responses to evaluate assets and resources;
- Identify preliminary Countryside Policy Areas;
- Consult council on main survey findings and options;
- Relevant guidance in:
  - PPS 2 – Planning and Nature Conservation;
  - PPS 6 – Planning, Archaeology and the Built Heritage.

xi) Settlement Appraisals

- Consider NI Landscape Character Assessment (LCA) in relation to key settlement characteristics;
- Identify potential LLPAs and ATCs;
- Identification and prioritisation of sites for TPOs;
- Consultation on potential sites;
- Consult council on main survey findings and options;
- Relevant guidance in: PPS1, 2 and 6 and the Planning Strategy for Rural Northern Ireland.

xii) Housing

- Northern Ireland Land Use Database – Housing Monitor & Annual Summary Report – assessment of commitments;
- Urban Capacity studies in accordance with PPS12;
- Consider Housing Need Assessment;
- Housing Allocations – HGIs from RDS
- NISRA – relevant demographic information from Census to demonstrate district and settlement population trends;
- Consult council on main survey findings and options;
- Relevant guidance in:
  - PPS 1 – General Principles including Joint Ministerial Statement;
  - PPS 7 - Quality Residential Environments;
  - PPS 12 – Housing in Settlements;
  - PPS 14 – Sustainable Development in the Countryside.

xiii) Open Space

- Carry out open space audit;
- Assess provision against NPFA standards. Work closely with district councils / Sports Council and any other interested bodies taking account of any local recreational strategies they may have;
- Identify with councils any proposals for new facilities to be delivered in the plan period;
- Consult council on main survey findings and options;
- Relevant guidance in:
  - PPS 8 – Open Space, Sport and Outdoor Recreation.

xiv) Public Utilities

- Assess and provide information on existing provision and capacities of water supply, drainage, waste disposal, public cemeteries, energy and telecommunications. Data sourced from Water Service, Rivers Agency, District Councils, NIE, Fire Services etc.
- Relevant guidance in:
  - PPS10 – Telecommunications;
  - PPS 11 – Planning and Waste Management;
  - PPS 15 – Planning and Flood Risk.

xv) Education, Health & Community Facilities

- Assess and provide information on existing provision, anticipated need and proposals regarding education, health and community facilities. Data sourced from various education boards or councils, colleges, health and social services boards, District councils and community groups.

Requests for digital spatial data from external sources to be directed through GIS Unit. Any digital data received from external sources e.g. Roads Service, Councils etc. to be forwarded to GIS Unit.

4. Drafting Initial Draft Proposals

i. Initial Draft Text

- Collate and review all relevant Regional Policy Guidance;
- Ongoing systematic analysis of survey information, representations and consultation responses by topic area/settlement;
- Prepare preliminary draft of Strategic Framework text.

ii. Initial Draft Plan Proposals

- Consider the broad land use implications of the survey and analysis results including consultant's reports for each topic area and prepare initial draft of technical supplements;
- Agree broad settlement hierarchy;
- Consider broad land use implications of transport study and consider land use implications;
- Considered detailed site evaluation matrix;
- **Agree through Plan Team meeting broad land use allocations by settlement across all topic areas to include housing allocation to each settlement against the HGI's and initial housing land allocation to each settlement;**
- Prepare preliminary Key Site Requirements for all proposed land use zonings and policy areas;
- Consider settlement appraisals and agree all plan specific Environmental Designations, identify key characteristics and instigate designation process for TPO's where necessary;
- Collate all regional Environmental Designations;

- Prepare initial draft text for District Proposals.

iii. Preparation of Document

- Collate and edit all draft text;
- Prepare preliminary draft plans (GIS Unit prepare Countryside Map(s) and Environmental Designations Map(s). Plan Team responsible for preparing all other maps viz. Settlement Maps, City / Town Centre Maps and Inset Clarification Maps where necessary. Preliminary Proposals maps to be prepared following guidelines set out in "Development Plan GIS – Mapping Procedures" (2005).

iv. Consultation with relevant statutory agencies, HQ and DRD

- **Submit draft text to HQ Plan Guidance and Support Team for clearance. This should be a managed process including regular meetings and the submission of text on an incremental basis to an agreed timetable;**
- **Distribute draft text to key agencies for comment and clearance (refer to guidance in relation to security for Draft Plan);**
- **Submit maps to GIS Unit for clearance, this should be a managed process and the submission of maps should be on an incremental basis to an agreed timetable;**
- Submit draft text to DRD RDS Team for information. This should be a managed process including regular meetings and the submission of text on an incremental basis to an agreed timetable.

5. Preparation of Draft Plan

i) Consider Consultations

- Send out reminders if consultation replies are not received;
- Record and file all consultee replies;
- Carefully check all replies and highlight where reply is requesting changes to be made to the Draft Plan;
- Check replies against previous comments from consultees.

ii) Amendments

- Amend text and maps as appropriate (Plan Team responsible for compiling schedule of amendments and subsequently making these changes to relevant geometry. Schedule of amendments to be forwarded to GIS Unit);
- Inform consultees of those instances where following consideration of their comments there is no resultant change to the Draft Plan/further action and make a record setting out the consideration.

iii) Final Assessments

SEA*

- Issue relevant information to consultees for assessment;
- Assessment of likely significant environmental effects;

- Internal consultation on assessment;
- Consideration of responses to assessment;
- Consult ROI in relation to transboundary consultations if necessary;
- Preparation of Environmental Report;
- **HQ clearance of Environmental Report**;
- Final edit and printing.

* Refer to SEA Guidance

EQIA

- Screening of Policies and Proposals
- Forward results of screening to DoE Equality Unit;
- Consider any responses received from DoE Equality Unit;
- Assessment of impacts;
- Prepare internal consultation draft;
- **Seek comments from Equality Unit and HQ clearance on consultation draft**;
- Printing.

Appropriate Assessment

- Receipt of draft report from EHS;
- Agree potential mitigation;
- Amend draft plan proposals as required;
- **Clearance of final draft with HQ**.

Rural Proofing

- Assessment of impacts;
- Internal consultation as required;
- Consideration of responses;
- Final edit.

iv) HQ Clearance

- **Submit Draft Plan to HQ Plan Guidance and Support Team for clearance, this should be a managed process including regular meetings and the submission of text on an incremental basis to an agreed timetable.**

v) DRD Conformity

- Submit Draft Plan and all technical supplements to HQ for forwarding to DRD;
- **Receipt of certificate.**

vi) Website and Printing

- Consult with Graphics Unit regarding layout, design, timescales (Refer to “Guidelines for preparation of Draft Plan for Printing” (2004);*
- Appoint printers (refer to A4 for procurement).

*This should happen at the earliest possible opportunity when realistic

timescales are known.

6. Publication of Draft Plan including Technical Supplements

i) Ministerial Clearance / Press Release

- Prepare briefing for Minister to seek approval to publish Draft Plan and Technical Supplements and indicate if ministerial involvement in launch is sought;
- **Prepare associated Press Release for Draft Plan and Assessments and seek clearance from Press Office;**
- **Submit to MB for clearance;**
- **Submit to SPAD for comment / clearance;***
- **Submit briefing and Press Release for ministerial clearance copy to Management Board etc;***
- Forward receipt of Ministerial approval and Press Release to Press office and Planning Secretariat;
- Prepare Q&A for Press Office / Secretariat and provide launch details.

*Refer to Guidance from Planning Secretariat

ii) Website and Printing

- Liaise with HQ GIS unit on preparation of maps for submission to printers (As per B 4 iii). In addition, the Plan Team is responsible for preparing all Technical Supplement maps with exception of Development Pressure Analysis maps for inclusion in Countryside Assessment TS. Plan Team to forward hard copy of each map to GIS Unit for clearance. Following clearance, Plan Team will export maps for GIS Unit to format. This should be a managed process in accordance with the timescales set out in “Guidelines for Preparation of Draft Plan for Printing” (2004);
- Proofing of all draft text / Technical Supplements / maps and forward to Graphics Unit in accordance with printing schedule. (Once formatting is completed, GIS Unit forwards maps to GDU or directly to Printers as necessary);
- Clearance of final proof of all Draft Plan and Technical Supplement text and plans with printers. (Plan Team is responsible for inspecting final proofs for problems caused by the printing process - e.g. Colour changes, lack of clarity / definition etc. If major error(s) identified, affected map(s) can be corrected, re-exported, re-formatted and forwarded to GDU or Printers. Again, Plan Team will receive a final proof);
- Consult accounts branch in relation to covering the publishing and printing cost of the plan;
- Prepare distribution list (refer to guidance on Distributing Departmental Documents);
- Agree number of plans to be printed with HQ;
- Liaise with IT in relation to making the Draft Plan available on the website;
- Submit Draft Plan to HQ Web Team for placing on the Planning Service website;
- Submit Draft Plan to FOI for inclusion in Publication Scheme.

iii) Publication of SEA / AA / EQIA and Non Statutory Assessments

- Publish Assessments with draft plan;
- **Formally invite EHS to submit comments on the SEA Environmental Report within the specified consultation period;**
- **Inform umbrella groups of publication of EQIA on the Draft Plan and invite comments within the specified consultation period;**
- Publication of Technical Supplement on Rural Proofing.

iv) Clear Advertisement

- Draft Advertisement for Draft Plan to include reference to EQIA;
- Draft Advertisement for SEA and AA;
- **Submit to HQ for clearance;**
- **Arrange with Graphics Unit for publication in Belfast Gazette and Local Press for Two Successive Weeks (refer to Planning (Development Plans) Regulations (Northern Ireland) 1991.***

*Retain copies of advertisement

v) Exhibition

- Arrange and book appropriate venues;
- Arrange for construction of exhibition;
- Prepare staff rota for manning exhibition.

vi) Formal Launch

- Agree with HQ personnel for launch;
- Arrange venue for launch;
- Issue invitations;
- Liaise with Press Office in terms of publicity.

C. Draft Plan – Adoption

Stage 1: Consultation period following publication of Draft Plan

- Public Exhibition and Meetings;
- Representations:
  - **Acknowledge receipt of representations;**
  - Enter details of representations on database;
  - Photocopy representations;
  - Scan representations;
  - Digitise site specific representations. (Plotted by Plan Team in a format compatible with Representations database);
  - Start interim classification to assist DC process, identifying elements of objection and support;
  - Enter information on database so that it can be searched by staff when replying to DC consultations and preparing for appeals.
- Log / acknowledge and analyse responses to SEA / EQIA / AA.

Stage 2: Public Display of Representations / Counter-

objection period

- Draft advertisement for display of reps;
- **Clear draft advertisement with HQ;**
- Publish advertisement in the Belfast Gazette and in Local Press for Two Successive Weeks including information as specified in Article 4A of Planning (Development Plans) (Amendment) Regulations (Northern Ireland) 2004;
- Organise Public Exhibitions;
- Plan Team responsible for preparing maps required for Public Display of Representations;
- Place scanned representations on the Development Plan web page incorporating a search facility if required;
- Ongoing classification of representations;
- Counter Objections:
    - **Acknowledge receipt of counter objections;**
    - Enter details of counter objections on database;
    - Photocopy counter objections;
    - Scan counter objections;
    - Classify counter objections in accordance with the elements of objection identified for the objections to the draft plan in order to assist the DC process;
    - Enter information on database so that it can be searched for by staff when replying to DC consultations and preparing for appeals;
    - Put Counter Objections on web page.

Stage 3: Independent Examination

- Informal Request for Independent Examination;
- Complete classification of representations identifying strategic/site specific elements;
- Collate information to meet PAC requirements (as specified in Annex A of the PAC Report 'Development Plan – Timetabling of Inquiries based on Two Stage Simultaneous Exchange of Statements').

- **Formal Request for Independent Examination;**
- Preparation of rebuttal statements relating to strategic issues (Plan Team responsible for preparation of any mapping required for rebuttal statements);
- Consultation process:
    - Identify statutory consultees for each issue;
    - If necessary re-engage private consultants;
    - Brief consultees regarding process and timeframe for consultation;
    - Consult electronically and set up web portal to receive responses;
    - Track responses from consultees and issue reminders as required;
    - Prepare a spreadsheet that includes details of the consultee responses, with a hyperlink to each response, to be used by staff during the preparation of rebuttals.

- 1st Pre-Examination Meeting to consider procedures, to set out

preliminary timetable for hearing strategic issues and to discuss broad timetable for site specific issues; ▪ Preparation of rebuttal statements relating to site specific issues (Plan Team responsible for preparation of any mapping required for rebuttal statements); ▪ Consultation process: o Identify statutory consultees for each issue; o Brief consultees regarding process and timeframe for consultation; o Consult electronically with web portal set up to receive responses; o Track responses from consultees and issue reminders as required; o Prepare a spreadsheet that includes details of the consultee responses, with a hyperlink to each response, to be used by staff during the preparation of rebuttals; o Publish consultation responses on the Development Plan Website 6 weeks prior to the simultaneous exchange of rebuttals.
▪ 2nd Pre-Examination Meeting for simultaneous exchange of rebuttals relating to strategic issues, and announcing date for simultaneous exchange of statements on site specific matters and setting a timetable for hearing site specific issues; ▪ Start of Independent Examination (Strategic issues);
▪ 3rd Pre-Examination Meeting for simultaneous exchange of site specific statements and confirmation of timetable for hearing site specific matters; ▪ Start of Independent Examination (Site specific issues).
Stage 4: Post Independent Examination ▪ Consider PAC Report; ▪ Seek consultees views and comments on PAC Report; ▪ Consider effects of changes on SEA / EQIA / AA*; ▪ Prepare Adoption Statement; ▪ Prepare Adopted Plan and maps (Plan Team responsible for compiling schedule of those recommendations accepted by the Department which have spatial implications for any proposals, zonings, designations and subsequently identify the maps affected. Refer to B 5 and B 6); ▪ Revise SEA / EQIA / AA; ▪ **HQ clearance of Adoption Statement / Order / Plan Text and Maps;** ▪ **DRD Statement of Conformity;** ▪ **Ministerial Clearance and Press Release;** ▪ **Arrange formal seal of Adoption Statement;** ▪ Plan etc to GDU and printers (Refer to B 5 and B 6); ▪ Organise launch (refer to B6); ▪ Adoption of Plan; ▪ **Draft advertisement and clear with HQ** ▪ Public Advertisement in the Belfast Gazette and by local advertisement for 2 successive weeks (Article 14); ▪ Publication and launch of Plan (Normally done with photo

opportunity with Mayors).

*Refer to appropriate guidance.

APPENDIX 3_ EU Guidance

IMPLEMENTATION OF DIRECTIVE 2001/42 ON THE ASSESSMENT OF THE EFFECTS OF CERTAIN PLANS AND PROGRAMMES ON THE ENVIRONMENT

23rd September 2003

Table of Contents

1. FOREWORD

1.1. Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment[2] ('the SEA Directive')[3] entered into force on 21st July 2001 and has to be implemented by Member States before 21st July 2004. It will greatly affect the work of many public authorities by obliging them to consider systematically whether the plans and programmes they prepare come within its scope of application and hence whether they need to carry out an environmental assessment of their proposals, in accordance with the procedures laid down in the Directive.

1.2. Experience of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment ('the Environmental Impact Assessment or EIA Directive')[4] has shown that it is important to ensure a consistent implementation and application across the whole Community to achieve the maximum potential for environmental protection and sustainable development. This document has been drawn up to provide guidance for Member States to ensure from an early stage as consistent implementation and application of the SEA Directive as possible.

1.3. The document was prepared by representatives of Member States and the Environment Directorate-General of the European Commission who, between them, possessed experience both of negotiating the Directive and of carrying out environmental assessments at various levels (see appendix II). It also benefited from discussions by national SEA experts from the Member States and the Accession Countries. The authors had very much in mind the questions which Member States will need to address as they apply the Directive in their own legal systems.

1.4. The document is designed to help Member States, Acceding States and Candidate Countries understand fully the obligations contained in the Directive and assist them in transposing the Directive into their national law and, equally important, in creating or improving the procedures which will give effect to the legal obligations. It does not set out to explain how to carry out an environmental assessment although it does offer some practical advice on how certain requirements could be met. In conjunction with national guidance prepared by Member States, it should also be of use to authorities which have to apply the Directive when preparing their plans and programmes. It may also be helpful when authorities come to consider the UN ECE Protocol on strategic environmental assessment which was opened for

---

2 OJ L 197, 21.7.2001, p.30.

3 Although the word 'strategic' does not appear in either the title or the text of the Directive, it is often referred to as the 'strategic environmental assessment' Directive (or SEA Directive) because it deals with environmental assessment at a higher, more strategic, level than that of projects (which are dealt with in the Environmental Impact Assessment (or EIA) Directive (Directive 85/337/EEC as amended by Directive 97/11/EC)).

4 OJ L 175, 5.7.1985, p.40.

signature on 21st May 2003 at the Fifth Ministerial Conference 'Environment for Europe' in Kiev, Ukraine.[5]

1.5. The document represents only the views of the Commission services and is not of a binding nature. The present version is not meant to be definitive. The document may be revised in the future according to the experience that will arise from the implementation of the Directive and from any future case law. It is not intended to give absolute answers to specific questions but it should help to throw light on the way they should be addressed. It must be emphasised that, in the last resort, it rests with the European Court of Justice (ECJ) to interpret a Directive.

1.6. The structure of the document draws upon the order of the Articles in the Directive itself. The first step in understanding the Directive is deciding which plans and programmes it applies to. The document therefore begins by discussing its scope of application focusing on the concept of plans and programmes as well as the issue of whether they are likely to have significant environmental effects. It then considers in turn the content of the environmental report, the requirements on quality assurance, the provisions on consultation, the nature of the monitoring requirement, and finally the relations between the Directive and other Community legislation.

1.7. So far as possible, the presentation of each section follows the same pattern, comprising reference (in italics) to the appropriate provision(s) of the Directive, a brief introduction to the topic, and a discussion of the issues which arise. This draws, where appropriate, on the jurisprudence of the ECJ, in particular on decisions which relate to the EIA Directive. Words quoted from the Directive itself are in bold type. Where examples are used in this document, it is not intended to imply that they necessarily fall within the scope of application of the Directive; that is a question which would have to be decided case by case.

[5] Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention). Those of its provisions dealing with plans and programmes are similar, but not identical, to those in the Directive. The Protocol also contains an Article on policies and legislation.

2. OBJECTIVES OF THE DIRECTIVE

Article 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.

2.1. Article 1 lays down two objectives for the carrying out of an environmental assessment in accordance with the Directive:

- To provide for a high level of protection of the environment.

- To contribute to the integration of environmental considerations into the preparation and adoption of certain plans and programmes with a view to promoting sustainable development.

2.2. These objectives link the Directive to the general objectives of Community environmental policy as laid down in the EC Treaty.[6] Article 6 of the Treaty lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, in particular with a view to promoting sustainable development.

2.3. Article 1 should be read in conjunction with the recitals of the Directive, particularly recitals (4), (5) and (6) which also describe the aims of the Directive:

- To ensure that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption (recital 4).

- To benefit undertakings by providing a more consistent framework in which to operate by the inclusion of relevant environmental information into decision making. The inclusion of wider set of factors in decision making should contribute to more sustainable and effective solutions (recital 5).

- To provide for a set of common procedural requirements necessary to contribute to a high level of protection of environment (recital 6).

[6] Article 174 of the Treaty establishing the European Community.

3. SCOPE OF THE DIRECTIVE[7]

3.1. The provisions determining the scope of application of the Directive are mainly expressed in two related articles. Article 2 sets out certain characteristics which plans and programmes must possess for the Directive to apply to them. Article 3 then sets out rules for determining which of those plans and programmes are likely to have significant effects on the environment and must therefore be subject to environmental assessment. Article 13(3) defines the temporal scope of application (see paragraphs 3.64-66 below).

Article 2

(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.

3.2. The first requirement in order for **plans and programmes** to be subject to the Directive, is that they must meet the conditions of both indents in Article 2(a). In other words, they must be both 'subject to preparation and/or adoption by the prescribed authorities' and 'required by legislative, regulatory or administrative provisions'.

3.3. **Plans and programmes** are not further defined. The words are not synonymous but they are both capable of a broad range of meanings which at some points overlap. So far as the Directive's requirements are concerned, they are treated in an identical way. It is therefore neither necessary nor possible to provide a rigorous distinction between the two. 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.

3.4. In considering the concept of 'project' under the EIA Directive in case C-72/95 *Kraaijeveld*, the ECJ noted that that Directive had a wide scope and a broad purpose. In view of the language used in Directive 2001/42/EC, the related purposes of that Directive and the EIA Directive, and the conceptual similarities between them, Member States are advised to adopt a similar

[7] In the jargon of environmental assessment, 'scope' usually refers to the coverage of the environmental report described in Article 5. This is not to be confused with the term 'scope' as used in the title of Article 3 to refer to the scope of application of the Directive.

approach in considering whether an act is to be considered a plan or a programme falling within the scope of Directive 2001/42/EC. The extent to which an act is likely to have significant environmental effects may be used as one yardstick. It may be that the terms should be taken to cover any formal statement which goes beyond aspiration and sets out an intended course of future action.

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. Waste management plans, water resources plans, etc, would also count as plans for the purposes of the Directive if they fall within the definition in Article 2(a) and meet the criteria in Article 3. [8]

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. One good example of such a programme could be the Icelandic Integrated Transportation Programme which is planned to take the place of independent programmes for road, airport, harbour and coastal defence projects. The transport infrastructure is defined and policy on transport infrastructure is laid out for a period of 12 years (identifying projects by name, location and cost). 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. In town and country planning in Sweden, for instance, the programme is thought of as preceding a plan and as being an inquiry into the need for, and appropriateness and feasibility of, a plan.

3.7. Plans and programmes include those **co-financed by the European Community.** The Directive is of course addressed only to the Member States and not to the institutions of the Community.[9] Regardless of the decision-making process within the Community institutions regarding funding (and whether or not there is SEA – or an analogous form of assessment - by those institutions) there will need to be an assessment by the Member State if the plan or programme is subject to the Directive.

3.8. If the criteria in Articles 2 and 3 are met, the Directive would apply in principle to co-financed plans in several sectors, including transport and

[8] In Case C-387/97 (Commission v Greece), the ECJ considered what would not qualify as the plans which the Member States are required to adopt under Article 6 of Directive 75/442 and Article 12 of Directive 78/319. It said that 'legislation or specific measures amounting only to a series of ad hoc normative interventions that are incapable of constituting an organised and coordinated system for the disposal of waste and toxic and dangerous waste cannot be regarded as [such] plans' (paragraph 76).

[9] The Commission has introduced a procedure for assessing the impact of its own proposals (Communication on impact assessment, of 5 June 2002 (COM(2002)276 final)).

regional, economic and social development (Structural Funds).[10] Article 11(3) prescribes expressly that for plans and programmes co-financed by the European Community, the environmental assessment under Directive 2001/42/EC must be carried out in conformity with the specific provisions of the relevant Community legislation. Hence the assessment must comply with each requirement of the applicable legislation; an assessment adequate for one Directive may not be adequate for any other which applies. Plans and programmes co-financed under the current respective programming periods of Regulations 1260/1999/EC and 1257/1999/EC are exempted from the scope of the SEA Directive. This is because plans and programmes under those Regulations will almost certainly have been agreed before the Directive is due to be transposed in the Member States (i.e. 21st July 2004) and will have undergone prior environmental assessment. The exemption does not apply to future programming periods under those Regulations and Article 12(4) requires the Commission to report on the relationship between the Directive and the Regulations before the expiry of the current programming periods.

3.9. **The definition of plans and programmes includes modifications** to them. Many plans, especially land use plans, are modified when they eventually become outdated rather than being prepared afresh. Such modifications are treated in the same way as plans and programmes themselves and require environmental assessment provided the criteria laid down in the Directive are met. If such modifications were not given the same importance as the plans and programmes themselves, the field of application of the Directive would be more restricted.[11] The adoption of such modifications will be subject to an appropriate procedure. It is important to distinguish between modifications to plans and programmes, and modifications to individual projects, envisaged under the plan or programme. In the second case, (where individual projects are modified after the adoption of the plan or programme), it is not Directive 2001/42/EC but other appropriate legislation which would apply. An example could be a plan for road and rail development, including a long list of projects, adopted after SEA. If, in implementing the plan or programme, a modification were proposed to one of its constituent projects and the modification was likely to have significant environmental effects, an environmental assessment should be made in accordance with the appropriate legal provisions (for example, the Habitats Directive, and/or EIA Directive).

3.10. Under Article 5 of Directive 2001/42/EC, the likely significant effects on the environment of implementing the plan or programme must be identified, described and evaluated. Thus it is logical to consider that a modification of a plan or a programme during its preparation must be subject to assessment under Article 5 if the modification in itself involves significant environmental effects not yet assessed. This might arise if a modification was made as a result of consultation, or of reconsideration of elements of the plan or programme, or if the state of the environment had changed so as to make

[10] 'Structural funds' are taken to include the European Regional Development Fund, the European Social Fund, the European Agricultural Guidance and Guarantee Fund, and the Financial Instrument for Fisheries Guidance (see Regulation 1260/1999/EC).

[11] See also Case C-72/95 (Kraaijeveld) which dealt with a similar point in relation to the EIA Directive before its amendment by Directive 97/11/EC.

assessment necessary. Even minor modifications can generate significant environmental effects, as foreseen in Article 3(3) of the Directive. Delays might ensue in the adoption of the plan or programme but these should be kept to a minimum, subject to the over-riding requirement to assess the likely significant environmental effects.

3.11. The element **subject to preparation and/or adoption by an authority** stresses that plans and programmes need to fulfil certain formal conditions in order to be covered by the Directive. The main idea of this element is that in the end a plan or programme would always be formally adopted by an authority. However, the phrase would also include the situation where a plan is prepared by one authority (or natural or legal person who works on behalf of the authority) and is adopted by another authority.

3.12. The concept of an 'authority' has been given a large scope in the case law of the ECJ. It can be defined as a body, whatever its legal form and regardless of the extent (national, regional or local) of its powers, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State, and it has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals (case C-188/89 *Foster and others v British Gas*). For example, privatised utility companies may be required to carry out some tasks or duties (such as preparing long-term plans for ensuring water resources) which in non-privatised regimes would be carried out by public authorities. In respect of those functions they would be treated as authorities for the purposes of the Directive. In other respects (such as providing consultancy services overseas) they would not be considered to be authorities in the sense of the Directive.

3.13. Plans and programmes which private bodies draw up for their own purposes (i.e. when not acting as authorities as described above, nor as agents of authorities, and when not preparing them for adoption by authorities) are not subject to the Directive.

3.14. Preparation of a plan or programme covers a process which lasts right through to its adoption. Adoption **through a legislative procedure by Parliament or Government** is one procedure for adopting plans and programmes in some Member States. For example, in Italy regional and local Territorial and Urban plans are adopted and approved in a two-stage procedure by the relevant regional or local authorities. The final approval is often by means of a regional law. 'Government' is not restricted to the level of the State. In some countries, plans and programmes may be adopted by primary or secondary legislation of any State, regional or local legislature. These cases, too, are subject to environmental assessment when the other requirements of the Directive are met. One example at national level is the French *Schémas de services collectifs* which are prepared at national level, with consultation at regional level, and approval by the Government after consultation with Parliament.

3.15. Another important qualification for a plan or programme to be subject to the Directive is that it must be **required by legislative, regulatory or**

administrative provisions. If these conditions are not met, the Directive does not apply. Such voluntary plans and programmes usually arise because legislation is expressed in permissive terms,[12] or because an authority decides to prepare a plan on an activity which is unregulated. On the other hand, if an authority is not required to draw up a plan unless certain preconditions are met, it would probably be subject to the Directive once those preconditions had been met (and the other requirements of Articles 2 and 3 had been fulfilled). It is of course open to Member States, in respect of their own national systems, to go further than the minimum requirements of the Directive should they so desire.

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.

Article 3

3.17. Article 3 sets out the scope of application of the Directive and is fundamental to its operation. It begins by expressing the requirement for an environmental assessment of certain plans and programmes which are likely to have significant environmental effects (paragraph 1). It then defines classes of plans and programmes which require assessment, either automatically (paragraph 2) or on the basis of a determination by Member States (paragraphs 3 and 4). Paragraph 5 specifies how that determination (so-called 'screening') should be made.

3.18. Paragraphs 6 and 7 deal with transparency aspects of the determination under paragraph 5, and paragraphs 8 and 9 list certain plans and programmes exempted from the scope of the Directive.

3.19. The point in time from which these provisions apply is defined in Article 13(3) of the Directive.

Article 3(1)

An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

3.20. Article 3(1) is the starting point for the more detailed provisions which follow in the remainder of the Article. The assessment to be carried out must be in

[12] 'The authority may prepare a plan', rather than 'The authority shall prepare a plan'.

accordance with Articles 4 to 9, and the plans and programmes to be assessed are specified in paragraphs 2 to 4.

3.21. The relationship between paragraph 1 and paragraphs 2 to 4 is clarified by Recital 10. It is important to note that the plans and programmes defined in paragraph 2 should as a rule be made subject to systematic environmental assessment. Except in the cases provided for in paragraph 3, there is no discretion for Member States to determine whether the plans and programmes covered by paragraph 2 are in fact likely to have significant environmental effects: the Directive deems them to have such effects. By contrast, Member States must determine whether plans and programmes not referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects and therefore, in accordance with paragraph 1, require environmental assessment.

Article 3(2)

Subject to paragraph 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 Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

.

3.22. Paragraph 2 defines two classes of plans and programmes which are deemed likely to have significant environmental effects. For a plan or programme to fall within the scope of paragraph 2(a), both conditions described there must have been fulfilled; the plan or programme must have been prepared for one or more of the sectors (agriculture, forestry, fisheries, etc) and it must set the framework for future development consent of projects listed in the EIA Directive. It is not necessary to decide whether projects in Annex II to that Directive would require EIA. All that is necessary is that they fall under the categories listed in either Annex I or II to the EIA Directive.

3.23. The meaning of '**set the framework for** future development consent' is crucial to the interpretation of the Directive, although there is no definition in the text. 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 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).

3.24. The words 'sets a framework for projects and other activities' are used in Annex II with illustrations of how such a framework may be set (location, nature, size or operating conditions of projects and the allocation of resources). These illustrations are indicative and not exhaustive.

3.25. As Annex II states, one way of 'setting the framework' may be through the way resources are allocated but the exemptions in Article 3(8) should be borne in mind. The Directive does not define the meaning of 'resources' and in principle they may be financial or natural (or possibly even human). A generalised allocation of financial resources would not appear to be sufficient to 'set the framework', for example a broad allocation across an entire activity (such as the whole resource allocation for a country's housing programme). It would be necessary for the resource allocation to condition in a specific, identifiable way how consent was to be granted (e.g. by setting out a future course of action (as above) or by limiting the types of solution which might be available).

3.26. Land use plans generally contain criteria determining what kind of development can take place in particular areas and are a typical example of plans which set the framework for future development consent. An example of the latter is the Netherlands' Municipal Land Use Plans which in some cases set conditions for the granting of building permits by municipalities. 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.

3.27. The phrase could include plans and programmes which, when adopted, themselves give consent for projects, provided these comply with the conditions set out in the plan or programme. Such provisions exist in several Member States. It could include the plans and programmes which, in some countries, set legally binding conditions with which future development consents must conform.

3.28. The phrase could also include sectoral plans and programmes which in broad terms identify the location of subsequent development within that sector. It would be necessary in each case to consider the extent to which future decisions on projects were conditioned by the plan or programme.

3.29. Article 3(2) expressly refers to '**projects**' listed in the EIA Directive. There 'project' is defined as:

- 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.

3.30. The word 'project' should be interpreted in a way which is consistent with its use in the EIA Directive. The same should hold good for the use of the word in

Article 3(4), given the conceptual and linguistic similarities between the two provisions.

3.31. **Town and country planning plans** and **land use plans** deal with the way land is to be developed or redeveloped. The terms may be used in different ways by different Member States, but generally both deal with the way territory is to be used, even if one may comprise a broader concept than the other.

3.32. Article 3(2)(b) refers to Articles 6 and 7 of Directive 92/43/EEC (the Habitats Directive). Those Articles require an 'appropriate assessment' of 'any plan or project not directly connected with or necessary to the management of a site but likely to have a significant effect thereon'. Hence, if a plan[13] has been found to have significant environmental effects under Article 6(3) of Directive 92/43 on a certain site or sites, this finding triggers the application of the SEA Directive under this paragraph. The sites at issue are those designated as special protection areas (SPA) under Article 4 of Directive 79/409 on the conservation of wild birds and those proposed to be classified as sites of Community importance (pSCI) under Article 4 of Directive 92/43 on the conservation of natural habitats and of wild fauna and flora.[14] In accordance with Article 11(2), integrated assessments are possible meeting the requirements of several items of Community legislation at the same time, in order to avoid duplication of assessment procedures. On the question of avoiding duplication of assessment see paragraphs 9.13 and 9.19-9.27 below.

Article 3(3)

Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

3.33. The meaning of '**small**' in the phrase 'small areas at local level' must be defined so as to take account of the differences between Member States and it will probably be necessary to decide it case by case. Interpretation will call for the careful exercise of judgement. The kind of plan or programme envisaged might be a building plan which, for a particular, limited area, outlines details of how buildings must be constructed, determining, for example, their height, width or design.

3.34. There is a similar difficulty in deciding the meaning of '**local**'. The language of the Directive does not establish a clear link with local authorities but the word 'level' does imply a contrast with, for example, national or regional levels. The complete phrase ('small areas at local level') makes it clear that the whole of a local authority area could not be excluded (unless it were itself

13 It is to be noted that Article 6(3) covers plans and projects, not programmes.

14 See the document 'Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC'.

small). In some Member States local authority areas can be very large indeed and an exemption for the whole of such an area would be a major loophole in the scope of application.

3.35. The key criterion for the application of the Directive, however, is not the size of area covered but whether the plan or programme would be likely to have significant environmental effects. A plan or programme which Member States determine likely to have significant environmental effects should undergo environmental assessment even if it determines only the use of a small area at local level. A similar point was made in Case C-392/96, *Commission v Ireland*, where the ECJ ruled that by setting thresholds on the basis of the size of projects alone, 'to the exclusion of their nature and location', the Member State exceeded the limits of its discretion. Projects could have significant effects on the environment by reason of their nature or location.

3.36. Similarly, **minor modifications** should be considered in the context of the plan or programme which is being modified and of the likelihood of their having significant environmental effects. A general definition of 'minor modifications' would be unlikely to serve any useful purpose. Under the definition of 'plans and programmes' in Article 2 'any modifications' to those plans or programmes are potentially within the scope of the Directive. Article 3(3) clarifies the position by recognising that a modification may be of such small order that it is unlikely to have significant environmental effects, but requiring that where the modification of a plan or programme is likely to have significant environmental effects then an assessment should be carried out regardless of the scale of the modification. It is important to note that not all modifications would require new impact assessment under the Directive since it does not require such new procedures to be triggered if the modifications are not likely to have significant environmental effects

Article 3(4)

Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

3.37. Article 3(4) broadens the scope of the Directive. Unlike Article 3(2), it does not automatically deem certain plans and programmes to have significant environmental effects. Instead it requires Member States to make a specific determination. The plans and programmes to which it applies are all those which set the framework for future development consent of projects but are not covered by Article 3(2). This includes projects in sectors not included in Article 3(2) as well as projects which are in those sectors but are not listed in the annexes to the EIA Directive. The definition of 'project' in the EIA Directive would apply in this paragraph as it does in paragraph 2. The meaning of **set the framework for future development consent of projects** was discussed under Article 3(2) above.

Article 3(5)

Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

3.38. As described above, Article 3(3) and (4) sets out the circumstances in which Member States have to determine whether a plan or programme is likely to have significant environmental effects. Article 3(5) prescribes how they are to discharge this general requirement, while Annex II identifies criteria to guide the determination (the so-called 'significance criteria').

3.39. Plans and programmes referred to in paragraphs 3 and 4 are of two kinds: (i) special cases of plans and programmes falling under paragraph 2; and (ii) plans and programmes other than those in paragraph 2 which set the framework for the future development consent of projects.

3.40. Following the model provided by the EIA Directive, Directive 2001/42/EC provides for three approaches (or 'screening mechanisms') to making this determination: case-by-case examination, specifying types of plans and programmes, or combining both approaches.

3.41. A **case-by-case examination** would require each plan or programme to be examined on an individual basis to see whether it is likely to have significant effects on the environment. This approach has the advantage of being best able to take individual situations and the characteristics of each plan or programme into account but at the cost of some added administrative burden.

3.42. By '**specifying types of plans and programmes'** the Directive envisages that plans and programmes of the same kind will be the subject of a general determination that they are likely to have significant environmental effects. This approach has the advantage of legal and administrative certainty since it is made clear from the start that an environmental assessment is necessary.

3.43. It is clear that the power in Article 3(5) to specify types of plans and programmes is not intended as a broad power to exempt whole classes of plans and programmes unless all those plans and programmes could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see Case C-72/95 *Kraaijeveld*). Insofar as it could represent a derogation from the Directive, it should be interpreted narrowly (see the comment at paragraph 65 of Case C-435/97 *Autonome Provinz Bozen*). In practice, exclusion from environmental assessment may not be justified in many cases. It might well be that at the outset not enough information is available at the plan or programme level to be sure that none of the plans or programmes in the proposed class will have significant environmental effects. Furthermore, care would be needed to avoid pre-empting decisions on the application of the Directive to future plans and programmes which might not

share all the characteristics of the class in question. For example, changes in the law might create new plans and programmes which would need consideration in order to determine whether the Directive applied to them.

3.44. A combination of both approaches (case by case examination and specifying types of plans or programmes) might be possible in some cases. The general approach would be to define a class of plans or programmes which would not, in specified circumstances, be likely to have significant environmental effects and to provide that in other circumstances the determination would have to be made case by case.

3.45. Article 3(5) of the Directive specifically requires Member States to take account of relevant criteria in Annex II when determining whether plans or programmes are likely to have significant effects on the environment. The wording of the Directive implies that the whole set of Annex II criteria first needs to be considered so that the relevant ones can then be applied. Expert judgement can help to apply relevant criteria to the plan or programme in order to reach a decision about the likely significance of its effects.

3.46. Different issues have to be taken into account when screening mechanisms are developed. The criteria in Annex II are divided into two categories: the characteristics of plans or programmes, and the environmental effects and the area likely to be affected. Cases of doubt about whether environmental assessment is needed are often likely to reflect uncertainty about the effects of the plan or programme. Further consideration by appropriate experts may resolve the doubt, if not it is recommended that environmental assessment should be carried out. Although Article 3(5) does not explicitly refer to Annex I, it may also be useful to consider the environmental factors identified there.

3.47. Careful consideration is needed of how the criteria in Annex II ('significance criteria') should be applied when specifying types of plans and programmes. In principle, the determination could be made by prescribing qualitative criteria or thresholds based on the relevant significance criteria. It is advisable to avoid screening systems which are based only on the size or financial thresholds of projects, or on the physical area covered by the plan or programme, as these may not comply with the Directive.

Annex II: Criteria for determining the likely significant effects

3.48. The list in Annex II contains criteria relating to the characteristics of the plan or programme (paragraph 1), and the effects and area likely to be affected (paragraph 2). They are not listed in order of importance. Their individual importance will be different as between cases. In general, it can be assumed that the greater the degree to which the criteria are met the more likely it is that the effects on the environment will be significant. It may be, however, that in some cases the effects related to a single criterion are so important as to trigger the need for SEA. In such cases, the screening procedure can be abbreviated accordingly but usually a more comprehensive consideration will be needed.

3.49. The criteria listed in Annex II are not exhaustive and the Directive does not prevent Member States from requiring additional criteria to be taken into consideration.

3.50. Throughout the text of the Directive environmental assessment is connected with the likelihood of significant environmental effects. The prediction of likely environmental effects is complex, especially in the context of relatively broad-brush, or high level plans or programmes, where it may be difficult to anticipate the outcomes of implementation at the time a plan or programme is adopted. The use of the word 'likely' suggests that the environmental effects to be considered are those which can be expected with a reasonable degree of probability.

The degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources

3.51. The more precisely the framework is set by a plan or programme, the more likely it is that an assessment under the Directive will be required. Hence plans or programmes which define, for example, not only the area for building houses or commercial activities but also their nature, size and (as appropriate) operating conditions, might establish a more detailed framework for projects than plans or programmes which define objectives without specifying details of the framework within which they must be achieved. Plans or programmes which are legally binding might set the framework more strictly than non-binding plans or programmes. Plans or programmes whose only or main purpose is to set a framework for projects might also set a stronger framework than plans or programmes which have several different purposes and issues.

The degree to which the plan or programme influences other plans and programmes including those in a hierarchy

3.52. If a plan or programme strongly influences another, any environmental effects it might have may be spread more widely (or deeply) than if this were not the case. Schematically, plans and programmes can be divided into two categories, 'horizontal' (plans and programmes belonging to the same level, or having an equal or similar status) and 'vertical' (plans and programmes belonging to a hierarchy). In a hierarchy, plans and programmes at the higher, general level might influence those at a lower, detailed level. For example, those at the lower level might have to take account explicitly of the contents or objectives of the plan or programme at the higher level or might have to demonstrate how they contribute to the objectives expressed in the higher level plan. It is of course clear that in practice things may be less straightforward; in particular, in some systems the lower level plan or programme might sometimes (e.g. if it were more recent) influence the one at a higher level. Binding plans or programmes, which will be explicitly implemented by means of other plans or programmes will probably have a strong influence. The legal aspect of a plan or programme - is it binding or not – may play a determining role in some systems. Plans or programmes which are the only ones in a sector and do not belong to a hierarchy might have less possibility of influencing

other plans or programmes. This is not a foregone conclusion and the relationships between different plans and programmes will have to be carefully considered in each case.

The relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development

3.53. The question to be addressed in this context is how far the plan or programme envisaged can contribute to reducing harm to the environment. A plan or programme which has great scope to affect the environment will be a strong candidate for assessment whilst one with few environmental implications may not be. For example, integrating the environment in, say, an education plan is a desired outcome. There is unlikely to be much scope for this in a plan about the contents of school curricula (even assuming that it sets the framework for projects); but plans about school accommodation may well be candidates for environmental assessment as they have a considerable potential to influence travel and possibly housing patterns.

3.54. In addition, an assessment may help to find ways of improving the environmental outcome of a plan or programme, or its contribution to sustainable development, at no greater cost; in reducing the cost of environmental safeguards whilst enabling other objectives to be met; or in choosing between alternatives.

environmental problems relevant to the plan or programme

3.55. The relevance of the problems to the plans or programmes is not defined and could be interpreted in several ways. It would include cases where plans or programmes either cause or exacerbate environmental problems, are constrained or otherwise affected by them, or contribute to solving, reducing or avoiding them. In any case it will be necessary to identify the nature and seriousness of environmental problems relevant to the plan or programme.

the relevance of the plan or programme for the implementation of Community legislation on the environment (e.g. plans and programmes linked to waste-management or water protection)

3.56. The Directive uses a rather neutral word ('relevance') in this criterion. Both positive and negative contributions to the implementation of Community legislation need to be considered here. It is important to ensure that the full range of Community legislation on the environment is taken into account.

the probability, duration, frequency and reversibility of the effects,
the cumulative nature of the effects,
the transboundary nature of the effects,
the risks to human health or the environment (e.g. due to accidents),
the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected),
the value and vulnerability of the area likely to be affected due to:
- *special natural characteristics or cultural heritage,*

- *exceeded environmental quality standards or limit values,*
- *intensive land-use,*

the effects on areas or landscapes which have a recognised national, Community or international protection status.

3.57. Many uncertainties exist, and insufficient or missing data and inadequate knowledge may make it difficult to decide whether significant effects are likely. Nevertheless, it is assumed that a rough estimation of the effects should always be possible.

3.58. The nature and characteristics of the likely effects will influence their significance in the context within which they are being considered. For example, it is relevant to consider whether the probability or frequency of effects will be very low (accidental cause) or whether the effects will occur continuously. Moreover, the more complex (e.g. due to synergies and accumulation), the more widespread, or the more serious the effects, the more likely it is that they should be considered 'significant'.

3.59. An equally important factor to be considered is the area likely to be affected by the plan or programme and consequently by its effects. It should be noted that it is not only areas that have a designated protection status which are required by the Directive to be given attention. The particular value or vulnerability of the area likely to be affected may make it more likely that effects must be considered significant there.

3.60. This was a point considered by the ECJ in case C-392/96 *Commission v Ireland* (referred to above). There the Court said: 'Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the [EIA] Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration. Similarly, a project is likely to have significant effects where by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size.'

3.61. Applying the criteria for determining potential environmental effects requires a comprehensive and systematic approach. To enable this to be achieved, some of the elements identified in Annex I may also be relevant. For example, for identifying likely significant effects the 'receptors' of these effects should be considered (see the list of issues in Annex I (f), i.e. *biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between these factors).* The characteristics noted in the footnote to Annex I(f) should also be taken into account (i.e. whether the effects are *secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative).* The use of Annex I together with Annex II in this way enables cross-media effects to be considered in a multidisciplinary way.

Article 3(8)

The following plans and programmes are not subject to this Directive:

- plans and programmes the sole purpose of which is to serve national defence or civil emergency,

- financial or budget plans and programmes.

3.62. The exemption of plans and programmes '**the sole purpose of which**' is to serve national defence or civil emergency is a stricter test than in the EIA Directive (which does not apply to 'projects serving national defence purposes'). This means that, for example, a regional land use plan which made provision for a national defence project in some part of the area it covered would require environmental assessment (provided the other criteria in the Directive were met) because to serve national defence was not its sole purpose. In applying this exemption, it is the purpose of the plan or programme which must be considered, not its effects. For example, an army base which is planned solely to serve national defence may have the additional effect of increasing local employment opportunities. It would still fall within this exemption. **Civil emergency** could include events having a natural or a man-made cause (e.g. earthquakes and terrorist activities respectively). There is no indication of <u>when</u> such plans and programmes should be drawn up; but their <u>sole purpose</u> must be to serve national defence or civil emergency. In line with the jurisprudence of the ECJ, the derogation should be construed narrowly. Thus a plan setting out what action should be taken if an avalanche were to occur would be exempt from the Directive, whereas one setting out measures to be taken to avoid avalanches occurring (perhaps through the provision of infrastructure) would not, because it would be intended to prevent an emergency rather than serve it.

3.63. Budgetary plans and programmes would include the annual budgets of authorities at national, regional or local level. Financial plans and programmes could include ones which describe how some project or activity should be financed, or how grants or subsidies should be distributed.

<u>Article 13(3)</u>

The obligation referred to in Article 4 (1) shall apply to the plans and programmes of which the first formal preparatory act is subsequent to the date referred to in paragraph 1 . Plans and programmes of which the first formal preparatory act is before that date and which are adopted or submitted to the legislative procedure more than 24 months thereafter, shall be made subject to the obligation referred to in Article 4(1) unless Member States decide on a case by case basis that this is not feasible and inform the public of their decision.

3.64. The obligation referred to in article 4(1) includes all the stages of an 'environmental assessment' as defined in Article 2 (i.e. environmental report, consultation, etc). It therefore implies the process of preparing a plan or a programme in the light of the emerging understanding of its environmental effects.

3.65. The word ‘formal’ does not necessarily mean that the act should be required by national law, nor whether it produces legal effects in national law. A judgement should be made in each case, taking into account factors such as the nature of the act in question, the nature of the steps preceding it, and the apparent aim of the transitional provision, namely to pursue legal certainty and good administration.

3.66. The second sentence of Article 13(3) is intended to ensure that an environmental assessment complying with the Directive will normally be carried out for plans and programmes of which the first formal preparatory act was before 21st July 2004 but which will not be adopted until after 21st July 2006. This implies that only minor or non- significant work would have been done on the plan by July 2004 in order to carry out a meaningful assessment. It would not be feasible to carry out an environmental assessment of a plan whose first preparatory act was before July 2004 and which was at a very advanced stage at that date. The focus of this provision is not so much on how long before July 2004 was the starting date of the plan or programme, but on whether the planning process of relevant plans or programmes is at a stage at which a meaningful environmental assessment can be carried out.

4. GENERAL OBLIGATIONS

4.1. Article 4 deals with three issues, the timing of the environmental assessment, the procedural arrangements for compliance, and the avoidance of duplication when plans and programmes form part of a hierarchy.

Article 4(1)

The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.

4.2. As a matter of good practice, the environmental assessment of plans and programmes should influence the way the plans and programmes themselves are drawn up. While a plan or programme is relatively fluid, it may be easier to discard elements which are likely to have undesirable environmental effects than it would be when the plan or programme has been completed. At that stage, an environmental assessment may be informative but is likely to be less influential. Article 4(1) places a clear obligation on authorities to carry out the assessment during the preparation of the plan or programme.

Article 4(2) and (3)

(2) The requirements of this Directive shall either be integrated into existing procedures in Member States for the adoption of plans and programmes or incorporated in procedures established to comply with this Directive.

(3) Where plans and programmes form part of a hierarchy, Member States shall, with a view to 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 Article 5(2) and (3).*

4.3. In Article 4(2), the Directive provides for the environmental assessment procedure either to be integrated into existing procedures for the adoption of plans or programmes or, to be incorporated in a separate procedure.

4.4. Where the assessment procedure is integrated into the existing preparation process for the plan or programme itself, the SEA procedure can affect the procedure for preparing the draft plan or programme. In this case, the preparation process for the draft plan or programme needs to be adjusted to agree with the demands of the Directive. The type of change which could be needed will depend on existing procedures but could involve, for example, adjustments to, or inclusion of, the public that has to be identified under Article 6(4) and the authorities that have to be designated under Article 6(3) in order to integrate properly the different steps of the assessment process into the preparation of the plan or programme.

4.5. 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 Article 5(2) and (3) is intended to ensure that duplication of assessment is avoided in this kind of situation.

4.6. If certain aspects of a plan or programme have been assessed at one stage of the planning process and the assessment of a plan or programme at a later stage of the process uses the findings of the earlier assessment, those findings must be up to date and accurate for them to be used in the new assessment. They will also have to be placed in the context of that assessment. If these conditions cannot be met, the later plan or programme may require a fresh or updated assessment, even though it is dealing with matter which was also the subject of the earlier plan or programme.

4.7. It is clear that the decision to reuse material from one assessment in carrying out another will depend on the structure of the planning process, the contents of the plan or programme, and the appropriateness of the information in the environmental report, and that decisions will have to be taken case by case. They will have to ensure that comprehensive assessments of each element of the planning process are not impaired, and that a previous assessment used at a subsequent stage is placed in the context of the current assessment and taken into account in the same way. 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.

5. THE ENVIRONMENTAL REPORT

5.1. The environmental report is the central part of the environmental assessment required by the Directive. It also forms the main basis for monitoring the significant effects of the implementation of the plan or programme.

5.2. The environmental report is an important tool for integrating environmental considerations into the preparation and adoption of plans and programmes since it ensures that their likely significant effects on the environment are identified, described and assessed and taken into account in that process. The preparation of the environmental report and the integration of the environmental considerations into the preparation of plans and programmes form an iterative process that should contribute to more sustainable solutions in decision-making.

5.3. The provisions on the environmental report are mainly expressed in Article 2 (Definitions), Article 5 (Environmental Report) and Annex I. In addition, the environmental report must be subject to consultation as provided for in Articles 6 and 7; it must be taken into account during the preparation of the plan or programme (Article 8) and, when the plan or programme is adopted, information must be made available on how this was done (Article 9); and it must be of sufficient quality to meet the requirements of the Directive (Article 12).

Article 2(c)

For the purposes of this Directive:
..
(c) 'environmental report' shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I.

5.4. Article 2(c) defines the environmental report as a part of the plan or programme documentation with a specified content. This implies that the environmental report should be a coherent text or texts. Although this is not required by the Directive, it maybe helpful to structure the report, so far as possible, on the headings used in Annex I. The Directive does not specify whether the report should be integrated in the plan or programme itself or a separate document. If it is integrated it should be clearly distinguishable as a separate part of the plan or programme, and be easy to find and assimilate for the public and authorities. In any case, there must always be a non-technical summary of the information provided under the headings listed in Annex I.

5.5. The environmental report might in many cases be a part of a wider assessment of the plan or programme. It could, for example, be part of a document on sustainability assessment covering also social and economic effects, or a sustainability assessment could be integrated in the plan or programme. Either model would be an acceptable way of complying with the Directive provided it fully met the requirements of the Directive.

Article 5(1)

Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

5.6. Article 5(1) gives the basic requirements for the environmental report. The tasks of the report are to identify, describe and evaluate the likely significant effects on the environment of the plan or programme and its reasonable alternatives. Annex I gives further provisions on which information must be provided concerning these effects. The studying of alternatives is an important element of the assessment and the Directive calls for a more comprehensive assessment of them than does the EIA Directive. Alternatives are discussed in paragraphs 5.11 - 5.14 below.

5.7. According to Article 4(1) the environmental assessment shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure. The process of preparing the report should start as early as possible and, ideally, at the same time as the preparation of the plan or programme. The preparation of the report should normally have ended when the report is made available to authorities and the public in accordance with Article 6(1).

5.8. Article 5(1) does not explicitly state who is responsible for preparing the environmental report but it would in many cases be the authority or natural or legal person responsible for preparing the plan or programme.

5.9. What is meant by the implementation of a plan or programme cannot be defined unambiguously. It depends to a large extent on the character of the plan or programme. For plans or programmes that fall within the scope of the Directive because of the condition in Article 3(2)(a) (setting the framework for projects in various sectors) and Article 3(4) (other plans and programmes setting the framework for projects), implementation could mean among other things the implementation of projects that correspond to such a framework. However, since there might be several ways of fulfilling the requirements of such a framework, implementation of the plan or programme cannot generally be reduced to the implementation of specific single projects. In any case, a plan or programme may include elements that are not project-related but are important to its success. The effects of those aspects of the implementation should also form part of the assessment. For the plans and programmes that fall within the scope because of the condition in Article 3(2)(b) (require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC), the implementation may be conceived in the light of Article 6(3) of the Habitats Directive which calls for an assessment of the implications for a site in view of the site's conservation objectives see also paragraph 3.33 above).

5.10. Implementation of a plan or programme could cover a wide array of issues and provisions and it should be noted that an assessment has to focus on the part of implementation that is likely to have significant environmental effects. All parts of the implementation should be studied, however, as taken together they might have significant effects. Whether implementation of different parts of the plan or programme actually will take place is not a matter for the assessment to consider.

Alternatives

5.11. The obligation to identify, describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

5.12. In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives.[15] The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they not are considered to be the best option. The information referred to in Annex I should thus be provided for the alternatives chosen. This includes for example the information for Annex I (b) on the likely evolution of the current state of the environment without the implementation of the alternative. That evolution could be another one than that related to the plan or programme in cases when it concerns different areas or aspects.

5.13. The text of the Directive does not say what is meant by a reasonable alternative to a plan or programme. The first consideration in deciding on possible reasonable alternatives should be to take into account the objectives and the geographical scope of the plan or programme. The text does not specify whether alternative plans or programmes are meant, or different alternatives within a plan or programme. In practice, different alternatives within a plan will usually be assessed (e.g. different means of waste disposal within a waste management plan, or different ways of developing an area within a land use plan). An alternative can thus be a different way of fulfilling the objectives of the plan or programme. For land use plans, or town and country planning plans, obvious alternatives are different uses of areas designated for specific activities or purposes, and alternative areas for such activities. For plans or programmes covering long time frames, especially

[15] Compare Article 5(3) and Annex IV of the EIA Directive which require the developer to provide an outline of the main alternatives studied and an indication of the main reasons for his choice taking into account the environmental effects.

those covering the very distant future, alternative scenario development is a way of exploring alternatives and their effects. As an example, the Regional Development Plans for the county of Stockholm have for a long time been elaborated on such a scenario model.

5.14. The alternatives chosen should be realistic. Part of the reason for studying alternatives, is to find ways of reducing or avoiding the significant adverse environmental effects of the proposed plan or programme. Ideally, though the Directive does not require that, the final draft plan or programme would be the one which best contributes to the objectives set out in Article 1. A deliberate selection of alternatives for assessment, which had much more adverse effects, in order to promote the draft plan or programme would not be appropriate for the fulfilment of the purpose of this paragraph. To be genuine, alternatives must also fall within the legal and geographical competence of the authority concerned. An outline of the reasons for selecting the alternatives dealt with is required by Annex I (h).

Articles 5(2) and 5(3)

2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I.

5.15. The starting point for the interpretation of these paragraphs is the requirement to provide information on the likely significant effects on the environment of the plan or programme. This information must be provided insofar as it may reasonably be required taking into account the factors mentioned in paragraph 2.

5.16. The reference to 'contents and level of detail in the plan or programme' is a recognition that, in the environmental report for a broad-brush plan or programme, very detailed information and analysis may not be necessary, (for example, a plan or programme at the top of a hierarchy which descends from the general to the particular); whereas much more detail would be expected for a plan or programme that itself contained a higher level of detail. So the environmental report for a national plan might not need to assess the effects of the plan on, say, every river in the country; but the environmental report underpinning a town plan would certainly be expected to address its implications for rivers or other waterbodies in or near the town.

5.17. Article 5(3) emphasizes the desirability of rationalising the collection and production of information; it provides that relevant information (which might

include analysis as well as data) already available from other sources may be used in compiling the environmental report. The value of this is obvious when plans and programmes form part of a hierarchy and for those cases Article 4(3) refers to the application of Article 5(2) and 5(3), especially for the purpose of avoiding duplication of the assessment. This issue is covered in paragraphs 4.5 – 4.7 above. Information obtained in other decision-making system, such as plans or programmes in other sectors, or from implementing other Community legislation such as the Water Framework Directive (2000/60/EC) can likewise be used.

Article 5(4)

The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report

5.18. The relevant environmental authorities, designated under Article 6(3), must be consulted when a decision is taken on the scope and level of detail of the information to be included in the environmental report. Those authorities might also be engaged in the preparation of the report throughout the process of preparing and adopting the plan or programme. Further information is to be found in section 7 below on consultation.

Annex I

5.19 Annex I specifies the information that is to be provided in the environmental report. The ten paragraphs of the Annex set out a broad spectrum of issues to be dealt with, each paragraph in itself being of a substantial nature. All paragraphs are to be examined in the light of the requirements in Article 5. Member States may introduce provisions on the content of the environmental report that go further than the requirements of the Directive. A plan or programme can be very extensive and treat a great number of different issues so it should be emphasized that the Directive calls for information that concentrates on issues related to the significant effects on the environment of the plan or programme (see Article 5). An excessive account of information on insignificant effects or irrelevant issues makes the report difficult to digest and might lead to important information being overlooked.

(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes.

5.20. Information on the relationship with other relevant plans or programmes sets the plan or programme in a broader context: it might, for instance, concern its place in the stage of decision-making or its contribution amongst other plans or programmes to changes in the environmental conditions of a certain area. Relevant plans or programmes can thus be those at other levels in a hierarchy which the actual plan or programme forms part of or they can be those drawn up for other sectors affecting the same or adjacent areas.

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC.

5.21. The requirements in (b), (c), and (d) may overlap but are coherent and they aim at different aspects of the environmental conditions in areas covered by the plan or programme and on which it is likely to have significant environmental effects. In (b) the concern is the state of the environment in all the area that is covered by or significantly affected by the plan or programme, currently as well as without its implementation. In (c) information is to be provided on the areas that are likely to be significantly affected by the plan or programme, information that can be seen as a specification of the information given under (b). The concern in (d) is focused on environmental problems while the aspects or characteristics in (b) and (c) could be problems as well as environmental values and assets or a favourable state of the environment. Since the requirements in (c) and (d) overlap, it might in many cases be appropriate to address them together, provided that all the necessary information is provided.

5.22. The information required in (b) on the relevant aspects of the current state of the environment is necessary for the understanding of how the plan or programme could significantly affect the environment in the area in question. The term 'the relevant aspects' refers to environmental aspects that are relevant to the likely significant environmental effects of the plan or programme. These aspects could be of a positive as well as of a negative nature. The information must concern the current state of the environment which means that it should be as up to date as possible. The description of the likely evolution of the relevant aspects without the implementation of the plan or programme is important as a frame of reference for the assessment of the plan or programme. This requirement can be seen as corresponding to the so-called zero-alternative often applied in environmental impact assessment procedures. The description of the evolution should cover roughly the same time horizon as that envisaged for the implementation of the plan or programme. Effects of other adopted plans or programmes, or decisions made that would affect the area in question, should also be considered in this respect so far as practicable.

5.23. In (c) the focus is on the areas that are of special interest for the assessment, namely the areas likely to be significantly affected by the plan or programme. A description of the environmental characteristics of these areas is to be given in the report. It would be appropriate to describe environmental characteristics by reference to the environmental issues listed in paragraph (f). Examples of characteristics could be that an area is specially sensitive or vulnerable to acidification, that it has high botanical value or that it is densely populated and

many people will be affected by traffic noise. It should be noted that such areas could be found outside the area covered by the plan or programme. If this area is near to another Member State or if the effects are of a long-range nature, areas in other Member States and beyond could of course be significantly affected. In such cases transboundary consultation will be needed (see paragraphs 7.24 - 7.29).

5.24. Paragraph (d) asks for information on any existing environmental problems relevant to the plan or programme. The purpose of this information is to provide for an assessment of how these problems will affect the plan or programme or whether it is likely to aggravate, reduce or in any other way affect existing environmental problems. The relevance may also lie in the likely significant effects of the plan or programme, and also in non-significant effects that in combination with existing environmental problems could create significant effects. Even issues treated in the plan or programme which do not have any environmental effects may be relevant. The problems do not need to be of a significant nature and they do not need to be specially related to specific areas such as those exemplified in the text. Areas of particular environmental importance could be those with especially high environmental values, such as the areas designated under the Birds and Habitats Directives, but areas designated under national legislation could also be included.

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation.

5.25. The environmental protection objectives to be dealt with should cover at least the issued listed in paragraph (f). International and Community objectives are often incorporated in objectives on national, regional and local levels and these could often be sufficient for this purpose. It should be noted that the paragraph concerns objectives that are relevant to the plan or programme, which would imply relevant to its likely significant effects or to issues it raises. Consultation with authorities according to Article 5(4) can help to provide this information. The German EIA Association has developed a prototype of a database on environmental quality objectives on international or community level. This can be found at: http://www.umweltdatenkatalog.de:8888/envdb/maintopic.jsp

(f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors.

These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.

5.26. The list of issues in (f) is not exhaustive and other issues may be relevant. Compared to the list of the amended EIA Directive, human health, biodiversity

and cultural heritage are here mentioned explicitly. The notion of human health should be considered in the context of the other issues mentioned in paragraph (f) and thus environmentally related health issues such as exposure to traffic noise or air pollutants are obvious aspects to study. Guidelines for incorporating biodiversity related issues in strategic environmental assessments have been adopted under the Convention on Biological Diversity. A description of the relationship between the factors mentioned in paragraph (f) is essential since it could show other and more severe significant effects than those resulting from a more isolated study of each single factor. Thus significant effects on air and climatic factors may cause significant adverse effects on flora, fauna and biodiversity. The purpose of the footnote is to emphasize the need for broad and comprehensive information on the factors and their interrelationship (although it should be read in the light of Article 5(2)). A description of positive effects is essential in order to show the contribution of the plan and programme to environmental protection and sustainable development.

(*g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme.*

5.27. The purpose of paragraph (g) is to ensure that the environmental report discusses how the significant adverse effects it describes are to be mitigated. The measures envisaged in paragraph (g) are not specified further and they could be measures envisaged or prescribed in the plan or programme or measures discussed in the environmental report. It should be remembered that mitigation measures may themselves have adverse environmental effects which should be recognised. There exist methods of mitigation in connection with environmental impact assessments that could also be helpful for assessments of plans and programmes.

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information.

5.28. Information on the selection of alternatives is essential to understand why certain alternatives were assessed and their relation to the draft plan or programme. A description of the methods used in the assessment is helpful when judging the quality of information, the findings and the degree to which they can be relied upon. An account of the difficulties met will also clarify this aspect. When appropriate, it would be helpful to include how those difficulties were overcome.

(i) a description of the measures envisaged concerning monitoring in accordance with Article 10.

5.29. According to Article 10 the significant environmental effects of the implementation of the plan or programme shall be monitored and, since these effects are specified in paragraph (f), the report should contain a description of

how that monitoring is to be undertaken. The description should refer to existing monitoring arrangements if these are to be used. There is some overlap between paragraph (i) and the requirement in Article 9(1)(c) to make available at the time of adoption information on the 'measures decided concerning monitoring'. It is obvious that no definitive statement about the final monitoring measures can be made when the environmental report is still being prepared, since the content of the plan or programme is not decided, and in any event the content of the environmental report is subject to the criteria laid down in Article 5(2). Likewise, in some circumstances the monitoring arrangements may need to be adapted as implementation of the plan or programme proceeds. There appears to be nothing in the Directive to preclude this in appropriate cases.

(j) a non-technical summary of the information provided under the above headings.

5.30. The purpose of a non-technical summary, as required under paragraph (j), is to make the key issues and findings of the environmental report accessible and easily understood by the general public as well as by the decision-makers. The summary may be part of the report but it might also be helpful to make it available as a separate document to ensure a wider dissemination. An overall summary table may be helpful in simplifying the findings.

6. QUALITY OF THE ENVIRONMENTAL REPORT

6.1. Practical experience with the EIA Directive (which contains no specific requirements as to quality) has shown that the provision of information in the environmental assessment is sometimes defective. During the preparation of the SEA Directive, there were concerns that, here too, environmental reports might be incomplete or be drawn up without proper application of the procedure.

6.2. The aim is to ensure that the environmental report will contain information that is complete and reliable (subject to the provisos in Article 5) and will be adequate for the purposes of the Directive. The specific provision on this issue provides extra emphasis on the importance of the environmental report and the proper application of Article 5 of the Directive.

Article 12(2)

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.

6.3. The Directive does not elaborate what is **sufficient quality**. But since the SEA process and environmental report are both defined by the Directive, a correct transposition and proper application of its provisions, both in content and procedure would appear to meet the requirement for sufficient quality. The Directive does not specify additional measures to ensure that this quality is sufficient.

6.4. 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 Article 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 Article 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.

6.5. The procedural and substantive requirements of the Directive, if properly implemented and applied, may be envisaged as a 'minimum standard' for ensuring the quality of environmental reports. Member States may decide for themselves whether to establish additional measures and, if so, what these

should be. There is a wide variety of possible models.[16] Many measures that are used in EIA practice may be adequate and appropriate for the purposes of the SEA Directive. Examples are independent assessments (such as a review panel, or a government commission which advises about the quality of the information in the environmental report); guidelines which prescribe procedural or substantive requirements for the planning authority to follow; an independent institution (to be used when determining the level of detail and scope of the environmental report); or simply reliance on appeals by complainants to a court of law.

6.6. As well as ensuring that every procedural step of the SEA process leading up to the environmental report is of sufficient quality, other methods may be envisaged to try to maintain the quality of the entire process. This may be done by, for example, checklists that demonstrate transparently whether every step in the procedure has been dealt with and dealt with properly; or by more advanced, computerised models enabling comparison to be made between the quality of individual elements in the environmental report and the quality of the report as a whole.

6.7. **Any measures** Member States take **concerning the quality** of the environmental reports will have to be **communicated** to the Commission. Among other things, this provision is intended to collect experiences within the Member States so that, for instance, innovative approaches can be disseminated amongst them. Even if these measures go beyond the obligations of the Directive, it will help to improve practice across the whole Community if they are disseminated as widely as possible.

[16] For an overview, see also Royal Haskoning.

7. CONSULTATION

7.1. The consultation provisions of the Directive oblige Member States to grant an opportunity to certain authorities and members of the public to express their opinion on the environmental report and the draft plan or programme. One of the reasons for consultation is to contribute to the quality of the information available to those responsible for the decisions that are made concerning the plan or programme. Consultation might sometimes reveal important new information which leads to substantial changes to the plan or programme and consequently its likely significant environmental effects. If so, it might be necessary to consider a revision of the report and, if the changes justified it, fresh consultation. The principal requirements on consultation in the Directive are in Article 6, but many other articles also deal with this issue. This section deals with these in the following order. It discusses first the relevant definitions; then the question of who takes part in consultations; what must be subject to consultation; some related procedural provisions; transboundary issues; and finally the decision on the plan or programme.

7.2. An overview of the Directive's information and consultation requirements is given in Box 1.

Box 1: Stage of SEA	**Consultation requirements in Domestic situations**	**Additional requirements in Transboundary situations**
Determination if a plan or programme requires an SEA	Consultation of authorities (Art. 3(6)) Information made available to the public (Art. 3(7))	
Decision on scope and level of detail of the assessment	Consultation of authorities (Art. 5(4))	
Environmental report and draft plan or programme	Information made available to the public (Art. 6(1)) Consultation of authorities (Art. 6(2)) Consultation of the public concerned (Art. 6(2))	Consultation of authorities in the Member State likely to be affected (Art. 7(2)) Consultation of the public concerned in the Member State likely to be affected (Art. 7(2))
During preparation of plan or programme	Take account of environmental Report and opinions expressed under Art. 6 (Art. 8)	Take account of results of transboundary consultation (Art. 8)
Adopted plan or programme; statement according to Art. 9(1)(b), measures concerning monitoring	Information made available to authorities (Art. 9(1)) Information made available to the public (Art. 9(1))	Information made available to the consulted Member State (Art. 9(1))

7.3. Public participation in decision-making is also dealt with by the UN ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention). Article 7 of the Convention contains provisions on public participation during the preparation of plans and programmes relating to the environment. Its provisions are incorporated in the SEA Directive insofar as they apply to plans and programmes falling under the scope of the Directive.[17]

Article 2(b)

'Environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9.

7.4. This definition clearly states that **consultation** is an inseparable part of the assessment. Further, the results of the consultation have to be **taken into account** when the decision is being made. If either element is missing, there is, by definition, no environmental assessment in conformity with the Directive. This underlines the importance that is attached to consultation in the assessment.

Article 2(d)

'The public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

7.5. The definition of **the public** follows that of the Aarhus Convention. It refers to any natural or legal person. The question of whether a particular member of the public is affected or has an interest is dealt with under Article 6.

7.6. In many cases, an **association, organisation or group** of natural or legal persons will itself have legal personality, and will be directly covered by the definition. The language should be interpreted, therefore, to provide that associations, organisations or groups *without* legal personality (including non-governmental organisations) may, if national legal frameworks so provide, also constitute 'the public' under the Directive. In Article 6(2) in conjunction with Article 6(4) the Directive provides for a clear role for associations, organisations or groups.

[17] Directive 2003/35/EC applies the Aarhus Convention to certain plans and programmes not subject to the SEA Directive.

Article 6(1)

The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

7.7. This Article is the starting point for consultation and any subsequent public debate about the proposed plan or programme. The draft plan or programme and the environmental report have to be made available to the public (which is defined in Article 2(d)). It is, however, only the public identified under paragraph 4 that is given the right to express its opinion on these documents. Whether or not the public is the same in any given case will depend on the plan or programme in question and on national law and practice.

7.8. The Directive does not specify the methods by which information shall be **made available** but these must be adequate to enable the authorities and public to express their opinion in accordance with Article 6(2). Appropriate publicity arrangements will be needed, and the information will need to be readily accessible. Also, interpretation in the light of Article 7 in conjunction with Article 6(3) of the Aarhus Convention would suggest effective dissemination either by public notice or individually as appropriate. This is true too for the information to be made available under Articles 3(7) and 9(1). In addition it might be appropriate for members of the public who have objected to a proposal to be informed individually about the decision (as is already normal practice in some Member States).

Article 6(2)

The authorities referred to in paragraph 3 [of Article 6] and the public referred to in paragraph 4 [of Article 6] shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

7.9. The **time frame** needs to be laid down in legislation. Member States are free to determine its duration so long as it meets the requirement to give an 'early and effective' opportunity for responses. Experiences with the EIA Directive and other consultation procedures will give Member States information about the time frames needed.

7.10. Different time frames may be appropriate for different types of plan or programme but care should be taken to allow sufficient time for opinions to be properly developed and formulated on lengthy, complex, contentious or far-reaching plans or programmes. Adequate time will also be needed for the planning authority to take these views into account before deciding on the plan or programme. Sometimes requests for additional information may be made and the time frame for consultation may also need to take into account the time for the responsible authority to respond.

Article 6(3)

Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.

7.11. In this article, **authorities** covers formal governmental or public authorities, defined by administrative or legal requirements (see also the commentary at paragraphs 3-12 - 3.13 above). They might include environmental inspectorates (at the national, regional or local level), environmental research institutions performing a public task or units in government (at the national, regional or local level) that are likely to be concerned by, or have expertise in, the environmental effects of implementing the plan or programme in question.

7.12. The phrase **specific environmental responsibilities** refers to their responsibilities as authorities (for example, to monitor the quality of the environment, inspect sites or activities, carry out research, etc).[18]

7.13. The **designation** of the authorities in accordance with Article 6(3) can be done in a general way by including them in the legislation implementing the Directive. For example, a national environmental inspectorate could be designated as an authority to be consulted in all cases, or in specified classes of case. It would, of course, be possible to provide for exemptions from such a general designation.

7.14. Authorities can also be designated case by case, provided the implementing legislation is drafted so as to permit this type of designation. The precise way in which this is done will depend on the national legal system. One method might be to designate in the implementing legislation several authorities for the purposes of this Article. They might include environmental inspectorates or regional governmental units that have a strong interest in the contents of particular plans or programmes. In a case by case approach, the planning authority subsequently may designate which of these authorities are to be consulted on individual cases, depending on the contents of each plan or programme.

7.15. Member States may also decide to designate authorities which have environmental responsibilities in a more general way, for instance, 'neighbouring local authorities'. This type of designation would mean that the particular local authorities to be consulted were those which have an interest in any given plan or programme, without its being necessary to consult every local authority in a country on plans or programmes in which most of them had no interest. This example seems a more intermediate approach between general and case-specific designation.

[18] The word 'authorities' is not used here to mean recognized (individual) experts, such as eminent scientists – though such individuals may be employed by public authorities.

Article 6(4)

Member States shall identify the public …, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.

7.16. **The public affected or likely to be affected by, or having an interest in**, **the decision-making subject to this Directive** can be described as a subset of the public in general. (For the definition of 'the public' see paragraphs 7.5-7.6 above.) This provision requires Member States to identify that subset, which is given the opportunity to express its opinion on the draft plan or programme and the environmental report (in accordance with Article 6(2)). But the duty to identify is not unfettered. The identification must include the public **that is affected or likely to be affected by,** or that has **an interest in** the plan or programme. It must also include relevant non-governmental organisations and other organisations concerned (see below). The public identified may differ from one plan or programme to another. In some situations, for instance in the case of a country-wide plan or programme, the public with an interest or likely to be affected may be very similar to the public in general and the identification would have to take account of that.

7.17. **Relevant non-governmental organisations** are by definition considered part of the public that is likely to be affected by, or has an interest in the decision-making for a specific plan or programme subject to assessment. NGOs may differ in their field of interest. Some are, for example, more active on the national level, and some are more active on the regional or local level or on specific issues, such as nature or waste. In identifying relevant NGOs in accordance with Article 6(4), Member States may tailor the identification to the nature and contents of the plan or programme concerned and the interests of the NGOs. NGOs with purely local concerns would need to be identified even in the case of plans or programmes relating to distant localities, provided it was clear that their interests were affected by those plans or programmes.

Article 6(5)

The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States.

7.18. The organisation of **the detailed arrangements** for informing the public and receiving reactions is left to the discretion of the Member States. The legislation implementing the Directive should provide for the framework for these arrangements.

7.19. In contrast to the EIA Directive, Directive 2001/42/EC does not specify any details about the method for consultation (e.g. the places for consultation or the method of dissemination). By analogy with the EIA Directive, the arrangements may, for example, specify the places where information can be consulted, the way in which the public may be informed, or the way in which comments can be given. Member States also have the opportunity of exploring

more modern arrangements for consultation such as internet-based discussions, provided that these do not by their nature exclude sections of the public.

7.20. There are many different methods and techniques for public consultation. These range through seeking written comments on draft proposals, public hearings, steering groups, focus groups, advisory committees or interviews.[19] It will be important to select the most appropriate form of consultation for any given plan or programme.

Article 3(6)

In the case-by-case examination and in specifying types of plans and programmes [regarding the determination of plans and programmes that are covered by the Directive], the authorities referred to in Article 6(3) shall be consulted.

7.21. Before determining under Article 3 whether an SEA is required, the relevant authorities have to be consulted. When a **case-by-case** approach is used, this consultation has to take place on each separate occasion.

Article 3(7)

Member States shall ensure that their conclusions pursuant to paragraph 5 [regarding the determination of plans and programmes that are covered by the Directive], including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public.

7.22. The determination under Article 3(5) of whether an environmental assessment is required has to be made public and, if an assessment is not to be required, there is a specific obligation for the reasons to be made publicly available. In publicising these conclusions, Authorities may find it helpful to state how the criteria in Annex II have been taken into account.

Article 5(4)

The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report.

7.23. This provision sets out requirements for what is known as the 'scoping phase' in an environmental assessment procedure. The EIA Directive does not include a requirement to have authorities involved on a mandatory basis at this stage in the EIA procedure. It is introduced into Directive 2001/42/EC as a means of improving the quality of the environmental report. One of the objectives of scoping is to leave less room for doubt later in the assessment process about whether the correct topics are addressed in the report and are covered in the right level of detail.

[19] For an overview of types of consultation, techniques and case studies, see also Environmental Resource Management.

Article 7(1)

Where a Member State considers that the implementation of a plan or programme being prepared in relation to its territory is likely to have significant effects on the environment in another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the plan or programme is being prepared shall, before its adoption or submission to the legislative procedure, forward a copy of the draft plan or programme and the relevant environmental report to the other Member State.

7.24. Article 7 provides for consultation on plans or programmes that are likely to have significant effects in other Member States. On this issue the Directive follows the general approach taken by the UN ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

7.25. Member States will need to ensure they have provisions in place which allow them to identify whether plans or programmes are indeed likely to have transboundary effects.

Article 7(2)

Where a Member State is sent a copy of a draft plan or programme and an environmental report under paragraph 1, it shall indicate to the other Member State whether it wishes to enter into consultations before the adoption of the plan or programme or its submission to the legislative procedure and, if it so indicates, the Member States concerned shall enter into consultations concerning the likely transboundary environmental effects of implementing the plan or programme and the measures envisaged to reduce or eliminate such effects.

Where such consultations take place, the Member States concerned shall agree on detailed arrangements to ensure that the authorities referred to in Article 6(3) and the public referred to in Article 6(4) in the Member State likely to be significantly affected are informed and given an opportunity to forward their opinion within a reasonable time-frame.

7.26. Once the transboundary mechanism is triggered, the Member States involved have to agree on more detailed arrangements to ensure the necessary consultation of the public and environmental authorities in the Member State affected. Bilateral agreements that have been established in the framework of the Espoo Convention may, suitably modified to cover plans and programmes, provide a pattern for these arrangements. Multilateral arrangements may be established where appropriate.

Article 7(3)

Where Member States are required under this Article to enter into consultations, they shall agree, at the beginning of such consultations, on a reasonable timeframe for the duration of the consultations.

7.27. The Directive requires that **reasonable** time frames are to be provided for consultation in transboundary situations. Compared with non-transboundary situations, these will need to be sufficient for contact to be established between the States concerned, the identification and consultation of the public and environmental authorities in the affected State, and consideration of the resulting comments by the appropriate authorities in the State of origin. Practical matters such as the need to prepare translations may also lengthen the process.

7.28. The Directive allows for *ad hoc* arrangements to be established for transboundary issues. These could differ in each case. This can be helpful when the affected Member State wishes to designate different authorities or different parts of the public for different plans or programmes to enter into the consultation.

7.29. Alternatively it would be possible to agree upon a general framework for bilateral consultation, leaving the detailed arrangements to case-specific situations. When different regions in an affected Member State are involved, this may be a practical solution.

Article 8

The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

7.30 The obligations in Article 8 of the Directive reflect the iterative nature of the process of environmental assessment as applied to plans and programmes. They also reflect the obligation in Article 7 of the Aarhus Convention which, in conjunction with Article 6(8) of that Convention, requires that in decisions on plans and programmes due account is taken of the outcome of the public participation. The requirement to make information on this available is set out in Article 9 of the Directive (see below).

Article 9(1)

Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed:
(a) the plan or programme as adopted;
(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6

and the results of [transboundary] consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and
(c) the measures decided concerning monitoring in accordance with Article 10.

Article 9(2)

The detailed arrangements concerning the information referred to in paragraph 1 shall be determined by the Member States.

7.31. Article 9 deals with the provision of information about the final results of the assessment procedure. The Member States have discretion in the way they make information **available** to the public. Authorities must provide sufficient information about the conditions under which the environmental information is available and how it can be obtained. The facilities for doing this include, for example, information publications, announcements in government publications or on government web-sites, television or radio public service announcements, or as part of environmental information catalogues that describe how relevant information can be obtained. The notification to the public is similar to that in the EIA Directive. Member States can make use of this experience or set up different arrangements with the same objective.

7.32. Contrary to the EIA Directive, Directive 2001/42/EC does not include provisions for confidentiality with regard to the plan or programme or environmental report.

8. MONITORING

8.1. Article 10 extends Member States' duties beyond the planning phase to the implementation phase and lays down the obligation to monitor the significant environmental effects of the implementation of plans and programmes. Monitoring is an important element of the Directive since it enables the results of the environmental assessment to be compared with the environmental effects which in fact occur.

8.2. The Directive does not prescribe how the significant environmental effects are to be monitored, for example, the bodies responsible for monitoring, the time and frequency of monitoring, or the methods to be used. Although monitoring activities are widespread across the EU, the information gathered is not always readily available or in comparable formats, even within the same administration. Member States may wish to consider whether any legal or administrative measures are needed not merely to ensure in accordance with the Directive that monitoring takes place but also to go further and enable data to be accessed and shared when appropriate, so that the obligations of Article 10 can be discharged efficiently.

Article 10(1)

Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

8.3. Article 10 establishes that monitoring of the significant environmental effects of plans and programmes covered by the Directive is an obligation. When a plan or programme is adopted, the authorities referred to under Article 6(3), the public and any Member State consulted under Article 7 must be informed about 'the measures decided concerning monitoring in accordance with Article 10' (Article 9(1)(c)).

8.4. The Directive does not define the meaning of **'monitor'**. Monitoring can, however, be generally described as an activity of following the development of the parameters of concern in magnitude, time and space. In the context of Article 10 and its references to unforeseen adverse effects and remedial action, monitoring may also be a means of verifying the information in the environmental report. Article 10 does not contain any technical requirements about the methods to be used for monitoring. The methods chosen should be those which are available and best fitted in each case to seeing whether the assumptions made in the environmental assessment correspond with the environmental effects which occur when the plan or programme is implemented, and to identifying at an early stage unforeseen adverse effects resulting from the implementation of the plan or programme. It is clear that monitoring is embedded in the context of the environmental assessment and does not require scientific research activities. Also the character (e.g. quantitative or qualitative) and detail of the environmental information

necessary for monitoring depend on the character and detail of the plan or programme and its predicted environmental effects.

8.5. If monitoring can be satisfactorily integrated in the regular planning cycle, it may not be necessary to establish a separate procedural step for carrying it out. Monitoring may coincide for example with the regular revision of a plan or programme, depending on which effects are being monitored and upon the length of intervals between revisions.

8.6. Monitoring has to cover the **significant environmental effects**. These cover in principle all kinds of effects, including positive, adverse, foreseen and unforeseen[20] ones. They may usually be the effects described in the environmental report (in accordance with Article 5 and Annex I(f)) and so will often be focused on the information that 'may reasonably be required taking into account the contents and level of detail in the plan or programme and its stage in the decision-making process' (Article 5(2)). It is possible that monitoring of other effects may sometimes be justified (for example, effects which were not foreseen when the plan or programme was drawn up).

8.7. The other elements of Annex I will not usually be relevant in implementing the monitoring requirement but it may in some circumstances be convenient to link the results of monitoring with, for example, environmental problems, environmental protection objectives, or mitigation measures identified under paragraphs (d), (e), or (g) of Annex I. The Directive does not, however, contain a requirement to that effect.

8.8. Article 10 appears not necessarily to require that significant environmental effects are monitored directly. The Directive also allows them to be monitored indirectly through, for example, pressure factors or mitigation measures.

8.9. **Implementation** means not only the realisation of the projects envisaged in the plan or programme (including both their construction and operation)but also covers other activities (such as behavioural measures or management schemes) which form part of the plan or programme (or its implementation).

8.10. Article 10 requires the significant environmental effects of the implementation of all plans and programmes subject to the Directive to be monitored. It does not specify whether this has to be done for each plan or programme individually. In view of the flexibility of Article 10, one monitoring arrangement may cover several plans or programmes as long as sufficient information about the environmental effects of the individual plans or programmes is provided and the purposes and obligations of the Directive are fulfilled.

8.11. In some cases, the cumulative effects of different plans and programmes may be easier to identify when they are monitored together.

8.12. One of the purposes of monitoring identified in Article 10 is to identify

[20] See explanation of 'unforeseen' effects in paragraph 8.12.

unforeseen adverse effects. It is unlikely that a reasonably practicable monitoring scheme could be devised which, except by chance, would reveal completely unexpected effects (if any materialised) and that can hardly be the intention here. Even though unforeseen changes in the environment might be detected it may be difficult to attribute them to the implementation of the plan or programme. Unforeseen adverse effects is better interpreted as referring to shortcomings of the prognostic statements in the environmental report (e.g. regarding the predicted intensity of an environmental effect) or unforeseen effects resulting from changes of circumstances, which have led to certain assumptions in the environmental assessment being partly or wholly invalidated.

8.13. One purpose of monitoring is to enable the planning authority to undertake appropriate remedial action if monitoring reveals adverse effects on the environment that have not been considered in the environmental assessment. The Directive does not, however, necessarily require Member States to modify a plan or programme as a result of monitoring. This is consistent with the general approach of environmental assessment, which facilitates an informed decision, but does not create substantive environmental standards for plans or programmes. If, in the framework of their national legislation, Member States were considering remedial action, any relevant information received through such monitoring could naturally be of assistance.

8.14. If an adopted plan or programme is modified as a result of monitoring, this modification may again require an environmental assessment (if it meets the requirements of Article 2(a)) unless it is a minor modification and Member States do not determine that significant environmental effects are likely to occur (Article 3(3)). It is likely that plan modifications resulting from monitoring will serve to offset or mitigate adverse environmental effects. When deciding whether the modification of the plan has to undergo an environmental assessment relevant factors in deciding the significance of effects may include how far the environmental performance of the plan or programme will be improved and which environmental effects have already been subject to a comprehensive environmental assessment.

Article 10(2)

In order to comply with paragraph 1, existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication of monitoring.

8.15. Article 10(2) helps clarify the obligations deriving from Article 10(1). Information on the effects of plans and programmes does not have to be collected specifically for this purpose, but other sources of information can be used. It also implies that there is no requirement to establish a new procedural step for the purpose of monitoring which is separate from the regular planning process, provided that process contains adequate monitoring arrangements. Monitoring can, for example, be integrated into the regular revision of the plan or programme. If no appropriate monitoring schemes exist Member States have to develop them.

8.16. The main challenge is to identify sources of information in different Member

States that are a suitable basis for implementing the monitoring requirements and, if necessary, to adapt existing monitoring arrangements to the requirements of the Directive. Data collected under other EU legislation (e.g. Water Framework Directive 2000/60/EC, IPPC Directive 96/61/EC) may be used for monitoring in accordance with Article 10 provided that they are relevant for the respective plan or programme and its environmental effects.

Related Aspects and Provisions

8.17. Article 5 and Annex I(i) together require that the public is informed on the monitoring arrangements 'envisaged', and Article 9(1) requires the public to be informed of 'the measures decided concerning monitoring'. These provisions are discussed in paragraph 5.29 above. Information on the monitoring measures decided is subject not only to Article 9(1) but also to the provisions of Directive 2003/04/EC of the European Parliament and of the Council of 28th January 2003 on public access to environmental information.

8.18. When appropriate, the environmental assessment will also cover transboundary environmental effects (see Article 7 and also Annex II(2), 3rd indent). Consequently, transboundary environmental effects may also be subject to monitoring. Therefore, in case of plans and programmes which require transboundary consultation, any arrangements concluded under Article 7 may also address monitoring measures. An inspiration for such arrangements could be the provisions of Article 7 of the Espoo Convention.

8.19. Monitoring may assist in the area of quality control (Article 12(2)). If monitoring reveals that a certain effect is systematically overlooked or underestimated in the environmental assessments of a certain type of plan or programme, then monitoring can help to improve the quality of future environmental reports. Generally speaking, monitoring may provide information on the quality of the existing environmental report which may be used for the preparation of future environmental reports. In that regard, efficient monitoring can be regarded as a tool for quality control helping to fulfil the requirements of Article 12(2).

9. RELATION WITH OTHER COMMUNITY LEGISLATION

9.1. There are overlaps between the Directive and certain other EC legislation. The Directive specifies that certain plans and programmes require an assessment in accordance with its provisions. Some of these plans and programmes are required by other Community laws which themselves may require further or different kinds of environmental assessments from that laid down in Directive 2001/42/EC.

9.2. Article 11 sets out the main general requirements with regard to the relations between the Directive and other EC legislation but there are further important requirements in Article 3(2)(b), 3(9), 5(3), and 12(4).

Article 11(1)

An environmental assessment carried out under this Directive shall be without prejudice to any requirements under Directive 85/337/EEC and to any other Community law requirements.

9.3. Article 11(1) means that other Community law requirements relating to an environmental assessment of plans and programmes apply cumulatively with Directive 2001/42/EC.

9.4. One of the criteria for triggering the application of Directive 2001/42/EC is whether a plan or a programme sets the framework for future development consent of projects listed in the annexes to the EIA Directive. These two Directives will not normally overlap as Directive 2001/42/EC applies to plans and programmes whereas the EIA Directive applies to projects. Overlaps may occur when plans or programmes provide for several projects to which the EIA Directive applies (transport plans might be an example). In such cases, application would be cumulative.

9.5. When Community environmental law requires plans or programmes to undergo environmental assessment, it will be necessary (if these plans or programmes fulfil the criteria set out in Articles 2 and 3 of the SEA Directive) to consider whether further elements of assessment are introduced by that Directive. Where such further elements are required, several ways of implementing the Directive may be envisaged. Member States may, for example, decide to introduce a single legislative instrument applying all the requirements of the Directive to all the plans and programmes to which it may apply. Alternatively, they may decide to amend each legal regime requiring the preparation of such a plan or programme. Or these two approaches may be combined, with the main principles being set out in a general requirement, and amendments to the details of existing regimes made where necessary. When, under Article 13(1) of the SEA Directive, the Member States notify the measures they have adopted, they are recommended to explain, for reasons of clarity, the method by which they have implemented such complementary provisions.

9.6. This part of the guidance explores the consequences of the SEA Directive for

some examples of plans and programmes based on Community legislation which may relate closely to the SEA Directive. It makes no claim to be comprehensive. For a summary overview see the table on pages 53-54. In considering the relationship between the Directive and other Community law, the national legislation implementing the other Community law must also be taken into account in determining the legal status of the plan or programme.

9.7. The **Water Framework Directive 2000/60/EEC** (WFD) introduces a Programme of Measures (Article 11 WFD) and a River Basin Management Plan (Article 13 WFD) to co-ordinate water quality-related measures within each river basin. It is not possible to state categorically whether or not the River Basin Management Plan (RBMP) and the Programme of Measures (PoM) are within the scope of the SEA Directive. Such an assessment should be done on a case by case basis. The tests which need to be applied in each case are the familiar ones in Articles 2 and 3 of the SEA Directive. Since the RBMP and the PoM are both required (by the WFD) and have to be prepared by authorities, the main question is whether they set the framework for the future development consent of projects. The answer will depend on the contents in each case. It will also be necessary to consider how far the element of planning is present in an RBMP if this does no more than summarise what has already been set out in PoMs.

9.8. The **Nitrates Directive** (91/676/EEC) requires action programmes for areas threatened by nitrate pollution. These action programmes are mainly directed towards certain agricultural practices rather than projects. In certain situations, however, these action programmes may set the framework for future development consent of projects such as intensive livestock units. In such cases they could be considered as 'programmes' within the meaning of the SEA Directive and would therefore require environmental assessment. Where they refer exclusively to agricultural practices, not to projects, the Directive would not apply to them.

9.9. The **Waste Framework Directive** (75/442/EEC) requires waste management plans to be established by Member States (Article 7). In particular Article 7 sets out the basic elements of the contents of waste management plans. Additional requirements regarding the content of waste management plans are applied by Directives 91/689/EEC on hazardous waste and 94/62/EC on packaging and packaging waste. One purpose of waste management plans is to identify suitable disposal sites or installations. In this sense they appear to set the framework for development consents of waste disposal installations, (which are covered by the EIA Directive in Annex I (9) and (10) and in Annex II (11)(b)). Such waste management plans would normally be covered by the SEA Directive and assessment would automatically be required, following Article 3(2)(a), provided all the other conditions of application are fulfilled. Furthermore, there may be plans which do not directly identify suitable disposal sites or installations but set the criteria for them and/or delegate this task to lower tier plans (e.g. regional or provincial plans). These plans also seem to set the overall framework for subsequent development consents and should therefore also be covered by the SEA Directive. Yet there may be waste management plans which do not identify areas for future disposal

installations, for example, in a situation where the disposal capacities are sufficient for the waste being produced. Such a waste management plan may allocate waste flows to certain regions or to certain recycling paths without setting 'the framework' for projects and so, in these cases, the Directive is unlikely to apply.

9.10. The **Air Quality Framework Directive** 96/62/EEC stipulates that in zones and agglomerations in which levels of one or more pollutants exceed certain limit values Member States shall prepare and implement a plan or programme for attaining the limit value within the specific time limit (Article 8(3)). In zones and agglomerations, where the level of more than one pollutant is higher than the limit values, Member States must provide an integrated plan covering all the pollutants concerned (Article 8(4)). The main purpose of these plans or programmes is to improve air quality and, although they may affect many sectors, they are not necessarily attributable to any of the sectors listed under Article 3(2)(a) of the SEA Directive; but, under Article 3(4), they will require environmental assessment if they set the framework for development consent of projects and the Member State determines them likely to have significant environmental effects. Article 11 of the Air Quality Framework Directive stipulates that Member States' plans or programmes for attaining the limit values should be sent to the Commission. Although there is no requirement to do so, it would be helpful if information about the related SEA (e.g. that referred to in Article 9 of the SEA Directive) could be sent to the Commission at the same time.

9.11. The **Habitats Directive (**92/43/EEC) aims at setting up a coherent European ecological network of special areas of conservation. It requires Member States to propose sites as special areas of conservation and transmit a list of such sites to the Commission. The purpose is to recognise that the site hosts nature values worth protecting. Thus, the essence of such a proposal is to recognise the environmental value of the site. The proposal itself would not normally result in a planning or programming decision. It defines only the geographical scope in which protection measures must apply. The environmental effects following this procedure arise from the later protection measures not from the proposal to designate a site as a special area of conservation. The proposal to designate protected sites under the Habitats Directive is therefore not likely to require assessment under Directive 2001/42/EC.

9.12. For plans and programmes under the Structural Funds and under the European Agricultural Guidance and Guarantee Fund the SEA Directive does not apply under the current respective programming periods (see Article (3)(9) and paragraph 3.8. above).

Article 11(2)

For plans and programmes for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, Member States may provide for co-ordinated or

joint procedures fulfilling the requirements of the relevant Community legislation in order, inter alia*, to avoid duplication of assessment*

9.13. As discussed above, where environmental assessment is required by the Directive and by other Community law, both sets of requirements apply cumulatively. It would be absurd if this meant that two essentially similar assessments had to be carried out on the same proposal and, in order to avoid such duplication, Article 11(2) of the Directive allows Member States to provide co-ordinated or joint procedures which fulfil the requirements of the relevant Community legislation. The first step is to find out whether Directive 2001/42/EC and other Community provisions for environmental assessment apply at the same time (see above). Member States may then wish to provide for an environmental assessment procedure that incorporates the requirements of both the Directive and of the other Community legislation. In so doing they will wish to take account of any guidance which has been issued to amplify the requirements of Community law, always bearing in mind that if any conflict were to arise between guidance on one Directive and the legal requirements contained in another Directive, it is the latter which must be transposed into national law.

9.14. The assessment under the *EIA Directive* is usually performed at a later stage of the decision making process than that under Directive 2001/42/EC, since it deals with projects instead of plans and programmes setting the framework for such projects. In some Member States, however, there may be overlaps between the two directives in situations where the plan or programme comprises the development consent for a project.

9.15. In these cases, to avoid a duplication of assessment, the introduction of a co-ordinated procedure covering both the EIA and the SEA aspects may be desirable. The basic requirements of the EIA and the SEA Directive are similar, taking into account the characteristic features of a project on the one hand and a plan or programme on the other hand. Compared to the SEA Directive, the EIA Directive does not require consultation of other authorities when there is a case by case examination (Article 4(2)), has different requirements about notification of decisions on screenings, and has no requirements on quality or monitoring.

9.16. The *Water Framework Directive* and the SEA Directive are complementary and provide for a broadly similar environmental assessment. Analysis of the legal texts reveals some differences between the elements of environmental assessment they cover. For example, the provisions on public participation in the WFD focus on the steps needed to produce, review and update RBMPs, whilst those in the SEA Directive are more general in nature since they have to apply to quite diverse types of plans and programmes. If Member States decide to provide for a joint procedure in their transposition of these directives, they will need to ensure that it correctly reflects the provisions of both. One way of avoiding duplication would be for the competent authority identified under Article 3 of the Water Framework Directive also to be made responsible for ensuring that the requirements of the SEA Directive are adequately covered in the RBMP. There is one area where the SEA Directive

can add particular value to the implementation of the Water Framework Directive. This is in the application of derogations as set out in Article 4 of the WFD. Whenever the terms 'the wider environment', 'significantly better environmental option' or 'sustainable human development' are used as criteria for applying a derogation, an environmental assessment in accordance with the SEA Directive may be useful in justifying the derogation on the basis of those criteria.

9.17. For the WFD, a Common Implementation Strategy has been developed and numerous informal guidance documents have been produced which give more detailed advice on approaches to implementing the Directive.[21] In some respects these go beyond the requirements in the text of the Directive. For example, the guidance document on public participation makes it clear that public participation is required not only for the RBMP (as Article 14 might imply) but also for the programme of measures. This guidance provides useful examples of how the public should be informed and consulted in accordance with the Directive and provides advice on good practice which could be applied to many other types of plan and programme covered by the SEA Directive. A similarly complementary approach is likely to be beneficial in applying other aspects of the Directives (such as the preparation of the environmental report, or the provisions on transboundary cases).

9.18. The procedure of preparing waste management plans pursuant to the *Waste Framework Directive* (75/442/EEC) does not include an environmental assessment. In general, the environmental assessment therefore has to be newly introduced here – though Member States may already have some elements of an SEA for waste management planning in their national legislation.

9.19. Plans and programmes that have been determined to require assessment pursuant to the *Habitats Directive*,[22] are also subject to the assessment procedure under the SEA Directive (Article 3(2)(b)). Therefore the SEA Directive and the Habitats Directive apply cumulatively for all plans and programmes which have effects on protected sites pursuant to Article 6 or 7 of the Habitats Directive and a combined procedure may be carried out provided it fulfils both the requirements of the SEA Directive and the Habitats Directive. In this case, the procedure has to include the procedural steps required by the SEA Directive, and the substantive test regarding the effect on protected sites required by the Habitats Directive.

9.20. The assessment under the Habitats Directive is a test to certify that a plan does not adversely affect the integrity of the site concerned; the competent national authorities must not adopt a plan which has adverse effects impairing the site unless the conditions and criteria in Article 6(4) of the Habitats Directive are

[21] These documents cover subjects such as economic analysis, analysis of pressures and impacts, planning process and ecological status assessment and will be published during 2003. They are already available on the internet under: http://forum.europa.eu.int/Public/irc/env/wfd/library.

[22] The Habitats Directive explicitly requires assessment for 'plans' and not for 'programmes. However, a 'plan' according to the Habitats Directive may have the characteristics of a 'programme' pursuant to the SEA Directive, since it is impossible to provide a rigorous distinction between plans and programmes. (See also paragraphs 3.3 - 3.6 and 3.32 above).

fulfilled.[23]

9.21. The assessment under the SEA Directive has a broader coverage; it not only covers effects on protected sites and on selected species, but also on biodiversity in general and on other aspects like air or water quality or the cultural or architectural heritage. The steps of an optional combined SEA procedure for the plans which have been determined to require an assessment pursuant the Habitats Directive might be the following.

9.22. Since the plan has been determined likely to have an effect on a site under the Habitats Directive, provided it complies with the other requirements of Articles 2 and 3 of the SEA Directive, it automatically comes within the field of application of that Directive.

9.23. The effects on the environment of the plan or programme and reasonable alternatives to the plan or programme are to be identified, described and evaluated in an environmental report. Effects on protected sites and on selected species in accordance with the Habitats Directive are part of this report. It may, however, be preferable to describe them in a separate chapter as the findings on such effects are binding for the decision of the competent authorities on the plan or programme.

9.24. The public and the authorities, which are likely to be concerned by the environmental effects of implementing plans, are to be consulted in accordance with Article 6 of the SEA Directive by making available the draft of the plan or programme and the environmental report. The consultation also includes the effects of the plan or programme on the sites and species, which are specially protected under the Habitats Directive.

9.25. The report and the results of the consultations have to be taken into account before the plan or programme is adopted or submitted to the legislative procedure. If the plan or programme is found to affect adversely the integrity of the site concerned, the plan or programme may be adopted only under the limited conditions described in Article 6 of the Habitats Directive. For other effects on the environment, the relevant national legislation under the Habitats Directive describes the conditions under which the plan or programme may be adopted.

9.26. Under Article 6 of the SEA Directive, the public and the designated authorities have to be informed about the decision on the plan or programme. The statement summarising how environmental considerations have been integrated into the plan or programme also includes the decision about whether

[23] Article 6(4) reads: 'If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

the plan or programme conforms to the Habitats Directive.

9.27. The effects on the environment of implementing the plan or programme have to be monitored (Article 10 of the SEA Directive). This monitoring includes effects on the sites and species protected under the Habitats Directive.

SEA for plans and programmes required by certain Community environmental legislation – Summary Table.

NB: This table is not exhaustive and readers should also refer to the relevant text as well as the Directives themselves.

	Plan or programme within the meaning of the SEA Directive (Art. 2 (a))		**Obligatory environmental assessment pursuant to Art. 3 (2)**			**Conditional environmental assessment pursuant to Art. 3(4)**
Community legislation	**Plan or programme?**	**Required by legislative, regulatory or administrative provisions?**	**Prepared for the sectors listed in Art. 3 (2)(a)**	**Setting the framework for future development consent of EIA projects**	**Requiring an assessment pursuant to the Habitats Directive**	**Requiring an assessment if likely to have significant environmental effects**
Water Framework Directive 2000/60/EC	yes/no	yes	yes (water management)	yes/no (depends on the contents)	yes/no (depends on the contents)	
Nitrates Directive 91/676/EEC	Yes	yes	yes (water management)	yes/no (depending on the contents of the action programme, possibly for installations for intensive livestock breeding)	yes/no (depending on the contents of the action programme)	
Waste Framework Directive 75/442/EEC Including the requirements of Directives 91/676/EEC and 94/62/EC	Yes	yes	Yes (waste management)	yes/no (depending on the contents of the waste management plan)	yes/no *(depending on the contents of the waste management plan)*	

	Plan or programme within the meaning of the SEA Directive (Art. 2(a))		Obligatory environmental assessment pursuant to Art. 3(2)			Conditional environmental assessment pursuant to Art. 3(4)
Community legislation	**Plan or programme?**	**Required by legislative, regulatory or administrative provisions?**	**Prepared for the sectors listed in Art. 3(2)(a)**	**Setting the framework for future development consent of EIA projects**	**Requiring an assessment pursuant to the Habitats Directive**	**Requiring an assessment if likely to have significant environmental effects**
Air Quality Framework Directive	Yes	yes	- (sector: air quality)		yes/no (depending on the contents of the action programme)	yes
Habitats Directive 92/43/EEC	- (designation of an area does not constitute a 'plan or programme'	yes	-		-	-
Habitats Directive 92/43/EEC	Yes (plans and programmes, which have effects on protected sites pursuant to Art.6 or 7 Habitats Directive)	yes	yes		yes	
Structural Funds Regulation and European Agricultural Guidance and Guarantee Fund (EAGGF) Regulation	- (For the current planning period, excluded from the SEA)					

Appendix I - Practical guidance on monitoring

As guidance for the authorities in Member States which are responsible for integrating the monitoring requirements of Directive 2001/EC/42 into the different planning procedures, the following section describes several steps which could provide assistance.. These steps put the different issues into a logical order, but they do not represent a necessary chronological sequence. Moreover, knowledge and practical experience as regards monitoring of plans and programmes is at this stage relatively limited. Monitoring schemes should therefore be flexible and allow for adaptations as necessary.

More detailed information on the practical implementation of Article 10 can be obtained from the report 'Implementing Article 10 of the SEA Directive' prepared in the framework of the IMPEL Network.

Determination of the scope of monitoring

The first step to design a monitoring system for a given planning process is to define what environmental effects the monitoring system needs to cover. The environmental report sets a framework for the scope of monitoring by identifying the likely significant environmental effects. The environmental effects to be monitored are therefore in principle the same as those of the environmental assessment. However, depending on the type of plan or programme and in particular on the stage of its implementation it may be appropriate to focus on those environmental effects which are relevant with respect to the implementation. Further, the possibility of undertaking remedial actions may be considered when determining the scope of monitoring. Also scientific difficulties in establishing a clear link between the implementation of a plan or programme and changes in the environment may be an obstacle to monitor all environmental effects. Additionally a safety check should be performed in order to make sure that no adverse effect of the plan or programme has been overlooked in the assessment.

- **Monitoring covers in principle the environmental effects included in the environmental report.**
- **It may, however, focus on some environmental effects or include additional aspects which were not apparent.**

Identification of necessary information

The second step is the identification of the necessary information for finding out the environmental impacts of a plan or programme. Information about the environmental effects of a plan or programme can also be gained from the causes of the relevant effects,[24] since the effect of the plan or programme on the environment can be monitored directly (measuring changes in the environment) or indirectly through collecting information for example on the implementation of (mitigation) measures foreseen in the plan or programme or pressure factors such as emissions or the amount of waste.

[24] A current model for the causal chain is the DPSIR scheme (driving forces-pressure-state-impact-response).

Monitoring schemes which have been examined in the course of the IMPEL project on monitoring showed a tendency to focus rather on the implementation of measures and pressure factors than on the impact. The reason for this can be seen in the difficult establishing of the cause-effect link, i.e. to attribute a change in the environment which may be influenced by various factors unambiguously to the implementation of a plan or programme. A biological monitoring system, for example, may reveal comprehensive information about the status of the environment in a given area and about its change in a given period of time, but it may not contain any findings about whether a given change in the environment (e.g. loss of a certain species, damage to certain plants) can be attributed to the implementation of a certain traffic plan. Here the data from a biological monitoring system could be combined with an analysis of the progress of implementing the traffic plan ('driving forces') and the mitigation measures foreseen in the plan.

It should be noted that not all environmental information that might be available for the planning territory is automatically necessary and useful for the purpose of monitoring. The crucial point is to identify those data which are relevant and representative for the plan or programme. A feasible approach to select relevant environmental information was presented at the IMPEL project on monitoring. The monitoring arrangements for the waste management plan of Vienna were based on a set of questions which were relevant for the follow-up of the plan (e.g. prognosis about the amount of waste in the coming years; prognosis about emissions reductions; achievement of targets, etc.)[25]. Also a set of indicators will in many cases be used as a framework for the selection of relevant environmental information. A key function of indicators or a set of questions used in Vienna is to condense environmental data to information which is understandable also for non-experts (who usually will decide on further action).

Of course, reliability and the availability of the respective data within the planning period should also be taken into account when determining what environmental data are needed.

- **It is useful to identify and select the environmental information which is necessary for monitoring the relevant environmental effects.**
- **Environmental effects may also be indirectly monitored through monitoring the causes of the effects (such as pressure factors or mitigation measures).**
- **Indicators or a set of questions may provide a framework which helps to identify the relevant environmental information. They also help to condense environmental data to understandable information.**

Identification of existing sources of information

The third step is to identify existing sources of information for the required information about the environmental situation. Whether this search is successful depends on the particular plan or programme concerned and on the monitoring systems existing for the environmental factors concerned. Two main sources of environmental information which may be useful for

[25] For more details see final report of the IMPEL project.

monitoring the significant environmental effects of plans and programmes are presented in the following section.

a) Data at project level

The first data source contains environmental data about the projects for which the plan sets the framework. Environmental data at project level are generated and collected at different stages of the project realisation. During the licensing phase of a project, information about its likely effects on the environment is collected for the purpose of the project EIA (although the data gathered in an EIA procedure are also prognostic they are usually more detailed than those used at the planning level) or other development consent procedures. During the construction and the operation phase the project is subject to inspections in order to make sure that the conditions set out in the development consent are observed in practice. Further, the IPPC Directive requires the establishment of a pollution emissions register covering emissions from a large number of industrial installations.[26]

Data at project level in most cases cover pressure factors such as emissions and also to some extent environmental effects. These data can help to compare the prediction of environmental effects and the achievement of environmental targets on the planning level with the real effects resulting from the implementation of the plan or programme.

Usually information at project level is collected by other authorities than those in charge of monitoring of plans and programmes. It must therefore be ensured that the data are made available to the monitoring authority if the monitoring system is to depend on project-related data. Also it has to be taken into account, that information at project level is mainly focused on small-scaled environmental effects while the SEA is often performed for large-scale plans or programmes. Therefore the information from the project level has to be processed, aggregated and summarised in order to use it for the monitoring of a plan or programme.

b) General environmental monitoring

The second and wide-spread source of environmental information consists in general environmental monitoring systems including statistics providing environmental data without being specifically related to plans, programmes or projects. Although these data show changes in the environment and thus environmental effects they only allow conclusions limited as to the impact resulting from the implementation of the plan or programme (as the cause-effect link is difficult to establish). However, these data can be used to find out whether environmental objectives and targets included in a plan or programme have been achieved. They also may give an indication about the efficiency of measures undertaken or foreseen to achieve these targets. Such sources of general environmental monitoring schemes, statistics and investigations can be found in all Member States and are to a large extent also required by EC legislation (e.g. monitoring according to Articles 5 and 8 of the Water Framework Directive 2000/60/EC or Directive on Ozone in ambient air 2002/3/EC).[27]

- **Sources of environmental information can be found at project level (e.g.**

[26] A comprehensive overview of EC legislation requiring the collection of project-related environmental data is to be found in the final report of the IMPEL project.

[27] A more detailed overview of relevant EC legislation is given in the final report of the IMPEL project

information gathered in EIA procedures or emissions registers established on the basis of the IPPC Directive).

- **Environmental information at project level addresses pressure factors and environmental effects. Information at project level needs to be aggregated and summarized when it is used for the planning level.**
- **General environmental monitoring systems provide environmental data detecting changes in the environment. These data help to verify the achievement of environmental objectives and targets but they allow only to a limited extent the changes in the environment to be attributed to the implementation of the plan or programme.**
- **EC legislation contains various provisions requiring the collection of environmental data which may be useful for the purpose of Article 10.**

Filling the gaps

The fourth step is to fill the gaps that are found when comparing the existing sources of information to the needs following from Article 10 for the specific plan or programme. In some cases the information may be sufficient to fulfil the requirements of Article 10, but it may be necessary to provide for a continuous exchange of information between the authorities collecting the information and the authority responsible for monitoring. In other cases existing monitoring systems may have to be enlarged by including additional aspects or measuring points. Yet it should be stressed that monitoring according to Article 10 has a limited purpose, i.e. to identify shortcomings of the environmental assessment, and that it is not a free-standing scientific exercise. This always has to be borne in mind when thinking about enlarging existing monitoring systems or installing new ones.

Procedural integration of monitoring into the planning system

The fifth step is to integrate monitoring into the planning system. As said above, monitoring does not have to be a separate step in the planning procedure, but it can be part of the regular planning system. A good point in the administrative process to integrate the monitoring required by the SEA Directive appears to be the regular revision of an existing plan or programme. If there is no such regular revision, time and frequency for monitoring the effects of the plan or programme should be laid down, either in a general rule or in the context of each individual environmental report.

In any case some procedural arrangements have to be made to ensure that the monitoring system runs effectively. It has to be determined which authority (or other body) is responsible for the different tasks of monitoring, comprising the collection of environmental information, processing the environmental information and their evaluation. Further, it is important that the relevant information is submitted to the respective authority in an appropriate form (e.g. environmental data should be explained and put in an understandable document when presented to a decision-making body).

When setting up monitoring arrangements it should be noted that monitoring does not end with the collection of environmental information but includes also their evaluation.

- **Monitoring can be integrated in the planning system.**

- **Efficient monitoring demands a determination of the responsible authority/ies and the time and frequency of monitoring measures.**
- **Monitoring arrangements should also include the evaluation of the environmental information.**

Remedial action

Environmental information received through monitoring can be of assistance when considering appropriate remedial action in the framework of national legislation. Article 10, however, does not lay down an obligation to undertake remedial action. The following section therefore contains only general reflections about remedial action.

It may be useful to determine criteria which trigger an examination of remedial action. Existing legislation in some Member States contains already general provisions requiring a revision of the plan if this is necessary to ensure the intended development (e.g. to ensure a well balanced urban development).

Remedial action can be taken on different levels. On the planning level, the decision on the adoption of the plan or programme can be reversed and a new plan or programme can be adopted or the existing plan or programme one can be modified. If the legal system of the Member States so allows, remedial action could also be taken on the implementation level. This could in particular mean that those statements in the plan or programme which have been proved incorrect or which were based on incorrect assumptions are no longer considered as a framework for the development consent of single projects.

Remedial action on the planning level could also be combined with such action on the implementation level. This would mean that the plan or programme is modified on the basis of the new information on its effects on the environment. In order to avoid developments which might occur while the (old) plan or programme is still in force and which might contravene the envisaged modification of the plan or programme, development consent procedures for projects could be postponed or the decision on projects could be taken without referring to the plan or programme if the respective national legal systems so allows.

- **It may be useful to determine criteria which trigger the consideration of remedial action.**
- **Remedial action can be undertaken on planning level and implementation level.**

Appendix II - Members of the Working Group

Ursula Platzer, Federal Ministry of Agriculture, Forestry, Environment and Water Management, Austria

Andreas Sommer, Provincial Government of Salzburg, Department of Environmental Protection, Austria

Ulla-Riitta Soveri, Ministry of the Environment, Finland

Otmar Lell and Astrid Langenberg, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Germany

Matthias Roder, Bavarian Ministry of Regional Development and Environmental Affairs, Germany

Mari Van Dreumel, Ministry of Housing, Spatial Planning and the Environment, Netherlands

Sten Jerdenius, Ministry of the Environment, Sweden

David Aspinwall and Phil Weatherby, Office of the Deputy Prime Minister, UK

Lieselotte Feldmann, European Commission, Directorate-General Environment

Antti Maunu, European Commission, Directorate-General Environment

Appendix III - Bibliography

Andreas Sommer, *'The Assessment of the Significance of Environmental Effects. Procedure and Criteria for Screening in Strategic Environmental Assessments'*, the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management, 2002

Royal Haskoning, *'Quality assurance strategic environmental assessment'*. Commissioned by the Netherlands Ministry of Housing, Spatial planning and the Environment, 2002

Environmental Resource Management, *'Public participation and stakeholders' involvement in the SEA process: an overview of available techniques and methodologies'*, commissioned by the Netherlands Ministry of Housing, Spatial planning and the Environment, 2002

European Union Network for the Implementation and Enforcement of Environment Law (IMPEL). *IMPEL PROJECT: Implementation of Article 10 of the EA Directive 2001/42/EC*

Jonathan Robinson, *'Anticipating the effect of Strategic Environmental Assessment'*, at **Planning law: Analysing Reform, Europe and Caselaw**, White Paper Conference, London, 21 March 2002.

APPENDIX 4_ DCLG Guidance

The SEA Directive: Advice for Planning Authorities on Retrospective Application

1. Introduction

1.1 The 'SEA Directive'[1], transposed by the Environmental Assessment of Plans and Programmes Regulations 2004[2] (hereafter referred to as the 'SEA Regulations'), applies mainly to plans and programmes whose formal preparation began on or after 21 July 2004. However, Article 13.3 of the Directive (regulation 6.2) also requires environmental assessment of plans and programmes whose formal preparation began before 21 July 2004 and which have not been adopted by 21 July 2006, unless it is decided that this is 'not feasible'. Decisions on whether an environmental assessment is feasible must be made on a case-by-case basis, and the public must be informed of decisions.

1.2 It is for the Responsible Authority (hereafter referred to as the 'authority') which prepares a plan and programme to form a view on whether it is feasible to carry out environmental assessment. Decisions are however open to both domestic judicial review and infraction proceedings brought by the European Commission. Ultimately, what is 'feasible' will be decided by the courts.

1.3 This note sets out issues which Communities and Local Government advises authorities to take into account in deciding how to comply with Art 13.3. It refers to European Commission guidance on the Directive (see paragraph 4.5 below). **It must however be emphasised that this note is intended as guidance only and cannot be used to predict with any certainty the view a court would reach in any particular case. Authorities should obtain their own legal advice.**

1.4 As in the Communities and Local Government consultation paper on *Sustainability Appraisal of Regional Spatial Strategies and Local Development Frameworks* of September 2004, this note uses 'SEA' to refer to an environmental assessment under the Directive. 'Plan' is used in this note to denote development plans under the Town and Country Planning Act, 1990, as amended.

2. Application to Local Development Documents

2.1 This note is very unlikely to be relevant to local development documents (LDDs) under the Planning and Compulsory Purchase Act 2004 since the issue of retrospective application should not apply. A local planning authority is allowed, under regulation 6 of the Transitional Arrangements Regulations[3] to the 2004 Act, to treat any step taken prior to commencement of that Act in September 2004 for the purposes of preparing a LDD as having been taken after that date. As PPS12 makes clear, this should include sustainability appraisal which incorporates the requirements for an environmental assessment under the SEA Directive. The need to undertake a sustainability appraisal as an integral part of preparing a LDD has been clear since the Bill was introduced in 2003. Since it is

most unlikely that any preparatory work on a LDD would have been undertaken before then, there should not be any cases of failure to carry out a sustainability appraisal even for those LDDs where work has started prior to July 2004. Similar principles apply to work on preparing revisions to regional spatial strategies (RSSs).

3. Summary

(i) The test of whether it is 'not feasible' to carry out SEA is likely to be interpreted very strictly by the courts (see paragraph 4.1 below). An argument that environmental assessment is inconvenient or unhelpful is very unlikely to be sufficient to satisfy this test. In determining feasibility, among the considerations which a court is likely to take into account include the following:

- the duty on Member States (which will include authorities) not to undermine the objectives of the Directive (see paragraph 4.2 below). This will include avoiding taking actions which would have that effect during the period prescribed for transposition (the period that runs from the coming into force of the Directive on 21 July 2001 until its transposition on 21 July 2004). (see paragraph 4.3 below); and

- the fact that guidance was available before the transposition date of 21 July 2004 (see paragraphs 5.2 and 5.3 below).

(ii) Where an authority had not been undertaking an SEA prior to 21 July 2004 , then it will need to consider whether **as at that date** it was feasible to do so. For the reasons summarised in (i) above, it is likely that only in exceptional cases will the test of 'non-feasibility' be met. In order to minimise the risk of legal challenge or infraction proceedings being brought by the European Commission, Communities and Local Government considers that it would be advisable to carry out SEA in all except the following cases:

- the plan concerns minor alterations to an existing plan or is concerned with a small area **and** is unlikely to have any significant environmental effects (see paragraph 7.2 below); or

- the plan had reached such an advanced state at 21 July 2004 that there were compelling reasons why SEA should not be carried out at that stage, and it would be unreasonable to do so. The criteria to be taken into

account when reaching this decision could include the nature and number of statutory steps still to be taken before adoption would normally take place, the expense and disruption of having to go back to the beginning of the plan preparation process and the extent to which SEA at this stage was unlikely to add value. These criteria must all be weighed against the environmental protection objectives of the Directive. In Communities and Local Government's view an authority's argument that it is not feasible to carry out SEA is likely to carry considerable weight if, as at 21 July 2004, an inquiry or examination in public had already commenced or was about to commence (see paragraph 7.3 below).

4. The meaning of 'not feasible' and possible court interpretation

4.1 When interpreting 'not feasible', it is essential to bear in mind that Article 13.3 is a derogation from the obligations of the Directive. In general, courts interpret derogations from Directives narrowly. A court may therefore be expected to interpret 'not feasible' very strictly.

4.2 The meaning of 'feasibility' in this context must be considered in light of the objectives of the Directive, which are set out in Article 1:

"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..."

4.3 When feasibility is considered, authorities should therefore consider whether the plan or programme is at a stage where SEA would help to achieve these objectives. A court might take an unfavourable view if an authority appeared to be using Article 13.3 to avoid or negate the objectives of protecting the environment or integrating environmental considerations into plan-making. European Court of Justice (ECJ) rulings on the Environmental Impact Assessment (EIA) Directive [4] emphasise that the method adopted to determine whether EIA should be carried out should not undermine the objective of the Directive [4], and it is likely that the ECJ will take a similar approach to SEA if the plan is likely to have significant effects on the environment. This will include action taken during the period prescribed for transposition (from the coming into force of the Directive on 21 July 2001 until its transposition on 21 July 2004). This means that authorities **at the very least** should not have evaded their duties by, for example, manipulating deadlines and intentionally attempting to rely upon the exception provided by Article 13.3 of the Directive.

4.4 The primary Oxford English Dictionary definition of "feasible" is "practicable, possible". This suggests that authorities would need to demonstrate that there is a real impediment to their carrying out SEA of a plan, rather than merely asserting that doing so would be inappropriate or unhelpful.

4.5 Finally, the European Commission's guidance on the Directive [5] provides a useful commentary which a court, though not bound by it, would be likely to take into account.

"The environmental assessment of plans and programmes should influence the way the plans and programmes themselves are drawn up. While a plan or programme is relatively fluid, it may be easier to discard elements which are likely to have undesirable environmental effects than it would be when the plan or programme has been completed. At that stage, an environmental assessment may be informative but is likely to be less influential." (paragraph 4.2)

"It would not be feasible to carry out an environmental assessment of a plan whose first preparatory act was before July 2004 and which was at a very advanced stage at that date. The focus of this provision is not so much on how long before July 2004 was the starting date of the plan or programme, but on whether the planning process of relevant plans or programmes is at a stage at which a meaningful environmental assessment can be carried out." (paragraph 3.66)

4.6 The reference to "meaningful" SEA suggests that an authority should consider against the background of the environmental protection objectives of the Directive and, in the light of the stage reached, whether an SEA would add value to the plan, i.e. by identifying significant environmental effects that would result in the plan needing to be amended.

5. When should feasibility be assessed?

5.1 The feasibility of SEA should have been considered in relation to the stage of preparation which the plan had reached on 21 July 2004, the transposition date. However, authorities were not entitled to ignore the obligations of the Directive during the transitional period between 21 July 2001 and 21 July 2004 (see paragraph 4.3 above).

5.2 In determining feasibility, it is likely that a court would have regard to the fact that authorities were aware, or were deemed to be aware, of the requirements of the Directive, from when it came into force on 21 July 2001. The Directive was published in the *Official Journal of the European Communities* on that date and courts are likely to take the view that authorities should have been aware of it from then.

5.3 Communities and Local Government issued a consultation draft of guidance for English planning authorities on how to meet the Directive's requirements in October 2002 [6] and published final guidance in October 2003 [7] One of the main reasons for producing this guidance well ahead of 21 July 2004 was to help authorities to move towards compliance where plans were unlikely to be adopted by

July 2006. Both documents were sent to every planning authority and regional planning body in England.

6. Documentation of decisions that SEA is not feasible

6.1 Where an authority decides that SEA is not feasible, it should ensure that its decision-making process is evidenced by documentation containing information that supports the decision. This documentation should be easy to follow without the need for research or reconstruction of an audit trail. If, in the event of legal challenge, a court was unable to check that the authority had considered the question of feasibility, it might draw the conclusion that this question had not been addressed adequately, and that therefore the derogation at Article 13.3 could not apply. A recent ECJ judgment on EIA [8] stressed the need for authorities to ensure decisions contain or are accompanied by all the information necessary to check that they are based on adequate screening. For this reason, an unsupported assertion is not likely to be sufficient for the purpose of the Directive, and authorities should not regard all plans that have reached a particular stage as automatically exempted from SEA.

7. What this means for particular types of development plan or stages in their preparation

7.1 Taking into account the above considerations and to minimise the risk of legal challenge, it would be prudent to carry out SEA on all plans begun before 21 July 2004 but unlikely to be adopted by 21 July 2006 unless the plan falls within one of the two categories set out below.

7.2 The first is that an SEA is not needed where a plan would only determine the use of a small area at the local level or constitutes a minor modification to an existing plan and it is unlikely to have significant environmental effects. It is unlikely that many plans would fall into this category and if they did that they would take this long (over two years) to prepare. If an authority considers that a plan does fall into this category then under regulations 4 and 9 of the SEA Regulations the authority should consult the Countryside Agency, the Historic Buildings and Monuments Commission for England , English Nature and the Environment Agency on whether they agree that there would not be any significant environmental effects. If the authority then determines that the plan is unlikely to have any significant environmental effects, in order to comply with regulation 11 of the SEA Regulations, it would need to publish that determination with a statement of reasons within 28 days of making the determination.

7.3 The second is that the plan was at such an advanced stage of preparation on 21 July 2004 that there are compelling reasons why an SEA should not be carried out and it would be unreasonable to do so. In deciding whether this is the case, an authority should consider matters such as the nature and number of statutory steps still to be taken before adoption would normally take place and the expense and disruption of having to go back to the beginning of the plan preparation process. In Communities and Local Government's view an authority's argument that a plan was at such an advanced stage that it was not feasible to carry out SEA where the plan was already undergoing an

inquiry or examination-in-public as at 21 July 2004, or was about to do so, is likely to carry considerable weight. In these cases there will be the expense and inconvenience caused to participants of a delay in the inquiry or examination-in-public or of asking them to participate again and account should be taken of the expectations of participants that the plan will proceed to adoption. However, the earlier the stage of the plan-preparation process reached at 21 July 2004, the less likely it is that an argument that it is not feasible to subject a plan to SEA will be convincing. For example, such an argument is likely to carry much less weight where a local plan or UDP had only just reached first or even revised deposit stage, or, in the case of a structure plan had only reached deposit stage, at 21 July 2004.

7.4 In determining whether the plan was at such an advanced stage of preparation on 21 July 2004 that it would be unreasonable to carry out an SEA another factor to be taken is whether a SEA would be likely to add value at that stage. Communities and Local Government considers it advisable for authorities to produce evidence from some form of environmental assessment, albeit not a SEA, that the likelihood of identifying significant environmental effects that would require any fundamental revision to the plan (including mitigation action) was minimal. It is long-established good practice, supported by guidance from Communities and Local Government and its predecessors, to carry out environmental appraisal or (more recently) wider sustainability appraisal of plans. While such appraisals cannot be expected to satisfy all of the Directive's requirements they may help authorities demonstrate that the plan is unlikely to have significant environmental effects.

8. What happens where a retrospective SEA has to be carried out

8.1 Where a retrospective SEA has to be carried out the authority will need to subject earlier stages of plan preparation to SEA, drawing upon any environmental appraisal or wider sustainability appraisal work that has been carried out. Where there are prohibitive cost or other practical considerations that prevent subjecting all previous stages of plan preparation to SEA then the authority should discuss this with the Government Office. Given this is a retrospective process it may be necessary to roll several of the earlier stages into one and consult on that. For example, the authority may wish to consult on an environmental report which appraises both the alternative and preferred options. However, any assessment that does not fully comply with the Directive runs the risk of legal challenge. Therefore, the authority should ensure that it complies with the Directive and in particular that it:

- prepares an environmental report on implementing the plan and reasonable alternatives in accordance with Article 5 and Annex 1 to the Directive;

- consults the designated environmental bodies and the public on the environmental report in accordance with article 6 of the Directive; and
- on adoption of the plan, publishes the information required by Article 9 of the Directive.

[1] Directive on the assessment of the effects of certain plans and programmes on the environment 2001/42/EC

[2] SI 2004/1633

[3] The Town and Country Planning (Transitional Arrangements) (England) Regulations 2004: SI 2004/2205

[4] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. A s amended by Directive 97/11/EC

[5] Implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, 2003

[6] Strategic Environmental Assessment, Guidance for Planning Authorities: Practical Guidance on applying European Directive 2001/42/EC 'on the assessment of the effects of certain plans and programmes on the environment' to land use and spatial plans in England , Consultation Draft, October 2002

[7] Strategic Environmental Assessment, Guidance for Planning Authorities: Practical Guidance on applying European Directive 2001/42/EC 'on the assessment of the effects of certain plans and programmes on the environment' to land use and spatial plans in England , October 2003

[8] C-87/02 Commission v Italy

Appendix 5 Judgement

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Ref:	WEAH4808.T
Delivered:	13/11/2007

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

---

(1) SEAPORT INVESTMENTS LTD and
(2) MAGHERAFELT DISTRICT COUNCIL & ORS

APPLICATIONS FOR JUDICIAL REVIEW (REMEDIES)

WEATHERUP J

[1] This judgment relates to the remedies to be ordered further to the substantive judgment of the Court on 7 September 2007 reported by neutral citation [2007] NIQB 62. In essence the judgement related to two applications for judicial review concerning environmental assessments carried out under the Environmental Assessment of Plans and Programmes Regulations (NI) 2004 transposing Directive 201/42/EC on the assessment of the effects of certain plans and programmes on the environment.

[2] The findings in the judgment were fourfold and were summarised in paragraph 56 as follows. First, the designation of the Department of the Environment as the consultation body under Regulation 4 of the 2004 Regulations does not transpose properly Article 6.3 of the Directive. Secondly, that the absence of appropriate timeframes in Regulation 12 does not transpose properly Article 6.2 of the Directive. Thirdly, that the environmental reports prepared for the Draft Northern Area Plan and the Draft Magherafelt Plan are not in substantial compliance with Schedule 2 of the Regulations and Article 5 and Annex 1 of the Directive. Fourthly, that the sequencing of the environmental reports and the draft plans were not in compliance with Regulations 11 and 12 and Articles 4 and 16 of the Directive.

[3] In effect there are two instances of non-transposition of the Directive into the Regulations, namely the absence of a consultation body when the Department of the Environment is the responsible body for the development plan or programme and the absence of time limits for the referral to consultation and for receipt of responses in relation to development plans and environmental reports. In addition there are two instances of non-compliance with the Regulations and the Directive, namely the information in the environmental reports was not in accordance with the requirements and the environmental reports did not emerge at appropriate times in order to influence the development plans in an appropriate manner.

[4] The applicants seek declarations and orders quashing the Regulations in the two instances of non-transposition of the Directive and declarations and orders quashing the development plans and the environmental reports in the two instances of non-compliance with the Regulations and the Directive.

[5] Since judgment was given on 7 September 2007 the respondent Department on 7 November 2007 issued non-feasibility notices under Regulation 6(2) of the Regulations. Regulation 6 specifies that the Regulations apply where a plan or programme has a first formal preparatory act occurring before 21 July 2004 and that plan or programme has not been adopted before 22 July 2006. Regulation 6(2) provides the Regulations do not require an environmental assessment of a particular plan or programme if the responsible authority decides (a) that the assessment is not feasible and (b) informs the public of its decision. The Department, as the responsible authority for the two draft plans, has now purported to exercise this power by the notices of 7 November 2007. The applicants have indicated that they intend to apply for judicial review of the Department's decision to issue the non feasibility notices and exempt themselves from the requirements of the Regulations to undertake environmental assessments in relation to the two plans.

[6] As to the impact of the non-feasibility notices on the proposed orders relating to the non-compliance, the applicants contend that the notices should be disregarded by the Court as the judgment was based on the respondent's activities prior to the issue of the notices at a time when the Department was arguing that they had complied with the requirements of the Regulations and the Directive. On the other hand the respondent contends that the notices of non-feasibility remain valid, unless and until they are set aside by the Court. Accordingly, as the notices amount to a valid derogation from the Regulations and the Directive, the respondent contends that no order should be made by the Court in relation to the findings of non compliance.

[7] In relation to the non transposition grounds the respondent contends that quashing Regulations 4 and 12 would have an adverse effect on environmental protection. This, it is said, would arise because it would remove such environmental protection as is provided by the Regulations and would not thereby correct the omission that has been found to have occurred in the present Regulations. Accordingly, the respondent contends that Regulations 4 and 12 should not be quashed, but should be retained to continue the limited amount of environmental protection that they accord. In any event the respondent contends that no further order is required in the proceedings in relation to either the non transposition grounds or the non compliance grounds as the judgment sets out the four findings of the Court and that is sufficient.

[8] A number of propositions should be stated. First of all, Member States, including the courts, must take appropriate measures to ensure fulfilment of Treaty obligations. Article 10 of the Treaty of the European Community provides that Member States shall take all appropriate measures, whether general or particular, "to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

[9] Secondly, the Court has minimal discretion not to quash decisions that fail to comply with Community law. The applicants refer to the decision of the House of Lords in Berkeley v The Secretary of State, 81 P & CR 492. The decision-maker had not considered whether a project involved an urban development project for the purposes of the relevant Regulations and the Directive. The Court considered the position in relation to the quashing of the decision and Lord Bingham stated –

> "Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still: the duty laid on member states by article 10 of the E.C. Treaty, the obligation of national courts

> to ensure that Community rights are fully and effectively enforced, the strict conditions attached by article 2(3) of the Directive to exercise of the power to exempt any and the absence of any power on the Secretary of State to waive compliance (otherwise than by way of exemption) with the requirements of the Regulations in the case of any urban development project which in his opinion would be likely to have significant effects on the environment by virtue of the factors mentioned, all point towards an order to quash as the proper response to a contravention such as admittedly occurred in this case."

[10] Thirdly, domestic difficulties do not excuse inaction by a Member State where there has been non-compliance with obligations under EC law. A member State may not plead provisions, practices or circumstances in its internal system in order to justify a failure to comply with obligations or time limits imposed by Directives. The applicants referred to a considerable number of cases to that effect and I refer to some of them to illustrate the point. Commission of the European Community v The French Republic, case 232/78, [1979] ECR 2729 involving the control of mutton and lamb. At paragraph 6 of the judgment it is noted that the French Government did not dispute that the domestic system was incompatible with EC law but sought to excuse that on a number of grounds which were all rejected by the Court. The grounds relied on were, first, that the French Government emphasised the serious, social and economic effects on the economy if they were required to take compatibility action; secondly, they drew attention to the progress that had been made in carrying out the setting up of a common organisation of the market in mutton and lamb; thirdly, they pointed out the inequality that would arise, in the field of competition, if they had to abolish their own organisation of the market. Commission of the European Community v The United Kingdom, case 337/89 [1992] ECR 1-1613 concerned the absence of appropriate measures in relation to the quality of water for the purposes of human consumption. The Court found at paragraph 25 that the Member State's claim that it had taken all practical steps to secure compliance could not justify, except within the limits of derogations expressly laid down, the failure to comply with the requirement to ensure that water intended for human consumption met the requirements of the Directive. Commission of the European Commission v The French Republic, case C-197/96 [1997] ECR 1-1489 was concerned with measures to secure equal treatment on gender grounds for night-time workers. The Court at paragraphs 14 and 15 rejected the domestic difficulties that the Member State as an excuse for non-compliance.

[11] Fourthly, the obligation is on the Court to nullify the unlawful consequences of a breach of Community law. In Wells v The Secretary of State for Transport, a decision of the European Court of Justice, an Environmental Impact Assessment for a particular quarry development was found to be contrary to the Regulations and the Directive. In considering the nature of the obligation to remedy the failure to carry out an Environmental Impact Assessment the ECJ addressed the UK Government's contention that in the circumstances of the case there was no obligation on the competent authority to revoke or modify the permission issued for the working of the quarry or to order the discontinuance of the quarry. The ECJ stated that it was clear from settled case law and under the principle of co-operation and good faith laid down by Article 10 of the Treaty that the Member States are "required to nullify the unlawful consequences of a breach of Community law." The ECJ referred to the decision of Humblet v Belgium [1960] ECR 559 and Francovich v Italy [1991] ACR 153 57 and stated that "Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned" and to that effect referred to Germany v The Commission [1990] ECR 1-2321. Thus the obligation to nullify would extend to this Court.

[12] Next, I consider whether the non-feasibility notices, if they are valid, have the effect that environmental assessments are not required in relation to the draft plans. In other words, do the notices amount to permitted derogations under the Directive and the Regulations? The applicants

contend that the notices can have no retrospective effect. I am unable to accept this contention. The derogation is capable of applying on the date of commencement of the Regulations. There is no requirement in the Directive or the Regulations that the non-feasibility notice be issued on a specified date or within a specified period from commencement of the Regulations. There may be a period from the commencement of the Regulations to the date of the issue of the notice where the need for an environmental assessment will arise on commencement and will be disapplied at the later date of issue of the notice. To that extent there would be inevitable retrospective effect. It cannot be the case that all such notices had to be issued on the date of commencement of the Regulations. There may be a different argument as to whether the notices in the present cases were issued within proper timescales. I find that the notices are capable of having retrospective effect.

[13] Further, the applicants contend that the facts must be taken as they were during the hearing of the applications for judicial review and therefore the Court should disregard the notices that have been issued. Again, I am unable to accept this contention. The Court has a discretion as to the remedies that should be ordered and it must have regard to all the circumstances. I am not prepared to disregard the notices. One outcome of the proposed challenge to the notices may be that they will be upheld so that the environmental assessment arrangements would not apply to these plans. Another outcome may be that the notices will be struck down and the requirements for environmental assessments will apply to these plans. In that event there has already been a finding that there has been non-compliance with the requirements for environmental assessments in the respects identified.

[14] I propose to make a declaration that the draft plans and the environmental reports are not in compliance with the Regulations and the Directive. I am not prepared to make an order quashing the draft plans and the environmental reports at this stage. I would reserve the position in relation to the plans and the reports pending the outcome of the judicial review of the non-feasibility notices. The quashing of the draft plans and reports may be an aspect of the judicial review challenge to the notices.

[15] The first provision that has not been transposed is Article 6.3 of the Directive which provides that Member States shall designate the authorities that are to be consulted about draft reports and environmental assessments. Regulation 4 provides, first of all, that the Department of the Environment shall be the consultation body and secondly that where the Department of the Environment is the responsible authority for the plan or programme it shall not at that time exercise the functions of a consultation body. The non-transposition in this particular instance is that there is no consultation body provided for in domestic law when the Department of the Environment is responsible for the development plan. This is a non-transposition by omission of one aspect of the requirements of the Directive.

[16] To quash Regulation 4 would remove that aspect of the Directive that has been transposed and would not relieve the omission or the incomplete transposition. I am mindful of all the propositions set out above. The appropriate measure to be ordered by the Court to ensure fulfilment of the obligation to transpose the requirement for a consultation body when the Department of the Environment is the responsible body is a declaration to that effect rather than an order quashing Regulation 4 which would have the effect of removing the limited protection that is provided. I refuse an order quashing Regulation 4 of the Regulations.

[17] The second provision that has not been transposed is Article 6.2 of the Directive which provides for time limits within which the requisite bodies should receive papers and express opinions and be given an early and effective opportunity to do so. Regulation 12 contains three unspecified times for action. The structure of Regulation 12 is to make provision for consultation with the consultation body in paragraph 2 and then to make provision for consultation with the public in paragraph 3. As far as the first matter is concerned it is provided that the consultation should take

place "as soon as reasonably practicable". The Regulation does not specify a time limit. Further the Regulation provides that the consultation body shall express its opinion "within a specified period" but does not specify the period. As far as public consultation is concerned the Regulation provides that the documents must issue within fourteen days, but in relation to the responses it provides that the papers that are issued will specify a period within which the opinions should be returned. It is provided in the Regulations that the above periods shall be of such length as will ensure that those to whom invitations are extended are given an opportunity to express their opinion on the relevant documents. The Regulations do not state the time limits as required by the Directive.

[18] The non-transposition is again a case of omission and incomplete transposition and to quash Regulation 12 removes that aspect of the Directive that has been transposed. I consider, as in the other instance of non-transposition, that the appropriate remedy, in order to ensure fulfilment of the obligations to transpose the requirement for time limits, is a declaration to that effect. I refuse an order quashing Regulation 12 as it would have the effect of removing protective measures without addressing the omissions in the Regulation.

[19] The applicants have submitted draft Orders. I refuse the declarations and the orders for certiorari specified in paragraphs 1 and 2 which relate to decisions of the Department of the Environment of 16 December 2004 refusing to withdraw the draft plans and environmental reports as such orders are unnecessary. I refuse certiorari as sought under paragraphs 4, 6 and 8 of the draft Order. I grant declarations as sought under paragraphs 3, 5, 7 and 9 of the draft Order, with the following modification. To declaration 3 will be added the words "…. where the Department of the Environment is also the responsible body for the proposed plan or programme." I order that the applicants in each case have their costs against the respondent.