ESPOO Convention, Ninth Meeting of the Working Group on EIA

Examination of the substantive relationship between the Convention and the Protocol: Informal Paper for information

(This paper does not purport to represent the views of the European Commission or the European Community.)

1. Introduction

1 The Work Plan adopted by the 3rd Meeting of Parties to the Convention in June 2004 included an activity headed "Examination of the substantive relationship between the Convention and the Protocol". Its objective was seen as "Clarification of the relationship between the Convention and the Protocol" (Decision III/9, ECE/MP.EIA/6 Annex IX).

2 The method of work envisaged for this activity was in two parts. First, a "presentation and discussion at a one-day workshop held back to back with a Working Group on EIA meeting of the results of an EC study on the relationship between the EC Directives on EIA and SEA that are relevant to the Convention ad the Protocol". This would be followed by a "decision by the Working Group on EIA on items for further study, which may include preparation of a report on the substantive relationship between the Convention and the Protocol". The lead organisation for the first part of this work is the European Commission, and that for the second part is Belgium.

3 At its Eighth Meeting, following a progress report by the European Commission on the study on the relationship between the Directives, the Working Group on EIA decided that a presentation of the outcome of the study should be included in its next meeting and that a separate workshop, as foreseen in the work plan, would not be necessary. The delegation of Belgium observed that its follow-up work on the study, as described in the work plan, was conditional on the Working Group's response to the presentation.

4 This informal paper is intended to present the main outcomes of the study. To facilitate understanding of these it begins by describing briefly the contents of the relevant EC Directives; it then reports the scope and main findings of the study on the relationship between these Directives prepared for the European Commission (largely quoting from the report itself), finally it considers parallels with the Convention and Protocol and indicates some elements which the Working Group may wish to consider in deciding whether and, if so, how to take this work forward. It should be noted that the views expressed in the study (and reported in this paper, essentially in section 4 and the annex) are those of the Consultants alone.

2. The EC Directives

(a) Environmental Impact Assessment (EIA)

5 The EIA Directive was agreed in 1985 and has been in application in the Member States (MSs) since 1988. It has been amended twice and this description is based on its current provisions.[1] Like all Directives, it sets out the main requirements to be achieved but leaves

[1] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC) OJ L 175, 5.7.1985, p40; Council Directive 97/11/EC of 3 March 1997, OJ L 73,

the MSs to implement them in their national legislation and to determine some of the details necessary to a functioning system.

6 The Directive provides for an EIA system which applies within each Member State – it is not restricted to transboundary effects. Its main requirements may be summarised as follows. It contains definitions of several key terms, including "project" and "development consent". It requires MSs to adopt measures to ensure that certain projects likely to have significant effects on the environment are made subject to a requirement for development consent and to a prior assessment of their effects. The projects are listed in two annexes; those in annex I must always undergo EIA before they are authorised, whilst those in annex II must undergo EIA if the MS determines (using criteria specified in Annex III) that they are likely to have significant environmental effects. The developer (i.e. the proponent of the project) is responsible for supplying certain information about the project, the main effects it is likely to have on the environment, measures to mitigate adverse effects, the main alternatives he has studied and the main reasons for his choice of project. A non-technical summary of this information is also required. Environmental authorities and the public must be consulted on the information supplied by the developer and on the request for development consent. There are transboundary consultation requirements which apply when a project is likely to have significant effects on the environment of another MS. Both the results of consultation and the environmental information must be taken into account in the development consent procedure and certain information about the nature of, and justification for, the decision must be made available when the decision to grant or refuse development consent has been taken.

(b) "Strategic" Environmental Assessment (SEA)

7 Whereas the EIA Directive applies to defined projects, the SEA Directive applies to certain plans and programmes. It was agreed in 2001 and has been in application by the MSs since 2004.[2] In most respects it is very similar to the SEA Protocol but neither the title nor the text of the Directive contains the word "strategic" and its application does not depend on the alleged strategic nature of a plan or programme.

8 The SEA Directive contains definitions of some significant terms (including "environmental assessment" and the plans and programmes to which in principle the Directive applies). It then defines in more detail the plans and programmes which come within its scope and provides for MSs to determine in certain circumstances whether plans or programmes are likely to have significant effects. It requires the environmental assessment to be carried out during the preparation of a plan or programme and before its adoption. An environmental report is to be prepared, describing and evaluating the likely significant effects on the environment of implementing the plan or programme and reasonable alternatives. This report must include certain information specified in Annex I to the Directive and MSs must ensure the quality of the report. Environmental authorities, the public and other Member States whose environment is likely to be affected by the implementation of the plan or programme must be consulted. The environmental report and the results of consultation must be taken into account during the preparation of the plan or programme and before its adoption, and certain information must be made available when it is adopted. The environmental effects of

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14.3.1997, p5; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, OJ L 156, 25.6.2003, p17. An unofficial consolidated version is available at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/consleg/1985/L/01985L0337-20030625-en.pdf

[2] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197/30, 21/7/2001, p30.

implementing the plan or programme must be monitored. An SEA under the Directive is without prejudice to any requirements of the EIA Directive and to any other Community legislation. Where assessments are required under the Directive and under other EC legislation, MSs may provide co-ordinated or joint procedures to meet the relevant requirements. Annex II contains criteria which must be used in cases where MSs need to determine the significance of environmental effects of plans or programmes.

3. Similarities between the Directives

9 It will be apparent even from these summary descriptions that the EIA and SEA Directives appear to have much in common. The core requirements resemble each other closely (production of environmental information, consultation, consideration of the results in the final decision). To a greater or lesser degree, other similarities are equally striking (assessment may be required automatically or only following a determination, there are similar information requirements (although they are more extensive in the SEA Directive), the significance criteria, and some of the language used ("development consent", "project")) are also similar.

10 It is clear from the text of the SEA Directive itself that overlaps between it and the EIA Directive are possible. Indeed, Article 11 expressly provides that assessment under Directive 2001/42/EC shall be without prejudice to any requirements under Directive 85/337/EEC and any other Community law requirements. Turning to specific examples, "urban development projects" and "industrial estate development projects" are both included in annex II to the EIA Directive but plans or programmes for urban development or industrial estates will come within the scope of the SEA Directive if they conform to the criteria it contains.

11 To cast light on the best way to deal with such overlaps and elucidate more generally the legal relationship between the two Directives, the European Commission let a study (which was undertaken by Imperial College London Consultants, between July 2004 and March 2005). The other objectives of the study (besides clarifying the legal relationship) were to identify cases whose actual characteristics suggest that overlaps are possible, describe the treatment of projects, plans and programmes in the legislation implementing the Directives in the then 15 MSs and in any national legislation on SEA not linked to the Directive, and make recommendations.

12 Analysis was required of overlaps and differences between the Directives; how these affect environmental assessment in practice; interdependencies between the two; and apparent similarities.

13 The study comprised a textual analysis of the Directive, a brief examination of relevant case law, a questionnaire on transposition of the SEA Directive and the possibilities of overlaps, selected Country case studies (Austria, Denmark, France, Germany, Ireland, Sweden, UK and, for comparison, USA and Canada), a discussion of the findings, and various recommendations. The study can be found at
http://www.europa.eu.int/comm/environment/eia/final_report_0508.pdf .

4. The Study's findings

14 One important caveat needs to be made at the outset. It was generally considered, both by the consultants and the people who replied to their questions, that the study was being

undertaken when there was too little experience of application of the SEA Directive to enable robust conclusions to be reached. Member States had drafted their transposing laws but had little experience of how the Directive would operate in practice.

15 Most of the study was devoted to overlaps identified in a series of case studies but it also describes the structural similarities and differences between the directives. These will in general terms be apparent from the brief descriptions contained in sections 2 and 3 of this paper. This part of the analysis did not identify any significant consequences for the application of either Directive.

16 The only true interdependency between the two is the trigger which makes SEA mandatory for certain plans and programmes (which satisfy the other criteria of Articles 2 and 3 of the Directive), namely that they "set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC" (Art. 3(2) (a)). This provision also illustrates the use in the SEA Directive of language occurring in the EIA Directive ("development consent", "project").[3]

17 The potential for overlaps exists where the 'object' being assessed falls both within the definition of a 'project' set out in the EIA Directive and the definition of 'plans and programmes' under the SEA Directive. The research found that this issue of "project" and "plan/programme" definition represented the single largest area of potential complexity and confusion.

18 The main areas identified by the research where overlaps between the Directives are likely to occur are:-

1) Where large projects are made up of sub-projects, or are of such a scale as to have more than local significance. The determination of whether the proposal is a project or a plan or a programme therefore has significant implications as to whether it is subjected to EIA or SEA or both, and the nature of any such assessment(s) that relate to it. They may be:-
    i. In the same sector, e.g. transport;
    ii. In different sectors e.g. different elements within an industrial development (roads, buildings, etc) could be treated as separate projects or the whole development could be treated as one project or as a plan/programme;
    iii. Be undertaken by different developers;
    iv. Be subject to different consent and EIA processes;

or various combinations of these;

2) Project proposals that require the amendment of land use plans (which will require SEA) before a developer can apply for development consent and undertake EIA;

3) plans/programmes which, when adopted, also effectively give consent for projects (or require an appropriate assessment under the Habitats Directive);

[3] This interdependency has no parallel in the Protocol since Article 4 does not cross-refer to the Convention in the same way. Interestingly, too, the Protocol refers to 'projects' whereas the Convention refers to 'activities'. The question of interpretation of 'projects' by reference to the EIA Instrument (which is inherent in the SEA Directive) therefore appears not to arise.

4) Hierarchical linking between SEA and EIA ('tiering').

19 These cases are described in more detail below on the basis of information derived from the case-studies.

4.1 Case study comparisons

a) Large projects made up of sub- projects

20 Urban development projects, in most countries studied, appear to have the potential to be defined in national legislation as either a project or a plan/programme, or both. In practice they have been defined as one or the other, but the SEA Directive opens the question as to how best to treat such developments, and raises the question of legality in such definition. For example in some countries such developments are treated as projects and subject to EIA, but SEA also may now be needed. In other countries EIA has been, and will continue to be, applied to development zones. In yet other countries EIA has been applied to some urban development plans, but these are now likely to be subject to joint EIA/SEA procedures. Another country intends to apply SEA to strategic development zones which were previously subject to EIA. And elsewhere, while EIA has been applied to urban development projects in the past, it is possible that SEA will also apply to certain types of urban development projects in the future.

21 Under the EIA Directive, 'urban development projects' fall under Annex II (10 b) *"Urban development projects, including the construction of shopping centres and car parks"*

22 A project is defined in the EIA Directive (Art 1 (2) 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;"

and 'development consent' means:-

"the decision of the competent authority or authorities which entitles the developer to proceed with the project."

23 At the same time, a statutory land use plan prepared by a local authority that sets the framework for development consent of projects under the EIA Directive and is likely to have significant environmental effects is a plan requiring SEA under the SEA Directive. If that plan also, in some way, gives consent for a developer to proceed, then it may also be considered a project.

24 Given these definitions, it is perhaps not surprising that urban development projects can be classified by MSs as projects or plans or programmes. At a local level a plan, which contains proposals for specific projects, may be quite detailed in itself and may contain detail relating to those specific projects. Or it may provide an overview with the detail of the specific projects coming forward at a later date. Prior to the implementation of the SEA Directive, MSs have required EIA for urban development projects in order to meet the requirements of the EIA Directive. A plan, therefore, may have been subject to EIA if it met the criteria of the EIA Directive for project and development consent. It is possible that in requiring EIA for certain plans, some MSs may have gone beyond the requirements of the

EIA Directive (if the plan did not actually meet the Annex II criteria). However, it is the advent of the SEA Directive that raises the question of definition, since certain plans may also meet the screening criteria of the SEA Directive as well as the EIA Directive, or only the SEA Directive or maybe do not meet the SEA Directive criteria at all.

25 Transport and energy sector developments are also typical of this category and most countries have had similar problems with e.g. road schemes made up of smaller sections for consent and EIA purposes (often referred to as 'salami slicing').

b) Project proposals that require the amendment of plans

26 There are close links between this category and (c) below. Project proposals that require the amendment of plans occur in some countries. Project proposals may result in an amendment to the regional plan, which is itself subject to the SEA Act. Alternatively, changes may need to be made to the land-use plan as a result of a project proposal for which the appropriate land allocation has not previously been made, if the project is to be given consent.

c) Plans/programmes which effectively give consent for projects

27 Examples of plans/programmes that effectively give consent for projects can be found in some MSs. While formally consent is required for subsequent projects it is in effect inevitable as long as the project is in conformity with the plan. From the countries examined this situation appears almost identical to *'Large projects made up of sub-projects'* - (a) above, except that the nature and scale of the plans concerned offers the opportunity for rather different approaches to resolving the overlap issue (see below).

d) Hierarchical linking between SEA and EIA

28 The SEA Directive makes explicit the link between it and the EIA Directive through the criterion of setting the framework for future development consent of projects listed in the EIA Directive. This hierarchical linking (known by assessment practitioners and academics as 'tiering') raises an issue of the degree of overlap and potential for duplication, or even a lack of formal consideration of real alternatives where the lack of a statutory process prevents a systematic hierarchy of plans/programmes and projects, and their associated assessments, being established.

29 This issue is commonly experienced in the transport and other infrastructure sectors, such as electricity. In these areas, the overlap is more to do with the practical considerations of the hierarchy of plans, programmes and projects ('tiering'), i.e. at which level are certain considerations taken into account, for example alternative modal options or route selection in transport. The overlap issue is often created because for many MSs strategic decisions on infrastructure do not fall neatly into the typical geographical hierarchy familiar to land use planning. Many plans are often not statutory and therefore fall outside the application of the SEA Directive. So the issue of concern is not necessarily a legal one (if the SEA Directive does not apply, it does not apply, subject to testing in the courts), more a practical one in that certain decisions may have been made outside of a formal SEA Directive-compliant process, raising practical issues of how and when these are best reported (if at all) in any assessment process.

30 In this context, respondents to the questionnaire suggested that the issue of definition of plans and programmes is a common one for Member States, particularly what is meant by "required by" (Art. 3) i.e. what is a statutory plan or programme? While plans and

programmes may be produced through regular practice, they may not be required by legislation and the administrative provisions may be more open to interpretation. So some plans may not meet both criteria of being "required" and "setting the framework for", but might meet either of these individually. More likely may be plans that are not required, but that in practice do set the framework for future development consent of projects. Examples of this are likely especially in the transport sector, in relation to where the line is drawn in the consideration of appropriate alternatives at the SEA level and at the EIA level. The timing of plans will also determine the alternatives available, since the time scale for much transport investment is so long, many plans and projects coming forward will already have been constrained by previous decisions with respect to options and alternatives available. An absence of an appropriate statutory strategic plan process and therefore SEA may result in the public and NGOs seeking to broaden the scope of EIA to cover these strategic issues. In practice, of course, individual transport schemes may come forward, and be subject to EIA, outside a strategic planning process, since political considerations are often significant drivers behind major infrastructure schemes.

4.2 Approaches adopted to address overlaps

31 The approaches adopted by the MSs studied above generally lie in a limited number of options:-

a) The main overlap problem is where EIA has previously applied to certain plans/programmes:-
   i. EIA can be replaced by SEA;
   ii. there could be parallel procedures, where SEA can be operated in parallel to EIA;
   iii. there could be joint procedures where both the requirements of the EIA and SEA Directives are met simultaneously;

- it could continue to operate as EIA, but enhanced to meet the SEA Directive's requirements.

b) The reverse situation is where certain projects might now be subject to SEA as well as EIA, i.e. particularly large or complex projects, such as airport complexes (see paragraph 36 below).

a) Where EIA previously applied to certain plans or programmes

i) Replacement of EIA by SEA

32 Complete replacement of EIA solely by SEA does not appear to be commonplace among the MSs studied. Legally this is a risky strategy unless the MS is sure that EIA carried out previously was done as a matter of policy and good practice, e.g. under broader MS legislation, rather than being technically required by the EIA Directive.

ii) Parallel procedures

33 There are two forms of what might be termed 'co-ordinated procedures' presented by the case studies and that offer potential solutions to the issue of overlap between the EIA and SEA Directive. The first of these is the 'parallel procedure' of operating EIA and SEA alongside each other, in parallel. A responsible authority might take the view that there would be some practical benefit in securing some form of overview assessment (voluntary SEA). Legally, of course, under the SEA Directive, an SEA is either required or it is not. But practically it may be beneficial to provide a framework through which subsequent EIAs are organized. This would require MSs to go beyond the SEA Directive in their national legislation to enable this to take place, or else it would require case by case negotiation between the appropriate parties on a voluntary basis. Where EIA is undertaken alone (with or

without an overview assessment), this will not be legally compliant if the 'object' of the assessment (the project or plan/programme) meets the screening criteria of the SEA Directive. The EIA process would have to be enhanced to cover the additional requirements of the SEA Directive to address satisfactorily issues of alternatives, cumulative effects, monitoring and adequate consultation, effectively creating a joint procedure. An overview assessment (voluntary SEA) of all the subsequent projects may go some way to achieving this, but not necessarily. If SEA is undertaken, with subsequent EIA of sub-projects, the appropriate level of detail for each assessment will need to be specified. If both SEA and EIA are undertaken, the timing of each may be significant with regard to the exact relationship between the two. If SEA comes well in advance of the EIA, the EIA can be much more focused. If SEA and EIA are carried out more or less in parallel, the SEA should address the wider strategic implications of the scheme (beyond the normal immediate geographical and temporal scope of an EIA), while the EIA can be more focused on the location-specific aspects. In parallel procedures the timing of any SEA and EIA will determine the nature of the information that can be shared from the SEA process to the EIA process (or possibly even the other way around). If the SEA occurs first then information from the SEA process will be available to the EIA process, but in many cases it may not be as neatly sequential as might be desired.

iii) Joint procedures

34 The second form of co-ordinated procedure is the 'joint procedure', whereby a single assessment procedure is adopted which meets the requirements of both the EIA and SEA Directive simultaneously. Most Member States did not consider joint procedures for EIA and SEA to be particularly advantageous or practical. While there is generally a good understanding among practitioners as to the potential benefits of a hierarchical ('tiered') relationship between EIA and SEA, it is not particularly clear yet as to how the two processes will interact in practice in most Member States. SEA is often identified as being a more dynamic process. As such the feasibility of a 'joint procedure' was questioned by many respondents to the questionnaire survey. SEA (in theory at least) precedes EIA by quite a long time and (in practice) the scale and level of detail of the environmental considerations is likely to differ significantly, making practical joint procedures difficult. However, in areas such as land use planning, local level plans may be of local scale, very detailed and closely linked in time and space to EIA and development consent of projects. In such circumstances the potential for close overlap between EIA and SEA is much larger. Joint procedures could also offer benefits, particularly in the identification of cumulative effects at strategic levels and following these through to project level. Efficiencies in public consultation may also be possible. Legally, joint procedures will only be appropriate for those occasions where the screening criteria of both the EIA and SEA Directives are met. A joint procedure will therefore need to ensure both the requirements of the EIA and the SEA Directive are met simultaneously. This will need to be reflected in joint documentation and possibly a generic contents list for a joint ER/EIS (a model is suggested in the report). As the types of plans/programmes which are likely to require simultaneous SEA/EIA are by their nature more detailed types of plans covering a relatively small geographical area (if they were not then they would be unlikely to fall within the scope of the EIA Directive) then any joint environmental documentation is likely to require a high level of detail.

iv) Enhanced EIA (a subset of (iii))

35 Enhancements of the EIA process will be necessary to meet the requirements of the SEA Directive, to avoid non-compliance. Ultimately (from a theoretical and practical point of view) such an approach can lead to a closer harmonisation of EIA and SEA as environmental assessments, with less distinction of them as different or separate processes, and more akin to

a joint procedure. This is essentially a pragmatic, 'bottom-up' approach to SEA (i.e. developing the scope of the EIA to address more strategic aspects). However, if the PP actually falls within the scope of the SEA Directive then to avoid legal risks SEA should be applied. If it is a PP (within the meaning of the SEA Directive) and a project (within the meaning of the EIA Directive) then a joint EIA/SEA procedure would be more appropriate.

b) EIA for projects supplemented by SEA

36 It may be that in certain circumstances some very large projects, e.g. airport complexes, which may have many sub-projects (and previously subject to EIA) can have much wider strategic effects and as such could be treated as a plan or programme as well as a project. In such situations it may be that the requirements of both Directives need to be met, whether at the same time or sequentially, e.g. as SEA and EIA for the whole airport scheme, or SEA for the whole scheme followed by EIAs for component projects. In cases where the SEA Directive did not apply, it may be that MSs might wish to go beyond the Directive's requirements by asking for SEA as good practice rather than to meet an obligation arising from EC law. The reason might be that it made practical sense as a way of allowing real strategic alternatives to be considered.

Recommendations

37 The report addresses 9 recommendations to the MSs, the European Commission or both. They are listed at annex A to this paper, without further comment.

5. Relationship between the SEA Protocol and the EIA Convention

38 In considering any lessons that the study on the EC Directives may have for the Convention and Protocol, it is important to have in mind that the Convention does not prescribe in detail a national EIA system for Parties to adopt. This may provide more flexibility for some Parties but it is unlikely to be available to EU MSs as they are bound by the respective Directives.

39 The paper prepared by the Secretariat in 2003 as a basis for the work plan under the Protocol raised three questions for consideration.

40 They were

a) potential overlap between plans/programmes and projects;
b) consideration of socio-economic effects; and
c) trans-boundary consultation.

41 These are discussed briefly in turn.

42 The first of these issues is essentially the same as that described in detail in the EU study. The Secretariat paper noted that there could be an overlap between projects (subject to EIA) and plans/programmes (subject to SEA). It said that large-scale projects have some of the characteristics of plans and programmes, just as small-scale plans and programmes may be confused with projects. For example, it asked, is an urban development project really a programme of small projects for which an SEA and a series of EIAs will be necessary? It also pointed out that the boundary between the EIA Convention and the SEA Protocol was further blurred by the common list of projects included as Annex/Appendix I to both instruments. It therefore suggested that it was "important that the two legal instruments (Convention and

Protocol) indicate clearly whether an EIA or an SEA has to be done". *Comment: This solution would appear to involve amending one or both instruments (and, in due course for EU MSs, the respective Directives) and does not seem a likely option in the foreseeable future. On the other hand, the practical solutions reported in the EU study (parallel or joint procedures) may be equally appropriate in the context of the Convention and Protocol.*

43 The issue raised by option (b) was that the definition of "impact" in the Convention includes among the effects listed "effects on cultural heritage or socio-economic conditions resulting from alterations to those factors" (Article 1(vii)). There is no explicit reference to "socio-economic conditions" in the definition of "effect" in the Protocol (Article 2(7)). Hence, the paper argues, there is the opportunity for ambiguity, or even dispute, as to whether socio-economic effects or impacts should be considered in relation to the activities listed in Appendix I to the Convention (and repeated in Annex I to the Protocol) where both instruments apply. There is an argument that the most appropriate level for considering socio-economic effects is the planning rather than the project level. *Comment: Given the flexibility of the language used in the Protocol ("the interaction among these factors", Article 2(7)) and Parties' ability to go beyond its requirements if they wish, it would be open to them to consider socio-economic effects at the planning, as well as the project, level. It would also be open to the working group to consider producing "good practice" guidance to this effect, if it considered it necessary.*

44 So far as issue (c), trans-boundary consultation, is concerned, the Convention provides more detailed and concrete provisions than the Protocol on how consultation is to be carried out. As the Secretariat paper points out, as with socio-economic effects, this may lead to legal ambiguity or dispute as to how trans-boundary consultations are to be conducted for large-scale projects and small-scale plans/programmes. *Comment: It may be that in cases where the Convention and Protocol both apply, joint procedures may provide an adequate solution. The working group may, however, wish to consider whether it could be helpful to draw up guidance to cover this situation and possibility also to deal with trans-boundary consultation on plans/programmes in cases where only the Protocol applies (i.e. the cases which cannot be considered to be both projects and plans/programmes).*

45 The working group may also wish to consider whether any other aspects of the relationship between the Protocol and Convention merit attention.

6. Summary

46 Potentially the EC Directives overlap in four areas:

i) Where large projects are made up of sub-projects, or are of such a scale as to have more than local significance;

ii) where project proposals require the amendment of land use plans (which will require SEA) before a developer can apply for development consent and undertake EIA;

iii) where plans and programmes when adopted or modified, set binding criteria for the subsequent consent for projects (i.e. if a developer subsequently makes an application which complies with the criteria then the consent has to be given);

iv) when there is hierarchical linking between SEA and EIA (tiering).

47 To be legally compliant MSs must ensure they meet the requirements of both Directives when both apply. This could be done through EIA and SEA procedures applying in parallel; or through joint procedures, specially devised to meet the requirements of both Directives simultaneously.

48 In principle similar potential overlaps appear to exist between the Convention and Protocol. The Working Group will wish to consider whether the same solutions could also apply.

49 The treatment of socio-economic effects and of trans-boundary consultations is not identical in the Convention and the Protocol and the Working Group may wish to consider what if anything needs to be done to clarify matters.

Brussels,
30 March 2006.

Annex A

The Consultants' Recommendations

i) MSs should consider whether co-ordinated - parallel or joint – EIA/SEA procedures are possible and/or appropriate.
ii) Where MSs might be faced with either i) replacing EIA with SEA, or ii) applying EIA to plans /programmes they should consider carefully how the requirements of both Directives shall be met if the object of assessment meets the screening criteria of both Directives.
iii) MSs should examine possible gaps between the EIA and SEA Directives and consider whether and how to address plans/programmes and projects that fall between these Directives (or where neither Directive applies), in order to ensure that likely significant environmental effects on the environment are considered at the most appropriate level of assessment.
iv) Where EIA and SEA might both apply, MSs should determine how best to co-ordinate the content of the assessments and the decision-making processes, and should consider whether it is appropriate to create clear differential responsibility for different aspects at different levels.
v) The Commission, in undertaking the review processes for the EIA and SEA Directives, should consider the scope for clarification, in either or both Directives, of the definitions of project, programme and plan.
vi) Guidance should be provided by the Commission and/or Member States on the content of EISs and ERs to encourage a consistent hierarchical relationship between the two processes ('tiering').
vii) The Commission and/or MSs should, after MSs have had more experience of operating both systems together, commission further research in this area, included focused research on the application of EIA and SEA to specific sectors, e.g. urban development projects, and the transport and energy sectors.
viii) MSs should consider reviewing their EIA and SEA implementing legislation after more experience of operating both together, to see whether there is scope to create a more consistent or consolidated approach where possible.
ix) The Commission should, after sufficient experience of the EIA and SEA Directives operating together, consider whether the consolidation of the two Directives might achieve greater consistency and efficiency in environmental assessment across MSs.