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Practical guidance on reforming legal and institutional structures

with regard to the application of the Protocol on Strategic Environmental Assessment

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Practical Guidance

On reforming legal and institutional structures with regard to the application of the Protocol on Strategic Environmental Assessment.

Prepared by a consultant to the ECE secretariat, Mr. Jerzy Jendrośka[1] in February 2016 and adopted by the by the Working Group on EIA and SEA at its sixth meetings (Geneva, 7-10 November 2016).

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The information and views set out in this document do also not necessarily reflect the opinion of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and the Protocol on Strategic Environmental Assessment (Protocol on SEA), nor are they binding for the Parties.

With regard to the references to the EU legislation, this practical guidance does not create any obligation for EU member States. The definitive interpretation of EU law is the sole prerogative of the Court of Justice of the EU.

The publication was not formally edited by the ECE secretariat.

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Preface

The United National Economic Commission for Europe (ECE) Protocol on Strategic Environmental Assessment (Protocol on SEA) to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) is an international agreement that provides for legal obligations and a procedural framework for the implementation of strategic environmental assessment (SEA) in countries that are Parties to it. It was adopted on 21 May 2003 and entered into force on 11 July 2010; by November 2017 it had 32 Parties, including the European Union, as identified on the Convention's website (http://www.unece.org/env/eia). The Protocol is open to all member States of the United Nations.

The Protocol on SEA was negotiated under the Espoo Convention to extend the principles and the scope of the Convention to plans, programmes, and, to the extent appropriate, to policies and legislation. Similarly to the Espoo Convention, the Protocol on SEA is intended to help make development sustainable by promoting international cooperation in assessing the likely impact of proposed development planning on the environment. However, unlike the Convention, which applies only to proposed activities that are likely to cause significant adverse impact across the national frontiers, the Protocol applies mainly to domestic plans and programmes that set framework for activities that require an environmental impact assessment under national legislation. The Protocol ensures that explicit consideration is given to environmental factors well before the final decision is taken on plans and programmes which are likely to have significant environmental, including health, effects. It also ensures that the environmental and health authorities and people living in areas likely to be affected by adverse effects are informed of the plan or programme. The Protocol further provides an opportunity for the environmental and health authorities and public to make comments or raise objections to the proposed document and to participate in relevant strategic environmental assessment procedure. It also ensures that the comments and objections made are transmitted to the competent authority responsible for preparation of the plan or programme and are taken into account in the final decision. Should transboundary effects be likely, the Protocol provides also for transboundary consultations.

Despite benefits, the path towards establishing and implementing SEA systems that comply with the Protocol standards remains challenging in a number of countries. Lack of legislative and institutional frameworks for SEA and gaps and contradictions in the existing legislative frameworks are important impediments which need to be overcome by their governments.

This Practical guidance on reforming legal and institutional structures with regard to the application of the Protocol on Strategic Environmental Assessment was prepared in response to a request by the countries of Easters Europe and the Caucasus to support legislative reforms. It provides ideas for designing effective legislative and institutional solutions. The guidance may also be of use to other countries within and beyond the ECE region that plan to join the Protocol on SEA and are in the process of establishing and reforming their national legal and institutional frameworks to implement the Protocol.

The Guidance was prepared by a consultant to the ECE the secretariat to the Protocol on SEA with the secretariat's support and funding from the EU Programme "Greening Economies in the Eastern Neighbourhood" (EaP GREEN). It was reviewed and revised by the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment (Working Group) at its fifth meeting (Geneva, 11–15 May 2016) and adopted by the Working Group at its six meeting (Geneva, 7–10 November 2016).

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I. Introduction

1. This practical guidance aims to assist countries of Eastern Europe[2] and the Caucasus[3] in their legislative reforms towards establishing appropriate legal and institutional frameworks to implement the provisions of the United Nations Economic Commission for Europe (ECE) Protocol on Strategic Environmental Assessment (Protocol on SEA) to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). It provides guidance for the implementation of the obligations under the Protocol on SEA, illustrates good practice and provides ideas for designing effective legislative and institutional solutions. The guidance may also be of use to other countries within and beyond the ECE region that plan to join the Protocol on SEA and are in the process of establishing and reforming their national legal and institutional frameworks to implement the Protocol.

2. The guidance has been prepared as a tool to facilitate legislative reforms undertaken by Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine with the assistance provided by the ECE secretariat to the Convention and the Protocol within the EU funded programme Greening Economies in the Eastern Neighbourhood (EaP GREEN)[4]. It draws heavily on the hitherto experience in this respect, in particular with regard to addressing the legislative dilemmas faced by law drafters in the countries benefiting from the EaP GREEN Programme.

3. As many of the countries that have been undertaking legislative reforms related to strategic environmental assessment (SEA)have been seeking to align their legislative framework with the requirements of the European Union (EU) law, the guidance - while being focused on the implementation of the Protocol on SEA - provides also a short description of the main differences between the Protocol on SEA and the EU SEA Directive.[5] Similarly, bearing in mind that legislative reforms related to SEA are quite often combined with the reforms related to environmental impact assessment (EIA), the guidance provides also a short description of the main differences between SEA and EIA.

4. The guidance aims to provide advice to law-drafters. It is therefore focused on issues related to designing the legal framework for SEA and not on its practical implementation. In this context it should be read in conjunction with the *Resource Manual to Support Application of the Protocol on Strategic Environmental Assessment* (Resource Manual)[6] and the *Good practice recommendations on public participation in strategic environmental assessment.*[7]

[2] The Easten Europe sub-region includes the following cpountries: Belarus, the Republic of Moldova and Ukraine.
[3] The Caucasus sub-region includes Armenia, Azerbaijan and Georgia.
[4] Greening Economies in the Eastern Neighbourhood (EaP GREEN) programme is a large regional programme implemented in 2013-2018 by the United Nations Economic Commission for Europe (ECE), OECD, UNEP, and UNIDO to assist the six European Union's Eastern Partnership (EaP) countries: Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine, in their transition to green economy. The programme is financed by the European Commission, the four implementing organizations and other donors. Further information is available at: http://www.unece.org/env/eia/about/eap_green.html.
[5] 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.
[6] Online publication (ECE/MP.EIA/17), available from http://www.unece.org/env/eia/pubs/sea_manual.html.
[7] ECE/ EIA/SEA/2014/2 available from http://www.unece.org/fileadmin/DAM/env/documents/2014/EIA/MOP/ECE.MP.EIA.SEA.2014.2_e.pdf

5. Throughout this guidance, “must” refers to the requirements stemming from the Protocol on SEA and other relevant binding international instruments (like e.g. the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)), and “may” or “could” refer to possible alternative ways of addressing a given issue in a legal framework or to additional good practice that the drafters may wish to follow.

II. Process of reforming legal and institutional structures for SEA

A. Steps in the reform and timing

6. Experience shows that the reform towards establishing appropriate legal and institutional frameworks for SEA is most effective in practice when it is designed to be carried out in the following consecutive stages that are described in the next sections of this publication:

a. Legislative review of existing frameworks relating to SEA;
b. Law-drafting;
c. Capacity-building.

7. To this end, one of the crucial factors is timing. The process is most effective when sufficient time is allowed to implement each of the above steps and when the respective time-frames are clearly defined in advance but remain flexible enough to accommodate unexpected developments. Unrealistically short time-frames may lead to either frustration or poor results.

8. Focusing only on law-drafting and omitting a proper legislative review may result in adopting a framework which is either difficult to implement in practice or which is not sufficiently comprehensive to ensure proper framework for SEA procedure aligned with the Protocol.

9. Even a perfectly designed legal framework may be poorly implemented without building capacities of implementing agencies and SEA experts in the respective country.

B. Legislative review

10. Legislative review of existing environmental assessment system, planning systems and relevant institutional frameworks vis-à-vis the provision of the Protocol has proven to be an extremely important initial step for a reform. Its role is to set the scene for the law-drafting by identifying the existing legal and institutional framework for strategic decision-making and basic options for legislative intervention. In countries with no (or very little) experience on SEA the review is most useful when - in addition to local experts - it involves international experts with extensive experience in drafting SEA legislation (on the role of international experts see section F).

11. The key function of the legislative review is to make an analysis of the existing situation in a given country with a view to identifying the following properly, clearly and comprehensively:

a. Types of strategic decision-making documents being prepared in practice in a given country that may fall under the application of the Protocol, e.g. that may become subject to SEA;
b. The legal basis for preparation of these documents;
c. Procedures for the preparation of such strategic documents;
d. Main stakeholders involved in the preparation of the strategic documents and their environmental assessment (see section E.);
e. The legislative and regulatory context, including the country's international obligations;
f. Major obstacles which may potentially hinder the adoption of a proper legal framework for SEA and/or its practical application.

12. On the basis of the above analysis the legislative review is expected to provide clear guidance regarding the scope of the reform and various solutions regarding inter alia the terminology or the legislative techniques to be employed during the law-drafting.

C. Law-drafting

13. Law-drafting is the most crucial stage of the legislative reform. It is worth noting, however, that even if the law-drafting itself is perfectly organized, it may not be successful if not preceded by a legislative review and not followed by capacity-building.

14. The key factors needed for drafting effective SEA legislation include motivation and expertise of the drafters and the commitment of the government. The drafters should possess the following key expertise:

a. In-depth knowledge of the requirements stemming from the Protocol on SEA and other relevant international instruments;
b. In-depth knowledge of the relevant existing legal and institutional framework in given country;
c. Practical experience and proven skills in law-drafting.

15. For drafting SEA legislation in countries with no or very little experience in SEA it would be extremely useful to ensure that the drafters also have proven experience in the following:

a. Drafting SEA legislation in various countries;
b. The practical implementation of SEA, ideally in various countries;
c. The legal practice in a given country, in particular with the practical implementation of environmental, planning or generally administrative law;
d. The administrative culture/s in a given country.

16. There are different approaches to organizing the law-drafting process: it can be done by governmental officials or by hired external consultants, by domestic or international experts, by a large group of representatives of various interests or a single person.

17. Bearing in mind the above listed qualifications and experiences useful for the purpose of law-drafting, it is extremely rare that one person meets all the criteria. On the other hand, it may prove difficult to manage a very large drafting group consisting of representatives of all stakeholders.

18. There is a need to ensure consistency throughout the entire process of preparing the draft law. To this end, the best results are achieved if the grafting group is kept relatively small and includes several governmental officials and up to three qualified external experts that cover all qualifications and experiences listed above, but the actual draft is written by one person who holds the role of the penholder. In this respect, relying solely on international experts does not seem to be producing good results - much more productive is to put the burden of the actual drafting on one person familiar with the style of legal documents customarily produced in a given legal system. It is useful to regularly discuss the results of the work of the small drafting group with a larger group of stakeholders.

19. The law-drafting process produces the best results when organized in the following consecutive stages:

a. Preparation of a draft concept of the law with the outline of the scope of the proposed legal instrument and a description of proposed legal content of the key options;
b. Developing of a first draft law with concrete drafting proposals (where applicable with alternative versions of certain provisions);
c. Preparing a final draft law.

20. At each of the above stages it is very useful to organize wide external consultations and public participation. These may take different forms, i.e. written consultations, face-to-face meetings, round-tables or formal public hearings. It is important that all key stakeholders (see section E. Identification and involvement of stakeholders) are involved.

D. Capacity-building

21. Capacity-building usually includes various activities. The most popular are:

a. Carrying out pilot projects on application of the SEA procedure to a selected governmental plan or programme;
b. Providing training to key stakeholders, including environmental and sectoral authorities;
c. Producing guidance on practical application of the SEA procedure.

22. A pilot SEA application may be initiated before the final adoption of a new legal framework on SEA. However, they would be most useful if conducted when some basic concepts and solutions for a proposed SEA scheme are already known and can be tested in practice.

23. Training for the key stakeholders would be most useful if conducted when the law with a new legal framework on SEA is already adopted and awaits entry into force.

24. Guidance on practical application of the SEA procedure would most usefully be:

a. Produced when the new legal framework on SEA is already adopted and awaits entry into force;
b. Revised following some practice with the implementation of the new legal framework for the SEA procedure.

E. Identification and involvement of stakeholders

25. It is extremely important to identify and involve relevant stakeholders at the very early stage of the legislative reform, possibly already at the stage of legislative review.

26. The key stakeholders in SEA-related legislative reforms usually include:

a. Environmental and health authorities;
b. Public authorities responsible for preparation of the strategic documents subject to SEA;
c. EIA/SEA consultants;
d. Non-governmental organizations (NGOs), in particular those dealing with environmental and health issues;
e. International and local experts in EIA/SEA;
f. Experts in law-drafting.

27. As opposed to legislative reforms related to EIA, legislative reforms related to SEA do not necessitate the involvement of representatives of the developers or private business as key stakeholders.

28. Usually not all key stakeholders need to be included in the small drafting group or be otherwise involved in the day-to-day law-drafting process. It is enough if they are involved routinely during the external consultations mentioned above (see para. 20).

F. Role of experts with extensive international experience

29. In order to provide required expertise and sufficient support to the legislative reform it is very useful to involve experienced international experts. Their role is usually to provide in-depth knowledge of the requirements stemming from the Protocol on SEA and other relevant international instruments as well as experience in drafting SEA legislation and in implementing SEA in various countries.

30. As international experts usually do not have sufficient expertise related to the domestic legal framework, relying solely on international experts in carrying any legislative reforms, including legislative reform related to SEA, cannot produce best results. The expertise of the international experts is best used if it is combined with the expertise of national experts. The combination may differ depending on the different stages of the reform.

31. At the stage of legislative review, the best results are usually achieved when the review process is led by an international expert possessing not only in-depth knowledge of the requirements stemming from the Protocol on SEA and other relevant international instruments, but also having extensive experience in such reviews in other jurisdictions. National experts, or even international experts that have experience only in their own country, are not always able to identify all potential issues that should be taken into account during the legislative reform.

32. At the stage of law-drafting, the best use of international experts is achieved when they are fully involved in the small drafting group and provide on a regular basis to the group (or to the decision-makers) the following:

a. Advice on the requirements stemming from the Protocol on SEA and other relevant international instruments;
b. Suggestions as to the possible approaches to be applied for individual SEA stages (such as screening, scoping, preparation of the SEA report, consultations with the environmental and health authorities, etc);
c. Experience with various approaches applied in other countries;
d. Comments regarding proposed approaches and specific provisions, in particular:
i. Their compatibility with the requirements stemming from the Protocol on SEA and other relevant international instruments;
ii. Their consistency with other draft provisions;
iii. Their likely efficiency in practice;
e. As needed and in close cooperation with the government representatives, providing specific elements for drafting.

33. It is not necessary that the international experts are present in person in the country during the entire legislative reform, but it can be good to get personally acquainted with any specific conditions or circumstances in a given country and meet the local experts. Assistance can be definitely provided from a distance, such as by way of exchanging written submissions, participation in tele-conferences or webinars.

III. Scope of the legislative reform and legislative technique

A. Environmental Impact Assessment and Strategic Environmental Assessment

34. EIA and SEA are both forms of environmental assessment. They are procedural instruments of preventive environmental policy and as such both have similar goals and a lot of similar features, in particular as far as the procedural elements are concerned. EIA and SEA differ however significantly with regard to the type of the activities covered by the assessment and the scope of the assessment.

35. EIA under the Espoo Convention and EU EIA Directive[8] is applied to specific activities i.e. concrete individual projects that are planned to be undertaken by developers (regardless of whether they are private or public) and require authorization by a competent public authority. Thus, EIA is undertaken for activities planned by developers regardless of whether they are individual persons, private companies or public bodies responsible for developing infrastructure projects.

36. SEA under Protocol on SEA and the EU SEA Directive is applied to strategic documents, such as plans or programmes, prepared by public authorities, which, unlike developers under the EIA scheme, do not need to seek a decision from any other authorities to authorize their strategic documents. The SEA scheme under the Protocol on SEA and the SEA Directive does not cover strategic documents prepared by private persons or companies.

[8] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

37. The assessment under EIA procedure focuses on the physical impact of the project on the environment while the assessment in SEA, bearing in mind the larger scale and less precise data, focuses rather on the achievement of relevant environmental objectives. However, when plans and programmes provide enough details with regard to the planned activities also physical impacts can be assessed.

38. The above differences between EIA and SEA are reflected in slightly different procedural requirements and the respective documentation (reports) to be prepared further to the EIA or SEA procedure. Also, the role of competent authorities in EIA and SEA procedures is different.

39. From the point of view of drafters of the SEA legislation the key difference between EIA and SEA is the fact that EIA is a quite well-established concept. Most countries have relatively developed legislation as well as practical experience in application of EIA procedure. At the same time, SEA is a relatively new concept. In many countries there is no or very little experience in SEA application. Furthermore, as already indicated, EIA is applied for concrete development project while SEA is applied for strategic documents, e.g. plan and programmes. To this end, developers or private business is not usually considered key stakeholders in SEA procedures.

40. To address the above differences, most countries opt for separate legal schemes for EIA and SEA in their national legal frameworks. Quite often however both schemes are included in the same legal act - whether a general environmental law or special EIA/SEA law (see section D. Legislative technique).

B. ECE Protocol on SEA and EU SEA Directive

41. The mandatory provisions of the ECE Protocol on SEA are broadly equivalent to those of the EU SEA Directive (Resource Manual, p. 3). There are however some differences. The major differences between the Protocol and the Directive from the point of view of drafters preparing the SEA legal framework relate to the following issues:

a. Approach to health issues;
b. Approach to biodiversity assessment;
c. Reference to development consents;
d. Approach to define the subject of rights to participate.

42. As far as the approach to health issues is concerned it is worth noting that the Protocol on SEA was a joint undertaking of two international organizations: ECE and World Health Organization. In this regard, the aim to some extent was to provide a first binding international legal instrument to comprehensively include health issues into the environmental assessment. Therefore, the Protocol refers to health explicitly in the definition of environment ("environmental, including health, effect", see article 2, para. 7 of the Protocol). Examination of health issues is clearly incorporated in to the assessment as a substantive part (see annex IV of the Protocol); health authorities are required to be formally involved into the SEA procedure (see article 9 of the Protocol).

43. In the SEA Directive, the biodiversity assessment under the Habitats Directive[9] is formally linked to SEA by a reference to impact on Natura 2000 sites as one of the factors triggering the need for SEA. In the Protocol on SEA there is no specific reference to biodiversity assessment (see paras. 46-48).

44. In the SEA Directive there is a reference to setting the framework for future development consent of projects listed in Annexes I and II to the EIA Directive (article 3, paras. 2(a) and 4) while in the Protocol on SEA there is a similar reference to setting the framework for future development consent of projects "listed in annex I to the Protocol and any other project listed in annex II that requires an environmental impact assessment under national legislation" (article 4, para. 2). While the list of projects in the respective annexes to both instruments is almost identical, the difference is that under the SEA Directive the reference to projects covers all projects listed in the annexes to the EIA Directive, whereas under the Protocol on SEA, the reference is much less clear as it refers to "any other project listed in annex II that requires an environmental impact assessment under national legislation" (article 4, para. 2). This reference may pose some problems for drafters of the national SEA scheme as it gives less precise standard than in the SEA Directive and refers to national EIA scheme (see section V. Field of application). It is worth noting, however, that regardless of whether all projects listed in annex II require EIA under a given national legislation, strategic documents "setting the framework for future development consent" of projects listed in annex II may, under article 4, paragraph 3, of the Protocol on SEA, require SEA to be performed (see section V. Field of application).

45. Finally, it is also worth noting that while both the Protocol on SEA and the SEA Directive clearly invoke the Aarhus Convention, the Protocol on SEA is rather unclear as to the subject of the rights participate in SEA procedure (as it refers both to „the public" and to „the public concerned" while the SEA Directive is much more in line with the approach in article 7 of the Aarhus Convention as it refers to „the public" which should be identified for the purpose of participating in the SEA procedure (article 6, para. 4, SEA Directive).

C. Biodiversity assessment

46. Article 14 of the Convention on Biological Diversity (CBD) identifies impact assessment at both project- and strategic-level as a key instrument for achieving the conservation, sustainable use and equitable sharing objectives of the Convention. At its sixth meeting (The Hague, 2002), the Conference of the Parties (COP) endorsed draft guidelines for incorporating biodiversity-related issues into EIA legislation and/or processes and in SEA (Decision VI/7-A). Following these guidelines and the guidelines adopted by the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) (Resolution VIII.9) and the Convention on Migratory Species (Resolution 7.2), voluntary guidelines on biodiversity-inclusive impact assessment were endorsed by the eighth meeting of the CBD COP (Curitiba, Brazil, 20-31 March 2006). They provide detailed guidance on whether, when, and how to consider biodiversity in both project- and strategic-level impact assessments.

[9] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

47. In the EU a special legal scheme for biodiversity assessment is regulated under the Habitats Directive. At the project level the scheme is separated from the EIA scheme (although the recent 2014 amendment to the EIA Directive requires both schemes to be coordinated) while at the strategic level it is formally linked with the SEA scheme by a specific reference in the SEA Directive to the impact on Natura 2000 sites as one of factors triggering the need for SEA (preamble, para. 10). In 2013 European Commission issued Guidance on climate change and biodiversity in SEA.[10]

48. While, as already mentioned, the Protocol on SEA does not specifically refer to biodiversity assessment, there is also nothing in the Protocol that would prevent Parties from including biodiversity assessment into their national SEA framework.

D. Legislative technique

49. There is a number of possible formal legal ways of introducing SEA into the national legal framework. In most continental EU countries, issues of significant legal importance are required to be regulated at the legislative level while issues of technical or purely implementing nature may be regulated by executive regulations. Since in the vast majority of EU countries, SEA has been considered of significant legal importance and not only of technical nature, it has been introduced to the national system by way of adopting a legislative act. Only in a few countries, most notably the UK (due to the specificity of its legal framework and the general arrangements regarding the transposition of EU laws) - SEA has been introduced by adopting respective executive regulations.

50. The most common way to introduce SEA procedure into the national legal framework at the legislative level is to incorporate it into already existing legislation, most often to the general environmental protection laws (the Environmental Protection Act/ Environmental Protection Code for example in Lithuania, the Netherlands, Slovakia and Sweden) or to specific laws on EIA (the EIA Act, for example in Czech Republic, Estonia, Germany, Hungary, Latvia, Malta and Slovenia). Some countries (such as Poland) found useful to develop the so-called “horizontal legislation” which in one legal act provides the legal schemes for EIA, SEA, public participation and access to environmental information. There are also countries (such as Cyprus, Denmark, Finland, France, and Luxembourg) that have chosen to introduce SEA by creating an independent SEA Act.

51. In most EU countries, regardless of the selected approach, the main legal instrument regulating SEA is complemented with a set of other legislative and/or regulatory measures introducing SEA-related provisions into a general legal framework for land-use planning and building (for example Austria, Czech Republic, Finland, France, Germany and Poland) and into sector-specific legislation (such as waste management, water management, forest management or transport).

[10] Guidance on Integrating Climate Change and Biodiversity into Strategic Environmental Assessment, European Commission 2013.

52. The report on the application and effectiveness of the SEA Directive prepared in 2009 for the European Commission by Cowi (Cowi Study 2009)[11] shows how the SEA Directive was transposed into the national legal framework and how it was implemented in practice five years after the transposition deadline. Worth noting in this report is the fact that countries which reported the smallest number of SEA procedures conducted annually (Cyprus, Luxembourg and Malta,) are those that relied on only one legal instrument to introduce SEA into the national legal framework. In contrast, countries reporting the biggest number of SEA procedures (or screening procedures) are those that complemented the main SEA legal instrument with a set of other legislative and/or regulatory measures introducing SEA-related provisions into the general legal framework for land-use planning and building legislation as well as into sector-specific legislation (Austria, Finland, France).

BOX I
Drafting suggestions regarding the scope of legislative reform and legislative technique

1. Efforts towards establishing a modern SEA scheme would be more successful if there is an effective modern EIA scheme in the country. In countries without such effective modern EIA scheme, it seems reasonable that the legislative reform attempts to cover both EIA and SEA in the same process.

2. For countries with the traditional OVOS/*expertiza* systems,[12] introduction of new modern EIA and SEA schemes does not necessarily involve abolishment of the system of *expertiza* as means to provide environmental control over development processes. Conceptually and technically it is perfectly possible to combine new modern EIA and SEA schemes with a slightly revised legal scheme for *expertiza*.

3. Countries that would like or are under legal obligation to follow the EU system of biodiversity protection of Natura 2000 sites but do not have the entire legal and institutional framework for the creation of such a system ready yet, may nevertheless consider introducing into their SEA scheme a biodiversity assessment modeled after article 6 of the Habitats Directive. Until the system of Natura 2000 sites is created, the biodiversity assessment may refer to protected areas of biodiversity existing under any of the nature protection law already in force in the country.

4. As the practice in the EU countries suggests, regardless of whether the main SEA legal scheme is incorporated into a general environmental law or a specific SEA law or otherwise, it

[11] Study concerning the report on the application and effectiveness of the SEA Directive (2001/42/EC) Final report April 2009 available at http://ec.europa.eu/environment/eia/pdf/study0309.pdf.

[12] For the description of the traditional OVOS/expertiza systems see *General guidance on enhancing consistency between the Convention and environmental impact assessment within State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia (ECE/MP.EIA/2014/2). Online available at: https://www.unece.org/fileadmin/DAM/env/documents/2014/EIA/MOP/ECE.MP.EIA.2014.2_e.pdf.*

will be much more effective if such a general SEA scheme would be supplemented with respective references to SEA introduced to the existing legal instruments under which strategic documents subject to SEA procedure are being prepared. Therefore, it is recommended that the draft law includes not only the general legal scheme for SEA but also draft amendments to all such legal instruments identified during the legislative review. In particular, the respective amendments seem to be inevitable in the general legal frameworks for land-use planning and building and into sector-specific legislation (such as waste management, water management, forest management, transport).

5. The amendments to other legal acts would be misleading if they referred only to the need for the SEA procedure. Bearing in mind the definition of SEA (see box II paras. 8-9) this would not cover situations where screening is needed. More appropriate would be to make a more general reference to the respective provisions of the SEA scheme.

6. In situations where the legislative reform foresees regulating the EIA procedure and the SEA procedure in one law it may be useful to design the terms and elements common to both legal schemes (like for example environmental impact or scoping) in a similar way. Some general principles (transparency, prevention and precaution) would be useful to place in a separate part of the draft which could be called General Provisions. In addition, it may be useful to include key legal issues related to public participation (such as methods of notifying the public, organization of public hearings or submission of comments) in a separate part of the draft law providing in it clear references to the relevant parts of the draft law concerning EIA and SEA schemes. A similar approach may be employed for the transboundary procedures within EIA and SEA schemes.

7. If a country has a legal act that generally regulates the procedure for the preparation of national strategic documents that may require SEA, it is very important to amend such an act to ensure that at certain stages of the general planning procedure proper references are made to the requirements with regard to relevant stages of the new SEA scheme (such as screening, scoping or taking due account of the SEA results).

IV. General issues

A. Terminology and definitions

53. The terms and definitions used in the national legislation on SEA must be compatible with the terms and definitions set out by the Protocol on SEA. It is not necessary, however, that all definitions of the Protocol be included into the national legal framework.

54. The key terms determining the scope of application of the Protocol on SEA, namely **plans, programmes, policies and legis**lation, have not been defined in the Protocol in a sufficiently precise manner to provide clear guidance for drafters of the national SEA legal framework. In fact, the Protocol (and also the SEA Directive) specifies some features of “plans and programmes”.

However, it does not distinguish the differences between plans, programmes, policies and legislation.

55. The term "legislation" is the only relatively clear term, understood the same in most national legal frameworks. For the term "plans and programmes", however, there seems to be quite a diversity of approaches, with these terms being quite often used interchangeably in many countries. Furthermore, strategic documents having identical features as those called plans, programmes or policies are often named in various ways, such as "strategies", "concepts", "guidelines" or "conditions". The official EU guidance document on the SEA Directive clearly states that "The name alone ('plan', 'programme', 'strategy', 'guidelines', etc.) will not be a sufficiently reliable guide: documents having all the characteristic of a plan or programme, defined in the Directive may be found under a variety of names" and recommends that a name of the document for the purpose of designing the range of documents subject to SEA "will not be a sufficiently reliable guide".[13]

56. Bearing the above considerations in mind, one of the key challenges for designing an effective SEA national framework is to identify types and names of strategic documents prepared in the country which may require SEA and to make sure that the SEA scheme is drafted in such a way that clearly captures all of them.

57. The Protocol on SEA and also the SEA Directive, requires that the SEA procedure is applied only in relation to those strategic documents **that are prepared by authorities** and not by private persons or companies. There is no definition of "authorities" but it is clear that the obligations refer to public authorities at national, regional and local level. The official EU guidance document on SEA directive indicates that the concept of "authority' has a large scope and covers also any institutions or bodies, including privatized utility companies, having public functions or providing public services.[14]

58. In the light of the above, it is equally important for the SEA scheme to capture clearly all the documents that may require application of the SEA procedure as well as all types of public authorities (at all levels) that are involved in preparation of those documents. This task may require finding certain terminological solutions to be properly reflected in the definitions and consistently used throughout the entire text of the legal instrument regulating the SEA scheme (see Box II Drafting suggestions regarding general issues).

B. Principles

59. Reference to principles is a standard clause in legal acts in many countries. They are referred to either in the preambular provisions (usually in the international treaties or EU directives) or in the main body of the legal text (usually in national legislation).

60. The principles that are most often referred to in the context of SEA include sustainable development and integration of environmental considerations into the respective strategic

[13] Implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, European Commission 2003 (EC Guide 2003), page 5).
[14] Ibidem, page 8.

decision-making as well as transparency and public participation. These principles are indicated by the Protocol on SEA both in the Preamble and in article 1 Objective.

61. In many countries following the EU SEA Directive, the above principles are supplemented with the principles of prevention and precaution and the principle of high level of protection of the environment.

62. The role of principles is different in different legal systems. Their role ranges from serving only as guidance for interpretation of the operative provisions to having a superior role over the operative provisions. In most legal systems they may be directly applied at courts.

C.Time-frames

63. The SEA Directive requires clearly that appropriate time-frames for public participation and consultation with environmental authorities are laid down in legislation or on a case-by-case basis (preamble, para. 15; article 6, para. 2;). The Protocol on SEA includes a similar requirement in relation to public participation, and also in relation to consultations with environmental and health authorities ("Each Party shall determine detailed arrangements…", article 9, para. 4).

64. Both the Protocol on SEA and the SEA Directive require that reasonable time-frames for the transboundary procedure are to be agreed between the States involved in such a procedure (article 10, para. 2(b), Protocol on SEA; article 7, paras. 2-3, SEA Directive).

65. The above requirements mean that for national SEA schemes it is recommended to include:

a. time-frames for public participation and consultation with environmental and health authorities; and

b. time-frames for transboundary procedure (except possibly for time-frames for initial notification).

66. There is no commonly accepted international standard as to the time-frames for consultations with environmental and health authorities. Consequently, e there is a considerable amount of discretion for national SEA frameworks in this respect. In practice respective time frames in different countries vary significantly (for example time-frames for consultations on SEA reports most often vary from 10 to 45 working days).

67. As far as time-frames for public participation are concerned there are some standards set under the Aarhus Convention which limit somehow the amount of discretion for national SEA frameworks in this respect. In practice time frames for consultations on SEA reports in different countries range from at least 1 month in most countries to 6 weeks (see for instance Latvia, Netherlands or Spain) or even 60 days (Belgium and Italy).

68. In most countries the time period for consultations with authorities is shorter than the time period for public participation. In some countries the legislation sets out only the minimum time period for public participation and allows longer time period to be established for individual cases.

BOX II
Drafting suggestions regarding general issues

1. The definitions usually cover the key terms that appear often throughout the entire legal instrument. Proper design of definitions may significantly simplify the language of the operative provisions, in particular, by avoiding repeating lengthy phrases. Thus, in designing definitions it is important to consider the need to make the definitions, where applicable, fully compatible with the respective definitions in the Protocol on SEA. In addition, it highly recommended to ensure through the definitions a possibility to facilitate the implementation of the operative provisions. It is also vital to strictly and consistently use the terms as defined throughout the legal scheme.

2. There are two dominant approaches to establish a sequence of definitions:
   a. Simple alphabetical order, used more often - this order may be deprived of its value when the legal instrument is translated into other languages;
   b. Substance-related order, used less often, whereby the terms are defined starting with the basic terms which later serve to define other terms (for example, public authority-planning authority).

3. Whichever of the above approaches is used - it is important to ensure that it is used consistently.

4. Bearing in mind that in many countries there is no clear typology of strategic documents and those falling within the ambit of "**plans and programmes**" under the Protocol on SEA (and the SEA Directive) may take different names, it is worth considering the use of a generic term to cover such strategic documents and define them, converting slightly the definition of "plans and programmes" from article 2, paragraph 5 of the Protocol on SEA.

   *„**Strategic document**" – means any plan, program, strategy or any other document regardless of its name, as well as any modifications to them that set goals for development and activities in different sectors of the economy and are:*
   a) Required by legislative, regulatory or administrative provisions, and
   b) Subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through a formal procedure, by the legislative or executive bodies.

5. In countries where the term "strategic document" already has a strictly defined legal meaning and this meaning does not cover all types of documents potentially subject to SEA, a different generic term would be needed.

6. Bearing in mind the scope of public authorities covered by the obligations related to SEA, it may be practical to define the term "**public authority**" following the definition of the public authority from the Aarhus Convention or referring to such definition in another national

law, which has already transposed such a definition (for example to a legislation regarding access to environmental information).

7. Quite practical may also be to find a short generic name for all authorities which are responsible for the preparation of strategic documents that may require application of the SEA procedure. It may be confusing if in the SEA scheme the authorities that are responsible for preparation of a strategic document are defined further to the terminology used in the EIA scheme ("developers, 'investors", project proponents" or "*zakazchik*"). Therefore, a different term may be more appropriate. For example, the term "planning authority" could be defined as follows:

> ***Planning authority*** *– means public authority, which is responsible for the preparation of a strategic document.*

8. It is worth noting that the definition of SEA in the SEA Directive is purely procedural (i.e. by reference to procedural elements, such as scoping or preparation of SEA report) while in the Protocol on SEA there is exactly the same procedural approach but it is complemented with a reference to the nature of SEA ("means the evaluation of the likely environmental, including health, effects", article 2, para. 6). Such reference in the national definition may be further elaborated, provided that the procedural element remains intact.

9. It is crucial to remember that screening is about determining the need for application of the SEA and therefore **screening is conceptually *not* part of the SEA**. Thus, while screening is important part of the legal scheme for the SEA, the definition of SEA cannot include screening.

10. There is a tendency to include the principle of "scientific basis of assessment" among the principles of environmental assessment. In this context it is worth mentioning that in many international negotiations (for example under Cartagena Protocol on Biosafety to the CBD) the "science based approach" is used as a principle opposed to the precautionary principle. Bearing in mind that the precautionary principle is the constitutive principle of EU environmental policy and of the EU SEA scheme (see recital 1 to the Preamble of the SEA Directive), a national SEA scheme that only mentions "scientific basis" without clearly mentioning the "precautionary principle" may be considered as not compatible with EU law.

11. In the SEA scheme it is important to use terms that are recognizable in a given administrative tradition (months or week or days – calendar days or working days) and to use them consistently.

12. It is recommended to clearly set time-frames for involvement of environmental/health authorities and the public, especially for the following stages of the legal scheme for SEA:

a. Screening;
b. Scoping;
c. Commenting on the SEA Report and the draft strategic document.

13. As opposed to EIA where time-frames are often set for the entire EIA procedure, in case of SEA it may be counterproductive to set time-frames for conducting the entire SEA procedure.

14. In case of a transboundary procedure:

a. It is impossible to set in the legislation any time-frames for conducting the entire transboundary procedure;

b. The only time-frame that may be set unilaterally is the time-frame for replying to the notification (either in the legislation or individually);

c. Time-frames regarding other steps in the transboundary procedure must be agreed between the Parties involved in such a procedure, i.e. these cannot be set unilaterally in the national legislation;

d. The national legislation must be designed in a way that allows for domestic time-frames to be changed, if needed, as a result of agreed by the Parties concerned time-frames regarding the transboundary procedure.

V. Field of application of the SEA procedure - article 4 of the Protocol

A. Strategic documents under article 4, paragraph 2, subject to mandatory SEA

69. Strategic documents which jointly fulfill the criteria listed in article 4, paragraph 2, of the Protocol SEA, are subject to a mandatory SEA procedure. In other words, these are documents that:

a. Are prepared for one of the areas listed in article 4, paragraph 2, and

b. Set the framework for development consent of projects listed in annex I and any other project listed in annex II that requires an EIA under national legislation (see paras. 72-78).

70. The above strategic documents as well as any modifications to them (except for minor modifications and documents which determine the use of small areas at local level - see paras. 79-83) are subject to mandatory assessment. This means that no screening is required for any strategic document which is prepared in one of the areas listed in article 4, paragraph 2 and which sets the framework for development consent of projects listed in annex I and any other project listed in annex II that requires an EIA under national legislation.

71. The SEA Directive applies a similar approach to mandatory SEA (article 3, para. 2) with the addition of strategic documents which require assessment under the Habitats Directive (see above - Biodiversity assessment, paras. 46-48).

B. Setting the framework for development consent of projects

72. The criterion of setting "the framework for future development consent of projects" relates to concepts of "project" and "development consent" used in the EIA scheme. It is well defined under the EU EIA Directive.

73. Under the EU EIA Directive (see article 1, para. 2):

a. *"project" means:*
- 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;

b. *"development consent" means the decision of the competent authority or authorities which entitles the developer to proceed with the project;*

74. The above concept of "project" is similar to the concept of "proposed activity" under the Espoo Convention and the concept of "specific activity" under article 6 of the Aarhus Convention.

75. The above concept of "development consent" is similar to the concept of "final decision" under article 6 of the Espoo Convention and concept of "decision whether to permit proposed activity" under article 6 of the Aarhus Convention. All of these concepts create a lot of confusion in many national legal frameworks because in most countries implementation of projects is subject to multiple decision-making processes.

76. A strategic document may set the framework for future development consent:

a. *Directly*, by providing binding requirements regarding the location, nature, size and operating conditions of projects (for example, a waste management plan allowing only waste disposal and not waste incineration, or a land use plan allowing buildings not higher than 3 stories) or by allocating resources for projects (see annex III.2 to the Protocol on SEA); *or*

b. *Indirectly*, by providing binding requirements for lower level strategic documents which set requirements directly binding upon development consent for projects (see annex III.3 to the Protocol on SEA)

77. As already mentioned, the reference in the Protocol on SEA to any other project listed in annex II that requires an EIA under national legislation may pose some problems for drafters of the national SEA scheme in countries where national EIA scheme envisages individual screening for projects listed in annex II to the Protocol on SEA. In this respect, the approach of the SEA Directive (which refers to all projects listed in Annex I and Annex II to EIA Directive) is much clearer and more practical.

78. It must be borne in mind that "setting the framework for projects" does not mean "envisaging projects" let alone "listing projects". A strategic document usually sets the framework for projects by providing binding requirements regarding the location, nature, size and operating conditions of projects, without however mentioning any concrete projects.

C. Minor modifications and documents which determine the use of small areas at local level

79. While for the strategic documents described above, as well as for any modifications to them, SEA is mandatory as a rule, in case of minor modifications both the Protocol on SEA and the SEA Directive allow certain discretion whether to require SEA. This is an exception from the general obligation which means that the national legal framework may, but does not have to, provide for such exception.

80. Bearing in mind the fact that in most countries modification of the existing strategic documents is a common practice, the reference to minor modifications is commonly used in order to avoid unnecessary administrative burden caused by the repetition of the entire SEA procedure in case of modifications which are not likely to have significant environmental, including health, effect.

81. The concept of "minor modification" refers to likely environmental, including health, effect and not to the mere length of the text to be modified in the existing strategic document (see Box III).

BOX III
Minor modifications - examples

1. A modification of the existing waste management plan which assumes replacing the provision "waste incineration ***is not*** envisaged as a method of waste management" with the provision "waste incineration ***is*** envisaged as a method of waste management" cannot be treated as minor modification. While it involves only deletion of one word (the word "not"), its environmental and health consequences can be significant.

2. A modification of the existing waste management plan by adding new provisions or even a chapter regarding reporting is unlikely to have significant environmental and health consequences and - after using the screening criteria from annex III to the Protocol - may well be considered as minor modification not triggering the need for SEA procedure to be conducted again.

82. The reference to documents which determine the use of small areas at local level may cover different types of strategic documents. Most often these include local land use plans of various categories (such as master plans, detailed plans, zoning), but sometimes also local waste management plans, special strategies for revitalization of brown fields (i.e. abandoned industrial areas) or of urban areas. The implementation of such strategic documents usually involves very significant impact locally. Therefore, many countries address such plans with extreme caution and not always fully use their discretion in this respect.

83. As already mentioned in case of minor modifications, also the possibility to exclude strategic documents which determine the use of small areas at local level is the exception from the general obligation which means that the national legal framework may, but does not have to,

provide such an exception. In fact, strategic documents related to land use planning in some countries (Belgium, Finland, France and Hungary, see Cowi Study 2009) require SEA in any case. In Poland, originally all land use plans even at a local level, as well as any modification to them, were always subject to mandatory SEA. This was aiming at developing a habit of conducting SEA among local authorities and only recently this strict requirement was relaxed in case of minor modifications which are now subject to screening. Still, however, as a rule all strategic documents related to land use planning, even at the local level, are subject to mandatory SEA. Bearing in mind the role of land use planning as a tool of preventive environmental policy, making all relevant strategic documents related to land use planning, in some cases even at the local level, subject to mandatory SEA can be useful, in particular, in countries with limited administrative capacities at the local level.

D. Strategic documents under article 4, paragraph 3

84. Article 4, paragraph 3, of the Protocol on SEA requires Parties to cover with their national SEA scheme also strategic documents "other than those subject to article 4, paragraph 2, which set the framework for future development consent of projects". Similar requirement is also envisaged in the EU SEA Directive.

85. The reference of setting "the framework for future development consent of projects" is not confined only (as is the case in paragraph 3) to projects subject to national EIA scheme, namely it covers strategic documents which set the framework for future development consent of any projects, thus also those not covered by the national EIA scheme (for example any land use plans or zoning ordinances setting the location of dwellings).

86. There are different approaches to address the obligations stemming from article 4, paragraph 3, in a national SEA scheme. They include:

a. Requiring mandatory SEA for strategic documents from other areas than those listed in article 4, paragraph 2, for example for strategic documents prepared for the purpose of nature conservation;
b. Requiring mandatory SEA for strategic documents setting the framework for projects not covered by the EIA scheme, for example for zoning plans setting the framework for individual dwellings;
c. Making strategic documents mentioned above in a) and b) subject to individual screening;
d. Introducing a general requirement that all strategic documents which are likely to have significant environmental, including health, effects and which are not subject to mandatory SEA, are subject to individual screening.

E. Exemptions - article 4.5

87. The Protocol on SEA does not cover strategic documents:

a. Whose sole purpose is to serve national defense or civil emergencies;
b. Which are financial or budget plans and programmes.

88. It must be remembered that the national SEA scheme may not exclude all strategic documents "relating to" national defense or civil emergencies but only strategic documents "whose

sole purpose is to serve national defense or civil emergencies". Thus, for example, plans for flood prevention are subject to SEA, but evacuation plans in case of flood are not subject to SEA.

89. Not all strategic documents that include allocation of financial resources can be treated as "financial or budget plans". In most of EU countries there are special rules regarding financial and budget plans and only those plans which are subject to such special rules are excluded from SEA.

VI. Determining whether the SEA procedure should be applied to certain types of plans and programmes or minor modifications: Screening – article 5 of the Protocol

A. Strategic documents subject to screening

90. The Protocol envisages screening for strategic documents under article 4, paragraphs 3 and 4. Strategic documents under paragraph 2 are not subject to screening - they are subject to mandatory SEA.

91. As indicated in article 5, paragraph 1, of the Protocol on SEA (the same in SEA Directive) screening may be done either through a case-by-case examination or by specifying types of strategic documents or by combining both approaches. The Protocol leaves to the Parties which of the above methods to use. In choosing the method, it is important to consider how effective a method may be in practice. The situation differs in this respect in case of strategic documents under paragraph 3 and those under paragraph 4.

92. As far as strategic documents under article 4, paragraph 3, are concerned, practical experience shows that a case-by-case approach to determine whether an assessment is needed can be less effective and even troublesome, because authorities preparing strategic documents other than those under paragraph 2 may be unsure what to do; they may submit for screening to environmental authorities documents even if it is obvious that they do not need environmental assessment (for example plans related to raising historical education) or – alternatively – they do not submit a document that would probably require such assessment.

93. Thus, in case of strategic documents referred to in paragraph 3, the categorical approach (i.e. specifying types/categories of strategic documents subject to mandatory assessment) is generally more effective because it gives recognizable handholds to local authorities. As it is however almost impossible to identify all strategic documents that require assessment, individual screening (case-by-case examination) is also needed. Hence, the most commonly used approach is a combination of both, whereby the list of strategic documents other than those under paragraph 2 to be assessed is supplemented by a case-by-case approach to determine whether an assessment is needed.

94. The starting point is usually the identification of all strategic documents (other than those under paragraph 2), which may require SEA and thereafter determining, which of them would always require SEA and which require SEA only in certain circumstances and therefore should be subject to individual screening (case-by-case examination).

95. A similar approach is often taken in case of strategic documents which determine the use of small areas at local level. It is usually the legislation itself that determines what "small areas at local level" mean and thus which strategic documents are subject to SEA and which are not, or which are subject to individual (case-by-case) screening.

96. The determination is not fully discretionary. Reference to local level means reference to the lowest level of administrative division of the country. For countries having several tiers of administrative country division, the concept of "local level" is not always obvious. For example, Poland originally determined that while all local land use plans, because of their environmental significance, require mandatory SEA, the other strategic documents considered to be relating to „small areas at local level" would include not only local communities (*gmina*) but also counties (*poviat*) and would be subject to individual screening. As a result, some of strategic documents prepared at this level were originally not subject to mandatory SEA. The European Commission (EC) questioned this determination in relation to counties (*poviat*)[15] and Poland had to adjust this determination in order to make subject to mandatory SEA strategic document prepared also at *poviat* level.

97. In case of minor modifications to existing strategic documents, it would be very difficult to apply categorical screening and precisely divide minor modifications from other modifications, therefore the most common approach is that of individual screening only (case-by-case examination).

B. Positive and negative screening

98. In all the above cases where individual screening (case-by-case examination) is employed (either as the only method or in combination with the categorical screening), such screening may follow the positive or negative approach. The difference between them relates to the burden of proof.

99. The positive approach to screening (for example in the UK) is based on the assumption that certain categories of strategic documents (for example, all modifications to existing documents) as a rule do not require SEA, unless otherwise determined in a specific case, bearing in mind the criteria set out in annex III to the Protocol.

100. The negative approach to screening (for example in Poland) is based on the assumption that certain category of strategic documents (for example, all modifications to existing documents) as a rule require SEA, unless otherwise determined in a specific case, bearing in mind the criteria set out in annex III to the Protocol.

101. In case of SEA schemes (as opposed to EIA schemes) the negative approach to screening seems to be more popular because it implements better the precautionary principle. Furthermore, despite the fact that the Protocol on SEA and the SEA Directive require environmental/health authorities only to „be consulted", in many countries the determination (sometimes called „screening decision") is either made only by environmental/ and health authorities (for example in Bulgaria) or jointly by the planning authority (initiator - proponent agency) and the respective

[15] Poland has population of 38 million and is divided into about 380 poviats.

environmental/health authorities. In Poland screening for strategic documents that determine the use of small areas at local level and for minor modifications to existing documents is based on the negative approach, i.e. as a rule they require SEA, but may be „screened out", and the determination in this respect is formally made by the planning authority (initiator - proponent agency) upon approval of the respective environmental/health authorities. This usually means in practice that it is the environmental/health authorities that decide whether in a given case the application of the SEA procedure is required or not. In the UK the screening determination is made by the planning authority after consulting the environmental authorities (see Box IX) but the Secretary of State (i.e. Environment Minister) is empowered to reverse such determination and instruct that SEA be carried out.

BOX IV
Drafting suggestions regarding the field of application and screening

1. The drafters should bear in mind that in case of strategic documents subject to article 4, paragraph 2, of the Protocol, the national SEA scheme must:
   a. Cover all the areas listed in paragraph 2,
   b. Envisage that all new strategic documents and modifications to existing ones, as a rule are subject to mandatory assessment.

2. In a legal framework that does not use the concept of "setting the framework for development consent for projects", drafters may replace this Protocol reference by a more general reference to "setting the framework for projects".

3. It would be difficult to apply a reference in the SEA scheme "setting the framework for projects that require EIA" in a national legal framework that applies individual screening. It would be much easier to follow the approach of the SEA Directive and refer to the list of projects subject to national EIA scheme (i.e. the list of projects subject to mandatory EIA and to the list of projects subject to screening).

4. The Protocol allows envisaging screening for minor modifications to existing documents and for documents determining the use of small areas at local level. This means that formally drafters may or may not envisage such a special approach. Not envisaging such a special approach would not be considered as non-compliance, but in case of a minor modification lack of such a scheme may cause problems in practice.

5. It would be highly impracticable to require SEA in case of even minor modifications to existing documents. Therefore, it is recommended to envisage in the national SEA scheme a special provision related to minor modifications to existing strategic documents.
6. Such scheme should apply, however, only to modifications in the existing documents, which have been subject to SEA in accordance with the SEA scheme. Modifications (even minor ones) to the existing strategic documents which have not been subject to SEA - but are

likely to have significant environmental, including health, effects -would provide an opportunity to conduct SEA for such documents and thus contribute to improving their environmental soundness.

7. As for documents determining the use of small areas at local level, it is recommended to identify those which may have significant local environmental, including health, effects (for example all local land use plans, zoning plans or waste management) and to subject them to a mandatory SEA procedure, at least at the initial stage of implementing the SEA scheme.

8. Any national SEA scheme which envisages individual screening must include, in the main body of the legislative act or in an annex to it, the screening criteria from annex III to the Protocol.

9. Whenever the draft envisages individual screening:
   a. There must be a reference to applicable screening criteria;
   b. It is recommended to envisage:
      i. Negative screening;
      ii. Determination on the screening to be made not by planning authorities themselves but by (or upon approval of) environmental/health authorities.

10. The drafters should bear in mind the need to address strategic documents under article 4, paragraph 3, of the Protocol. This may take various forms (see paras. 90-97). Extending the list of strategic documents subject to SEA to new areas may be done by amending the relevant horizontal or sectoral legislation. An indication can then be added in the respective legal act providing for the procedure of adoption of a given strategic document that before adoption, the draft document must be subjected to SEA or at least to individual screening – for example, the nature conservation law that provides for the preparation of nature conservation management plans includes a requirement for carrying out SEA or at least screening.

11. The drafters must pay attention to properly address exemptions allowed under article 4, paragraph 5, of the Protocol, in order not to extend the scope of exemptions by excluding for example from SEA all documents which “relate to” national defence or civil emergencies.

VII. Determining the relevant information to be included in the environmental report: scoping – article 6 of the Protocol

102. Scoping is a mandatory part of the SEA procedure. Except for the requirement that environmental and health authorities must be consulted and for the recommendation to involve the public, neither the Protocol on SEA nor the SEA Directive provide clear instruction as to the procedural aspects or legal nature of scoping

103. In some countries (such as in Belgium), scoping is conducted in the form of a meeting with the participation of the planning authorities, environmental and health authorities, the public and

the consultants responsible for the preparation of the SEA report. There are no clear rules or commonly followed international standards as to who organizes such scoping meetings or who chairs them. Sometimes they are organized by the planning authorities, sometimes by environmental and health authorities – similarly for chairing the meetings.

104. The scoping meeting is always based on the basic information regarding the proposed strategic document in the form of the outline or the concept for the document or an initial draft. Sometimes it is required that the planning authority also provides some other information to facilitate scoping.

105. The determination of the relevant information to be included in the environmental report during scoping has different names and takes various legal forms in different countries. Sometimes it is the planning authority (for example in Austria, Finland, Germany, UK), sometimes the environmental authorities (for example in Bulgaria, Cyprus, the Netherlands, Portugal, Slovakia and Spain) and sometimes jointly (for example in Poland) the planning and environmental authorities that determine what information should be included in the environmental report. Health authorities must always be consulted.

106. It must be noted that scoping is meant to streamline the information to be included into the SEA Report under each of the headings (categories) indicated in annex IV to the Protocol and is not meant to allow omitting entire categories (headings) envisaged therein. For example, scoping determination may indicate which alternatives should be discussed in the SEA Report, but cannot allow for omitting discussion regarding alternatives altogether.

BOX V
Content of scoping document

1. In Spain, the scoping document, determines the scope of the SEA, the environmental objectives, sustainable criteria and indicators to be integrated into the strategic document. The scoping document also includes the modalities and timing of the public information process.

2. In Lithuania, the scoping document includes short description of the strategic document, description of the concept directions and their alternatives, the main objectives and the relation with other documents, a description of the territory that might be significantly affected, identification of environmental components and effects that will be assessed and identification of methods that will be used for forecasting and assessing the effects.

3. In Malta, the scoping document describes the relation with existing legislation, policies and other plans and programs and their objectives, baseline information, likely significant environmental effects and constraints, proposed SEA objectives, indicators and targets, alternative options, proposals for monitoring, proposals on assessment methodologies and proposals for the structure and level of detail of the environmental report.

(Cowi Study 2009, pp. 70-74)

VIII. Environmental Report and its quality control - article 7 of the Protocol

107. The Protocol on SEA, in its article 7 and annex IV, sets out requirements regarding the Environmental Report (SEA Report).

108. All specific requirements in annex IV are mandatory and must be clearly and precisely reflected in the national SEA legislation. The national legislation may, however, include additional requirements for the SEA Report.

109. One of the key requirements for the SEA report is the requirement in point 5 of Annex IV regarding environmental, including health, objectives which are relevant to the strategic document. This requirement is specific for the SEA Report and differentiates it from the EIA Report.

BOX VI
Environmental protection objectives - example from the UK

According to Appendix 2 to the United Kingdom Practical Guide to the Strategic Environmental Assessment Directive:[16]

Environmental protection objectives may be set by policies or legislation, such as:

- European Directives, including the Habitats, Birds, Nitrates, Air Quality, Water Framework and Waste Framework Directives
- International undertakings such as those on greenhouse gases in the Kyoto Protocol
- UK initiatives such as Biodiversity Action Plans and the Scottish Biodiversity Strategy
- The UK Sustainable Development Strategy, and those of England, Wales, Scotland, and Northern Ireland
- White Papers setting out policies (e.g. Urban, Rural, Aviation)
- Planning Policy Statements and Minerals Policy Statements
- The Welsh Assembly Government's Environment Strategy

110. Article 7, paragraph 3, of the Protocol on SEA requires Parties to ensure sufficient control of SEA Reports. However, neither the Protocol on SEA nor the SEA Directive include any provisions to regulate directly the system of quality control. More specific obligations are included only in the EIA Directive as amended in 2014. In case of SEA, there is, however, considerable discretion as to the means to ensure quality of SEA reports. It is worth noting that usually countries apply similar means to ensure quality control for both EIA and SEA reports.

111. The most popular means to provide quality control currently include:

[16] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7657/practicalguidesea.pdf.

a. Wide public availability of EIA/SEA documentation together with possibilities for the public to comment upon their quality and ultimately challenge it before independent courts;

b. Review performed by specialized environmental agencies (for example some countries follow the approach invented in the United States, where the US Environmental Protection Agency grades the environmental reports with marks from 1 (report adequate) through 2 (gaps) till 3 (inadequate) and these marks are publicly available;

c. Review performed by specialized independent experts:
   i. individually (Belgium);
   ii. in panels (Canada);
   iii. in special EIA/SEA Commissions (Netherlands, Poland);

d. Guidances, checklists, regular information exchange of the planning authorities and environmental/health authorities.

112. In some countries, there are also voluntary private institutions which bring together EIA/SEA experts involved in the preparation of EIA/SEA documentation. They have often a system of their own accreditation. One of the first such institutions was the *Institute of Environmental Management and Assessment*[17] in the UK. In Poland, there is the *Association of Environmental Assessment Consultants* (SKOS) with its own system of accreditation.[18] Some of these national institutions are active on a wider pan-European level, such as for instance the Croatian Association of Professionals in Nature and Environmental Protection (HUSZPO).[19]

113. In some EU countries the applicable legislation envisages that the assessment documentation is prepared or reviewed by accredited experts. The mechanism was originally developed for EIA documentation, but in most cases, it applies also for SEA documentation.

114. A requirement that EIA/SEA documentation may be prepared only by accredited experts still exists in few EU countries but the system of quality control based on accreditation of EIA/SEA consultants has a lot of disadvantages. Therefore, most countries do not regulate who prepares the EIA/SEA documentation, but rather envisage independent review of the quality of the documentation.

115. Another approach is to introduce into the law binding requirements as to the education and experience of consultants involved in the preparation of EIA/SEA reports, combined with the requirement to certify with a signature the accuracy of the information and the findings included in the respective reports.

116. Quite illustrative in this respect are the changes in the approach to quality control applied in Poland, which currently has one of the most extensive, in terms of the number of procedures and size of documentation prepared, practical experience with EIA/SEA in the EU (see Box VII).

[17] http://www.iema.net/.
[18] http://www.skos.org.pl/pdf/regulaminkk.pdf.
[19] http://www.huszpo.hr/en/.

BOX VII
Experience with quality control in Poland

1. Originally, in the 1980s, the law in Poland required that the assessment documentation should be prepared by an expert designated by the authority competent to take the decision whether to authorize the proposed activity. Under this approach, the proponent of the activity would bear the costs of preparing the respective assessment documentation, but had no discretion as to choosing who would prepare the documentation. Practical experience showed that the fact that authorities designated who should prepare the documentation did not provide sufficient guarantee for the quality of the documentation and actually made authorities less prone to scrupulously review the documentation.

2. These arrangements were considered to be both ineffective and corruption-prone. Consequently,. they were replaced by a requirement that the expert documentation under EIA and SEA procedures and also under water management and nature conservation procedures should be prepared only by accredited experts. This requirement was accompanied by a scheme for the accreditation of experts, whereby the required qualifications were precisely described and a system was established to verify these qualifications. Moreover, a National EIA Commission was established as an advisory body to the Environment Minister. The Commission's role was to review the quality of the EIA documentation (and later also of the SEA documentation) prepared by the accredited experts. The accreditation for the preparation of documentation was different for natural persons and institutions, including companies, and was based on previous experience (such as (co)authoring certain number of documents in that respect) and was later supplemented for natural persons with an exam before a commission specially established for that purpose. The accreditation was originally related to sectors (water, air, noise, nature) and later became related to the type of assessment – separately for EIA, for SEA and for water and nature assessments).

3. In the period 1990-98 accreditations were awarded by the Environment Ministry. In 1998 following a general administrative reform to decentralize the country, the competence to award accreditations was shifted to the regional governors (*voivods*). There were about 1000 natural persons and about 160 institutions (mostly research institutes and private consultancy firms) accredited by the Environment Ministry before 1998; there is no record of how many experts have been accredited by the regional governors.

4. Generally the system of accreditation created a lot of administrative burden and legal problems and was considered to be ineffective and even counter-productive as a tool to assure quality control of the EIA/SEA documentation. Therefore in 2000, when Poland introduced legal schemes for EIA and SEA fully harmonized with EU law, the accreditation scheme for the preparation of EIA/SEA documentation was abandoned. However, as the experience with the EIA Commission was extremely positive, the new scheme maintained the National EIA Commission as an advisory body to the Environment Minister and established the legal basis for the creation of Regional EIA Commissions to advise regional governors (*voivods*).

5. Recently, following 2014 amendment to EIA Directive, Poland introduced in the law binding requirements as to the education and experience of consultants involved in the preparation of EIA and SEA reports combined with the requirement to certify with a signature the accuracy of the information and findings included in the respective reports. This is supplemented by the inclusion of a criminal sanction for making false statement.

BOX VIII
Drafting suggestions regarding quality control of SEA reports

- Whatever the established system of quality control, it is reasonable that it covers both EIA and SEA reports.
- It is difficult to administer and may often be counter-productive to have a system of mandatory accreditation of EIA and SEA experts i.e. those who are entitled to prepare EIA and SEA documentation - environmental reports.
- A system of independent reviews is much more effective, either in the form of a special independent commission - more comprehensive and objective, but more costly, approach; or in the form of review done by individual experts -less costly but also less comprehensive and perhaps less objective.
- The least costly, yet still quite effective, are the following two most popular tools: review by environmental/health authorities and public control system plus mandatory requirements regarding the education and experience of the consultants involved in the preparation of EIA/SEA reports.
- As for the review of environmental/health authorities, it is worth considering the establishment of a formal system of quality control by way of a check-list and also of a system of grading the SEA documentation (environmental reports).
- As for the public control, it is worth considering a requirement that all the SEA documentation/environmental reports are submitted in electronic form and are publicly available in their entirety at the specially designated website of the Environment Ministry immediately after they have been submitted for review. The designated website may take the form of an electronic register of SEA procedures whereby the environmental reports are accompanied by other relevant information regarding the respective procedures, in particular the scoping decisions, draft and final strategic documents (plans and programs) subject to the SEA procedure. They should all be kept there publicly available for the record.

IX. Consultations - articles 8, 9 and 10 of the Protocol

117. The mandatory element of SEA under the Protocol on SEA are various consultations:

a. With environmental and health authorities;
b. With the public (public participation);
c. Transboundary.

118. Consultations with environmental and health authorities are required to be held at all stages of the procedure: starting from screening, through scoping and discussion on the SEA report. This means that a legal scheme for SEA must designate which authorities are to be consulted. There are different approaches employed in this respect.

119. In many countries (Austria, Cyprus, Czech Republic, France, Hungary, Lithuania, Luxembourg, Poland, Slovakia and Spain,) authorities with "specific environmental responsibilities" are designated directly in the national legislation. In some countries (Denmark, Germany and Sweden) a case-by-case approach is used. Other countries (Belgium, Estonia, Latvia, Netherlands, Portugal, Romania and Slovenia) combine both approaches in designating authorities with "specific environmental responsibilities" (Cowi Study 2009). In the UK, authorities preparing a strategic document - planning authorities - in practice consult not only statutory designated environmental authorities but also other authorities (see Box IX). Countries relying solely on a case-by-case approach tend to provide in the legislation itself guidance about which authorities to consult. Thus, for example, in Germany the planning authority must consult all authorities whose environmental or health-related responsibilities are affected by a strategic document (Cowi Study 2009, p. 46).

BOX IX
Consultation with environmental authorities - example from UK

The designated Consultation Bodies in the UK are:

- England: Countryside Agency, English Heritage, English Nature, and the Environment Agency Northern Ireland: The Department of the Environment's Environment and Heritage Service
- Scotland : Historic Scotland, Scottish Natural Heritage, and the Scottish Environment Protection Agency
- Wales: Cadw (Welsh Historic Monuments), Countryside Council for Wales, and the Environment Agency Wales

Responsible Authorities will however normally consult a range of other bodies in the course of preparing their plans and programmes (e.g. Local Authorities, Regional Development Agencies and Primary Care Trusts) and information from these may be useful in SEA.

(A practical Guide to the Strategic Environmental Assessment Directive, p. 17)

120. It is worth noting that the Protocol on SEA requires only that environmental/health authorities be consulted and does not require to give them any right to veto in relation to adoption of a strategic document (with some exceptions - see below). The same is with public participation. The only requirement is that the opinions submitted by environmental/health authorities and the public must be taken into account. In real terms, this means that authorities preparing a strategic document (planning authorities) must consider the views submitted and must explain how these views were considered (article 11, para. 2, of the Protocol on SEA).

121. The Protocol requires merely to consult environmental/health authorities, but in many countries their role is more prominent. Quite often they have decisive role in screening. In some

countries the views of environmental/health authorities are binding, i.e. when they say that SEA must be conducted, the authorities preparing the document must follow their view and carry out SEA. Similar is often the situation with scoping. Usually, however, they have only consultative competence in relation to the final decision whether a strategic document may be adopted.

122. A specific feature of the Protocol on SEA is the significant role assigned to health authorities. The role of health authorities - not necessarily the Ministry - depends on their competence in a country. Different countries assign different competences to health authorities. Those most closely related to SEA are competences related to occupational safety, including for example standards for exposure of workers, or to epidemiology or health standards of buildings. In some countries the competence of health authorities includes also ambient air or water quality standards.

BOX X
Consultation with health authorities - example from Poland
Article 58

1. The authority of the State Sanitary Inspectorate competent to provide its opinion and approval within strategic environmental assessments shall be:

1) The Chief Sanitary Inspector – in the case of documents prepared and modified by chief or central government administration authorities;

2) The Voivodship State Sanitary Inspector – in the case of documents other than those mentioned in points 1 and 3;

3) The County State Sanitary Inspector – in the case of local spatial development plans as well as survey of conditions and areas of spatial development of a commune.

(The Act of 3 October 2008 on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments)

123. Public participation is mandatory for SEA and, in some countries, is required at all stages of the procedure, sometimes starting already from screening, through scoping and the discussion on the SEA report.

124. The Protocol on SEA does not provide details regarding elements of public participation except of elements to be included in the public notice (annex V to the Protocol). Instead it requires that such details are included in the national legislation (article 8, para. 5). In order to ensure effective public participation, the national legal scheme should provide detailed requirements regarding the means of notifying the public, the possibilities to submit comments and the obligation to inform the public about the final decision for the adoption of the strategic document. In this respect, it is worth noting article 15 of the Protocol on SEA, which stipulates that the Protocol applies without prejudice to the Aarhus Convention. Article 7 of the Aarhus Convention is particularly relevant for the SEA legal scheme. As far as the details regarding public

participation are concerned, a set of specific recommendations may be found in the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters adopted under the Aarhus Convention.[20]

125. The Protocol on SEA (and also the SEA Directive) requires in article 8, paragraph 3 that the public concerned is identified for the purpose of participation in the environmental decision-making. The public concerned is not defined in the Protocol, but it is defined in the Aarhus Convention – and following the Convention also in SEA Directive. The Aarhus Convention defines the public concerned as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, NGOs promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest" (article 2, para. 5).

126. It is worth noting that following the non-discrimination principle the foreign public should be entitled to the same participation rights as the citizens who may be directly affected by the decision-making regarding a strategic document.

127. Reliance solely on Internet to inform the public may be justified in case of strategic documents at the central level, but in case of documents addressing rural population or documents at the regional or local level, such as local waste management plans, this method may not be effective. Given the need to provide effective opportunities for public participation, it may be inadequate to provide documents only via electronic media, as this may exclude important segments of the public such as the poor, the isolated (rural) and the elderly, who may not use the Internet (see also the Resource Manual, annex A 5.2).

128. Usually in case of public participation regarding strategic documents, the public is informed by placing a public notice:

a. On a publicly accessible physical noticeboard at the planning authority and on a prominent and publicly accessible part of its website;
b. In the newspaper(s) corresponding to the geographical scope of the potential effects of the proposed strategic document and which reaches the majority of the public who may be affected by or interested in the respective decision-making.

129. Sometimes additionally the legal framework requires public notice to be placed also on the notice boards and websites of:

a. The environmental and health authorities involved in the decision-making and/or SEA procedure;
b. The local authorities in the area potentially affected.

130. The SEA Directive specifies that the draft strategic document must be accompanied by the environmental report during public participation (article 6, para. 2); whereas the Protocol requires both documents to be made available to the public, but does not explicitly require that the two documents be made available together (article 8, para 2). The requirement for timely public availability must however be interpreted as having the same effect.

[20] http://www.unece.org/index.php?id=41803.

131. It must be emphasized that the Protocol (article8, para. 4) requires that the public concerned has the opportunity to express its opinion not only on the environmental report but also on the draft strategic document. This may be any opinion, not necessarily limited to environmental considerations only and does not need to be motivated.

132. In most countries, the responsibility for carrying out obligations related to public participation is put on the authorities preparing the strategic document (planning authorities) and not on the environmental/health authorities, which usually have only consultative role in the SEA. This does not exclude the possibility that some specific activities (for example notification or organization of a hearing) are delegated to other authorities or to consultants hired to prepare the SEA documentation (see Maastricht Recommendations, Delegating tasks in a public participation procedure, p. 19).

BOX XI
Drafting suggestions regarding public participation

1. As mentioned in the paragraph 65 of the Guidance, it is recommended (but not mandatory) to include the time-frames for public participation in the national legislation. When setting out the time frames for the different stages of the public participation procedure, it should be borne in mind that strategic documents that require application of the SEA procedure, unlike projects subject to EIA, are prepared by public authorities solely in the public interest. Therefore ensuring sufficient time frames for the public to prepare its comments and participate effectively may outweigh other factors.

2.Time frames should be set also bearing in mind the following:

a) The methods intended to be used to notify the public and to make the necessary information available, as well as the proposed modalities for public participation;
b) The nature of the plan, programme or, to the extent appropriate, policy, in particular its geographical application, intended duration and complexity;
c) The number and characteristics of the public which may wish to participate.

3.The legal framework for SEA should:

a) Specify methods of informing the public, taking into account the need for effective notification and the fact that reliance solely on electronic media is not effective;
b) Specify the content of public notice, taking into account annex V to the Protocol;
c) Clearly require that the public be informed in an adequate, timely and effective manner, so that public authorities have clear guidance as to the timing, content and quality of notification, in particular when they have a degree of discretion as to how notification is to be carried out.

4. There are three main types of information which are necessary to be provided to the public during a decision-making procedure subject to SEA:

a) Information about the decision-making procedure, including all opportunities for the public to participate and all opinions submitted by consulted authorities;
b) Information about the proposed strategic document, including access to its draft texts;
c) Information about the possible effects of the strategic document and environmental report.

5. For more effective public participation, public authorities may consider expanding the set of information which the public should have access to during the SEA procedure and make the following information available as well: scoping documents, cost benefit and other analyses upon which the strategic document is based.

(based on Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters)

133. The basic procedural elements of transboundary procedure are usually included into the domestic legal framework in most countries. It does not mean that all the details must be in the legislation – some might be regulated in executive regulations.

BOX XII
Drafting suggestions regarding transboundary procedure

1. The national framework should clearly indicate where in the decision-making process there is a place for a transboundary SEA procedure, who is responsible for carrying it out and by which means.

2. The national framework should provide also other necessary details of the transboundary procedure both in respect of acting as the Party of origin and as the affected Party.

a) The environmental report could include a separate chapter on transboundary impact to facilitate translation;
b) A legal mechanism should be included so that:
(i) Comments of foreign authorities and public (article 10, para. 4, of the Protocol on SEA) regarding information in the SEA documentation are taken into account so that transboundary impact is properly addressed (article 11, para. 1(c) of the Protocol);
(ii) Results of consultations with foreign authorities under (article 10, para.3 of the Protocol) are to be duly taken into account by authorities adopting the final decision as to the plan or program (article 11, para.1(c) of the Protocol).

3. It is reasonable to establish a legal and financial mechanism allowing public authorities to undertake their duties related to providing public participation in case of transboundary procedure.

4. When drafting the details of the transboundary procedure regarding SEA it may be useful to take into account any existing guidance material regarding the transboundary procedure for EIA issued under the Espoo Convention, in particular the *General guidance on enhancing consistency between the Convention and environmental impact assessment within State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia* (ECE/MP.EIA/2014/2, endorsed by MOP decision VI/8).

X. Final decision and monitoring - articles 11 and 12 of the Protocol

134. The Protocol (article 11, para. 1) requires that in the final decision regarding the adoption of a strategic document due account is taken of the conclusions of the environmental report and the necessary measures to prevent, reduce or mitigate the adverse effects identified therein. Due account must also be taken of the comments received as a result of:

a. Public participation pursuant to article 8;

b. Consultations with the relevant environmental and health authorities pursuant to article 9;

c. Transboundary consultations pursuant to article 10.

135. Following adoption of a strategic document, the relevant environmental and health authorities, the public (not just the public concerned) and any affected Parties must be informed of that decision (article 11.2 of the Protocol). The adopted document must be made available to them together with a statement:

a. Summarizing how the environmental considerations, as presented in the environmental report), have been integrated into the adopted document;

b. Summarizing how their opinions, as expressed by the public concerned in the case of the public), have been taken into account;

c. Summarizing the reasons why the document has been adopted in the light of the reasonable alternatives considered;

d. Following the SEA Directive, also describing the monitoring measures decided upon (article 9, para.1(c) of the SEA Directive).

136. The Protocol does not specify what taking “due account” means in practice. Similar obligation is included in the SEA Directive and the EC Guide 2003 attributes this clause to the obligation in article 7 of the Aarhus Convention which, in conjunction with article 6, paragraph 8, of that Convention, requires that in decisions on plans and programmes due account is taken of the outcome of public participation.

137. The Aarhus Convention Implementation Guide[21] refers in this respect to the guidance developed by some Parties to assist on this issue. For example, the EU online guide on the Aarhus

[21] J. Ebbesson, H. Gaugitsch, J. Jendrośka, S. Stec and F. Marshall, The Aarhus Convention: an Implementation Guide, 2nd edition, United Nations 2014.

Regulation states that taking due account of the outcome of the public participation "means that the Commission will duly consider the comments submitted by the public and weigh them in the light of the various public interests in issue".[22] Another example cited in the Aarhus Implementation Guide is guidance on Standards on Public Participation adopted in 2008 by Austria's Council of Ministers to assist government officials, which, inter alia, state that: "Take into account" means that you *review* the different arguments brought forward in the consultation from the technical point of view, if necessary *discuss* them with the participants, *evaluate* them in a traceable way, and then let them become part of the considerations on the drafting of your policy, your plan, your programme, or your legal instrument."[23].

138. As it is clearly indicated in the Aarhus Implementation Guide, the obligation to take due account does not require the relevant authority to accept the substance of all comments received and to change the decision according to every comment. The Guide emphasizes however that while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received. In this context the obligation to take "due account" under article 6, paragraph 8, of the Aarhus Convention, should be seen in the light of the obligation of article 6, paragraph 9, to "make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based" (Aarhus Implementation Guide, p. 155).

139. The need for authorities to seriously consider the outcome of public participation and to address it in decision-making, policymaking and law-making is considered to be a key aspect of the Aarhus Convention (Aarhus Implementation Guide, p. 156). The same may be said about the SEA Protocol: the obligation in article 11, paragraph 1, of the Protocol to seriously consider the SEA report and outcome of consultations is indeed a key element of making SEA effective. Equally important is providing evidence for this by way of preparing and making publicly available a statement referred to in article 11, paragraph 2, of the Protocol.

140. Therefore, the above obligations must be clearly reflected in the domestic legal schemes for SEA. The obligation to "take due account" is addressed to the public authorities competent to take a decision regarding a proposed activity which in case of strategic decisions are usually planning authorities. They are also usually responsible for preparing the statement and informing about the decision.

141. A mere obligation to put the decision on the website of the authority does not satisfy obligations related to informing about the decision. Usually the environmental and health authorities as well as the affected Parties participating in the transboundary consultations are informed individually. Regarding the public, the ways of informing it about the decision should meet the same requirements as the ways of informing the public about the possibilities to participate.

142. Article 12, paragraph 1, of the Protocol requires Parties to ensure monitoring of the significant environmental and health effects of the implementation of the adopted strategic

[22] European Commission, *Access to information, public participation and access to justice in environmental matters at Community level – A Practical Guide*. Available from http://ec.europa.eu/environment/aarhus/pdf/guide/AR%20Practical%20Guide%20EN.pdf

[23] Standards of Public Participation, adopted by the Austrian Council of Ministers on 2 July 2008, p.13. Available from www.unece.org/env/pp/ppeg/Austria_pp_standards.pdf.

decision in order to identify, among other things, unforeseen adverse effects and to enable remedial action to be taken (see also corresponding provision in the SEA Directive in article 10).

143. It may be difficult to comply with this obligation without appropriate provisions in the national SEA framework. A comprehensive legal scheme is needed. Therefore, national legal frameworks usually address the issues of monitoring in several places: proposals regarding monitoring are required to be included in the SEA documentation, part of the decision regarding the adoption of the strategic document concerning determination on monitoring (scope, timing, frequency, methods) and a section about monitoring is included in the statement of reasons.

144. The Protocol also requires (article 12, para. 2) that monitoring results be made available in accordance with national legislation to the relevant environmental and health authorities and to the public. This obligation also requires appropriate provisions in the national SEA framework to determine the details regarding methods of making monitoring results available (directly or via the planning authority).

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Practical guidance on reforming legal and institutional structures with regard to the application of the Protocol on Strategic Environmental Assessment

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