



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

Resource Manual to Support Application of the UNECE Protocol on Strategic Environmental Assessment

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- Legal obligations
- Detailed description of tests
- Possible practical arrangements

# SEA?



## A3.2 Legal obligations

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- 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

tourism, town and country planning or land use, and which set the framework for future development consent for projects listed in annex I and any other project listed in

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## A3.3 Detailed description of tests

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Definition of a plan or programme (P/P) (art. 2.5)	
Test 1	Is the P/P (or the modification to it) required by legislative, regulatory or administrative provisions? (art. 2.5(a))
Test 2	Is the 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))
Exemption from application (art. 4.5)	
Test 3	Is the sole purpose of the P/P to serve national defence or civil emergencies, or is it a financial or budget P/P? (art. 4.5)
Mandatory application (art. 4.2)	
Test 4	Is the 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)
Test 5	Does the P/P set the framework for future development consent for projects listed in annex I? (art. 4.2)
Test 6	Does the 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)
Non-mandatory application (art. 4.3 and 4.4)	
Test 8	Does the P/P set the framework for future development consent of projects irrespective of whether they are listed in annex I or annex II? (art. 4.3)
Test 9	Does the P/P determine the use of a small area at a local level or is it a minor modification to a P/P? (art. 4.4)
Determination of significant effects (art. 5.1)	
Test 10	Is the P/P likely to have significant environmental effects (taking into account the criteria set out in annex III)? (art. 5.1)

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- 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



- 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



- 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





- 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



- 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



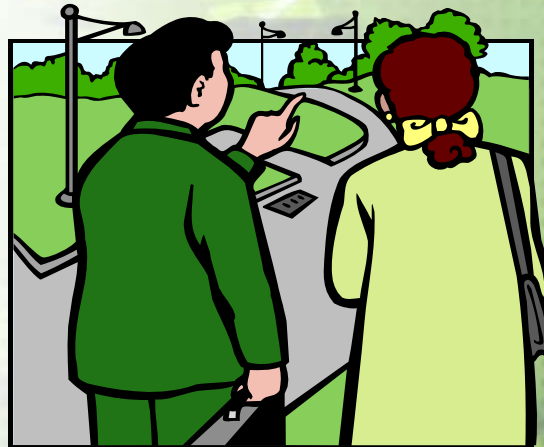
- Is P/P being prepared for agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning or land use? (art. 4.2)
- A candidate P/P that has reached this test falls within 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



- 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



- 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)



- 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)



- 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





- 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)



- 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



- 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).



- 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



- 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*)

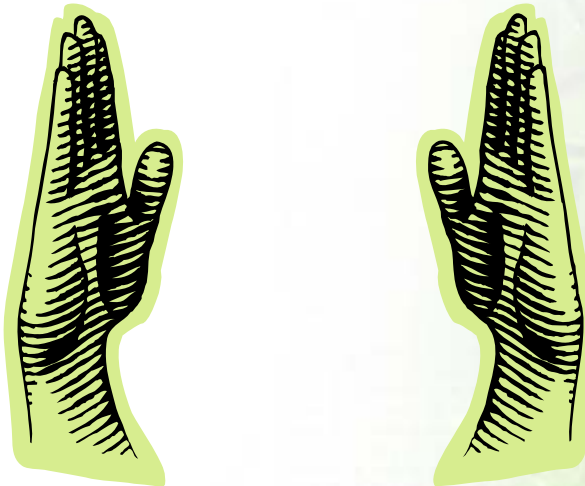


- Has to take into account **criteria** for P/P characteristics & effects provided in annex III:
  - Contribution to sustainable development
  - Degree to which sets framework for projects
  - Influence on other P/Ps
  - Relevant environmental, including health, problems
  - Nature of effects, including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

2. 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



- 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



- 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





- 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



- 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



- 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

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- 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

3. waste management plan
4. municipal land-use plan
5. waste disposal plan
6. local transport plan
7. minerals plan

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