Chapter A3: Determining whether plans & programmes require SEA under the Protocol

Resource Manual to Support Application of the UNECE Protocol on Strategic Environmental Assessment
A3.1 Contents of the Chapter

- Legal obligations
- Detailed description of tests
- Possible practical arrangements
A3.2 Legal obligations

- Article 2.5 – Definition of ‘plans and programmes’
- Article 4 – Field of Application concerning Plans & Programmes
- Annex I – List of projects as referred to in article 4, para 2
- Annex II – Any other projects referred to in article 4, para 2
- Article 5 – Screening
- Annex III – Criteria for determining of likely significant environmental effects referred to in article 5, para 1
### A3.3 Detailed description of tests

<table>
<thead>
<tr>
<th>Definition of a plan or programme (P/P) (art. 2.5)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Test 1</strong></td>
</tr>
<tr>
<td><strong>Test 2</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Exemption from application (art. 4.5)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Test 3</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Mandatory application (art. 4.2)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Test 4</strong></td>
</tr>
<tr>
<td><strong>Test 5</strong></td>
</tr>
<tr>
<td><strong>Test 6</strong></td>
</tr>
<tr>
<td><strong>Test 7</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Non-mandatory application (art. 4.3 and 4.4)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Test 8</strong></td>
</tr>
<tr>
<td><strong>Test 9</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Determination of significant effects (art. 5.1)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Test 10</strong></td>
</tr>
</tbody>
</table>
Test 1

- Is P/P (or the modification to it) required by legislative, regulatory or administrative provisions? (art. 2.5(a))
- If not, no SEA required under Protocol
- Need to consider how P/Ps may be identified – the name not sufficient indication:
  - What is called a ‘plan’ or ‘programme’ may not be within Protocol’s definition
  - Similarly, P/Ps not always named as such: policies, projects, guidelines & strategies among many labels sometimes attached to P/Ps
  - Open mind necessary when deciding what is a P/P
  - Recognize wide scope & broad purpose of Protocol
  - Consider extent to which act likely to have significant environmental effects
  - Consider any formal statement that goes beyond aspiration & sets out intended course of future action
Examples of plans include:
- A document that sets out how it is proposed to carry out or implement a scheme or policy
- Land-use plans & development criteria
- Waste management plans
- Water resource plans
- Transport plans

A programme may comprise set of projects in a given area.

Not necessary to differentiate between plans and programmes: Protocol treats them identically.
Test 1 (cont’d)

- Protocol also applies to modifications to P/Ps
- Modification to P/P for minor reasons (e.g., changes to individual projects not changing significantly P/P’s environmental effects) may be exempt from SEA
- Examine carefully any exemption
- Fundamental test is whether modification likely to have significant environmental effects
- Modification to P/P may lead to significant environmental effects not yet assessed – e.g. because of
  - nature of modification
  - change in the state of the environment
- Also consider where knowledge (of activities, environment, effects) has developed since original P/P was developed
- Also consider where original P/P not subject to SEA because pre-dated entry into force of SEA legislation
- Throughout Manual, references to P/Ps include modifications to P/Ps
Test 1 (cont’d)

• P/P must be required by *legislative, regulatory or administrative* provisions

• Might therefore choose not to subject to SEA any P/P not mandatory under such provisions

• Administrative provisions are formal requirements for ensuring action is taken
  – not normally made using same procedures as for new laws and
  – do not necessarily have full force of law

• So, though administrative provisions not themselves legally binding, P/Ps required by administrative provision do fall within Protocol’s definition
Test 2

• Is P/P subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through a formal procedure, by a parliament or a government? (art. 2.5(b))
• If not, no SEA required under Protocol
• P/P must be subject to preparation and/or adoption by an authority:
  – Either preparation or adoption by an authority adequate
  – May be prepared by one authority but adopted by another
  – An authority may include privatized utility company when preparing plans that in non-privatized regimes would be carried out by public authorities, but not when drawing up plans for its own commercial purposes not related to public authority role
Test 2 (cont’d)

- As alternative to a P/P being ‘subject to preparation and/or adoption by an authority’, it may be ‘prepared by an authority for adoption through a formal procedure, by a parliament or a government’, as is normally the case in some States.
- Protocol qualifies both parliament & government by the indefinite article ‘a’ – may be several parliaments or governments within a State, at different levels (e.g. national, regional, provincial, local).
• Is the sole purpose of P/P to serve national defence or civil emergencies, or is it a financial or budget P/P? (art. 4.5)
• If so, no SEA required under Protocol
  – Exemption for P/Ps of which **sole** purpose is to serve national defence or civil emergencies.
  – Exemption not for P/Ps having elements that serve such purpose
  – Civil emergencies include man-made & natural disasters
    • P/P prepared in response to particular emergency that had already occurred
    • Not as preventative measure
  – Budgetary plans might include budgets at different government / authority levels
  – Financial plans might include project financing / finance distribution
Test 4

- Is P/P being prepared for agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning or land use? (art. 4.2)
- A candidate P/P that has reached this test falls within the definition of a P/P (art. 2.5)
- Tests 4, 5 & 6 together implement article 4.2
- This test asks whether P/P within listed sectors
- Terms ‘town and country planning’ & ‘land use planning’ used in different States & might be used interchangeably
Test 5

- Does P/P set the framework for future development consent for projects listed in annex I? (art. 4.2)
- Would normally mean that P/P contains criteria / conditions that guide the way consenting authority decides on application for development consent
- Such criteria could
  - place limits on type of activity / development to be permitted in given area
  - contain conditions to be met by applicant if permission is to be granted
  - be designed to preserve certain characteristics of area concerned
Test 5 (cont’d)

• Same expression used in annex III, together with list of ways in which framework might be set: location, nature, size & operating conditions or by allocating resources (indicative & not exhaustive list)
  – Resources might be natural, human, financial
  – Generalized allocation of financial resources would not appear to be sufficient to set framework
  – For resource allocation to set framework it would condition how consent to be granted (e.g. by defining course of action or limiting solutions)
Test 5 (cont’d)

- Land-use plans generally contain criteria determining what kind of development can take place in particular areas (a typical example of plans that set framework for future development consent)
  - Plan would need to define precise / non-trivial conditions relating to future development consents
- P/Ps might
  - *either* define conditions in this way
  - *or* directly, once adopted, give consent for projects
- Sectoral P/Ps might define locational / technological conditions of future development projects
- List in Protocol annex I broadly similar (not identical) to corresponding list for Directive (Annex I to EIA Directive)
Tests 6 & 7

- Test 6: Does P/P set the framework for future development consent for any other project listed in annex II? (art. 4.2)
- Test 7: Does the relevant annex II project require EIA under national legislation? (art. 4.2)
- Two tests may be considered together
- Test 6 similar to Test 5
- List in Protocol annex II similar, but not identical, to corresponding list for Directive (Annex II to EIA Directive)
- Test 7 introduces important difference between Protocol & Directive:
  - Projects listed in Protocol annex II that do not require EIA under national legislation do not need to be included
  - All projects in corresponding list for Directive are included, irrespective of whether national legislation requires EIA
Test 8

- Does P/P set the framework for future development consent of projects irrespective of whether listed in annex I or annex II? (art. 4.3)
- Broadens Protocol’s scope to include P/Ps that
  - set framework for future development consent of projects and
  - have significant environmental effects (determined through determination of significant effects, Test 10)
- Includes projects in sectors not included in article 4.2 (Test 4) as well as projects in those sectors but not listed in the annexes (Tests 5, 6 & 7)
Test 9

• Does P/P determine the use of a small area at a local level or is it a minor modification to P/P? (art. 4.4)
• If not, SEA required under Protocol
• Meaning of small calls for careful exercise of judgement
• Small may have different meanings
  – in different countries
  – within different locations in a country
• ‘Local level’ (not just ‘local’) might imply local authority level
• ‘A small area at a local level’ might prevent exemption (i.e. Test 9 being passed) for whole of local authority area
• ‘Minor modifications’ – consider in terms of likelihood of such changes having significant environmental effects, not in terms of degree of change to P/P
Test 10

• Is P/P likely to have significant environmental effects (taking into account criteria set out in annex III)? (art. 5.1)
• Only test for significant environmental effects of P/P that
  – Falls within definition (art. 2.5)
  – And has not already been identified as clearly subject to SEA by reference to a list of P/P types
  – And:
    • either is within one of specified sectors & is listed in annex I or II (& required by national legislation) (art. 4.2), but determines use of small area at local level or is minor modification (art. 4.4)
    • or sets framework for future development consent of projects irrespective of whether listed in annex I or II (art. 4.3).
Test 10 (cont’d)

• Key features of this test (art. 5):
  – An analysis against significance criteria (in annex III, similar to Directive’s Annex II)
  – Mandatory consultation with authorities
  – Optional public participation
  – Making outcome publicly available
Test 10 (cont’d)

• Whereas earlier tests (1-9) may be carried out internally, within authority, Test 10 requires at least consultation with environmental & health authorities

• Also explicitly provides for public participation, but not mandatory (and not requirement of Directive)

• Result of any determination of significant effects publicly available (discussed later)
Test 10 (cont’d)

- Has to take into account **criteria** for P/P characteristics & effects provided in annex III:
  - Contribution to sustainable development
  - Degree to which sets framework for projects
  - Influence on other P/Ps
  - Relevant environmental, including health, problems
  - Nature of effects, including whether transboundary
  - Risks
  - Effect on valuable or vulnerable areas
Test 10 (cont’d)

- Might consider criteria as group & apply expert judgement to determine which criteria relevant & apply only them
- If not possible to determine whether P/P likely to have significant effects, recommend SEA undertaken as precautionary measure
- Avoid significance testing systems based only on
  - size / financial thresholds of projects, or
  - physical area covered by P/P
Test 10 (cont’d)

- Other possible criteria to determine significance:
  - Environmental receptors identified in article 2.7
  - Information referred to in annex IV
  - Directive includes extra criteria not in Protocol:
    - Cumulative nature of effects
    - Value & vulnerability of area likely affected, due to:
      - Special natural characteristics / cultural heritage
      - Exceeded environmental quality standards / limit values
      - Intensive land-use
Test 10 (cont’d)

• If application of one criterion indicates that P/P likely to have important effects, no need to continue with significance determination – enough to trigger SEA
• For many P/Ps, difficult to determine, with certainty, whether likely to have significant environmental effects
• The word ‘likely’ provides for this, as only required to show that effect expected with reasonable probability
A3.4 Possible practical arrangements

- Making publicly available outcome of determination of significant effects
  - May be useful to state how P/P ‘performed’ against individual significance criteria
  - Protocol suggests doing so ‘by public notices or by other appropriate means, such as electronic media’ – take care information available to broad spectrum of the public
A3.4 (cont’d) Possible practical arrangements

- Lists of types of P/Ps subject to SEA
  - Not a Protocol requirement
  - States might wish to prepare such lists, e.g.
    - identifying types for which SEA mandatory (positive)
    - providing indicative list
  - If P/P identified on positive (or other) list, may be no need to continue with detailed determination of whether P/P subject to SEA
  - If P/P on positive list then always subject to SEA
  - Discretionary list identifying P/P types always subject to case-by-case examination (art. 4), including as appropriate determination of significant effects (art. 5)
  - If using negative list, take care that P/P likely to have significant effects not wrongly exempted
A3.4 (cont’d) Possible practical arrangements

- Lists of types of P/Ps subject to SEA (cont’d)
  - Government or others may prepare lists by applying article 4 (field of application) to common P/P types to determine whether subject to SEA
  - Lists can be distributed as guidance or be included in national laws or regulations
  - Parties must provide for consultation with environmental & health authorities when first developing lists
  - May also consult with the public, but Protocol does not explicitly require this
  - Many Parties may anyway require consultation on proposed national guidance, laws, regulations