INTEGRATION PRINCIPLE: UK REPORT

Sharon Turner

Overview of the UK's approach to compliance with the environmental integration principle

With the exception of the legislation introduced to implement the SEA Directive in the UK, there is no general legal duty operating at national level to integrate environmental considerations into decision-making. Rather than develop a formal or legally binding approach, the UK's strategy for ensuring environmental integration has relied on much more loosely defined and confused policy based approach. However, since UK devolution in 1998, under which responsibility for policy on the environment and sustainable development was devolved to the Scottish Parliament and the Northern Ireland and Welsh Assemblies, these regional administrations have begun the process of developing more formal legislative approaches to ensuring compliance with the principle of environmental integration.

Despite the currently ambivalent nature of the UK's commitment to environmental integration, it was arguably a leader in this regard in the early 1970s. It was the first country to create a dedicated central government Department of the Environment (DOE) which provided an unusually integrated policy structure combining environmental protection, land use planning, transport, housing and local government. Although integration is not simply about getting department structures right, the steady erosion of this integrated policy structure over subsequent years is symptomatic of the UK's ambivalence in this context. Transport was separated from DOE to create a post for a Cabinet minister; then Labour reinvented the Department of the Environment, Transport and the Regions (DETR) but sent planning policy to a separate department (Office of the Deputy Prime Minister). This was then changed to DEFRA - the current incarnation - combining agriculture and the environment. This marriage of environment and agriculture is widely considered to be a failure and reflects the Prime Minister's lack of understanding of the modern environmental agenda. Energy policy in the UK largely falls to the Department of Trade and Industry, and now the new Department of Business, Enterprise and Regulatory Reform (BERR). Only climate change has kept DEFRA in the loop of energy policy making.

Apart from structural considerations, the emergence of UK central Government's approach to integrated decision making on the environment can be traced to the launch of its 'Greening Government Initiative' (GGI) in 1990. This was developed from commitments made in the 1990 White Paper on the Environment: *'This Common Inheritance'.* The GGI recognised that the protection of the environment could not be the sole responsibility of just one government department. Three key integration mechanisms emerged from the GGI: (a) the creation of a cross-departmental Environmental Audit Committee; (b) the appointment of 'Green Ministers'; and (c) the introduction of 'Policy Appraisal and the Environment' which was designed to integrate

environmental considerations into policy making. In theory, these initiatives were designed to provide the necessary leadership, co-ordination and communication to integrate environmental considerations into policy making and wider operations. The 1994 UK Sustainable Development Strategy introduced three further mechanisms designed to support environmental integration: (a) The UK Roundtable on Sustainable Development; (b) the Government's Panel on Sustainable Development and (c) 'Going for Green' – an awareness raising publicity campaign aimed at the wider public.

In 1999 the Environmental Audit Committee published a critical report highlighting a significant lack of progress in terms of achieving environmental integration in the context of UK policy making. The principle reasons for failure can be summarised as:

- Minimal use of the 'Policy Appraisal and the Environment' tool across Government
- A general focus within Government policy systems on efficiency and throughput rather than outcomes and effectiveness
- The flexibility of the approach being used to achieve environmental integration (particularly through the publication of 'best practice' guidelines) which led to inconsistency and variable success rates across Departments.
- Insufficient investment in capacity building

The UK's Sustainable Development Strategy was reviewed in 1998 with a new iteration published in 1999. This document emphasised the need to pursue social, environmental and economic objectives in an integrated manner, thereby reflecting a shift in focus from consideration of environmental impacts to embrace a broader sustainability analysis including economic and social considerations. This greater emphasis on sustainable development was reflected in the launch of the UK Sustainable Development Commission in 2000 (merging the Roundtable and Government Panels on SD); the 'rebranding' of the 'Greening Government Initiative' in 2001 as 'Sustainable Development in Government' and the changing of the 'Policy Appraisal and the Environment' tool into 'Integrated Policy Appraisal' and then its merger into the Cabinet Office Regulatory Impact Assessments and Policy Appraisal initiative in 2004.

The emphasis on environmental integration as part of a broader integration of sustainable development principles is also reflected in the latest iteration of the UK SD Strategy *(Securing the Future, 2005*); however, it also acknowledges that despite a substantial history of initiatives and institutions designed to promote integrated policy making, in practice little integration has been achieved in UK policy making. Delivering better integration between social, environmental and economic policies is identified as a key focus of the current UK SD Strategy. To this end, the 2005 Strategy states that:

> *the goal of SD is to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life, without compromising the quality of life of future generations. For the UK*

Government and the devolved administrations that goal will be pursued in an integrated way through a sustainable, innovative and productive economy that delivers high levels of employment; and a just society that promotes social inclusion, sustainable communities and personal wellbeing. This will be done in ways that protect and enhance the physical and natural environment, and use resources and energy as efficiently as possible.

In effect, the UK SD strategy is focusing on environmental integration on two levels. First, it is continuing its focus on the need to ensure better integration of environmental, social and economic policy development. However, the secondly dimension seeks to address the potential barrier to integration posed by the devolution of responsibility for environmental policy and sustainable development to the UK devolved administrations. The national Strategy identifies 5 'shared UK-wide' principles to be used in all regional SD strategies:

- Living within environmental limits
- Ensuring a strong, healthy and just society
- Achieving a sustainable economy
- Promoting good governance
- Using sound science responsibly

Each of these principles reflects an emphasis on realising the objective of the integration obligation. The Strategy states that these principles:

'…will form the basis for policy in the UK. For a policy to be sustainable, it must respect` all five principles'.

The Strategy recognises that some policies will place more emphasis on certain principles than others, but states that '*any trade-offs should be made in an explicit and transparent way.'* In effect, the Strategy is anticipating instances of imbalance in the level of scope of policy integration, but emphasises the need for transparency where deviation from policy integration occurs. The Strategy also identifies 4 shared national priorities which also reflect an implicit policy emphasis on the integration principle; namely:

- Sustainable consumption and production
- Climate change and energy
- Natural resource protection and environmental enhancement
- Sustainable communities

Despite its limited success in actually delivering environmental integration in the context of policy making or land use planning, UK central Government appears to be committed to pursing this objective through the largely non-legislative, policy based arrangements described above. However, an uneven picture concerning the use of legal frameworks governing environmental integration is now emerging across the UK. As already stated, there is currently no general legal requirement imposed on UK central Government Departments to integrate environmental considerations into policy making.

Only those plans and programmes falling into the SEA Directive are subject to a formal legal obligation requiring a rigorous form of environmental assessment (discussed below). In England, Wales and Northern Ireland policy making remains outside the regulations implementing the SEA Directive. Consequently policy making in those parts of the UK will only be subjected to the more informal sustainability appraisal approach, albeit now linked to the emerging idea of 'environmental limits' under the national and regional SD Strategies.

In contrast, the legislation implementing the SEA Directive in Scotland requires policy making to be subjected to the SEA process which represents a major departure from UK central Government's traditional preference for a more flexible policy based approach to environmental integration. In this regard, it is also worth noting that, Wales and Northern Ireland have also taken steps, albeit more diffuse, to enshrine the concept of environmental integration within legal frameworks. Section 121 of the *Government of Wales Act 1998* places the Welsh Assembly under a duty to promote sustainable development in the exercise of its functions - which includes policy making. The Act requires the Assembly to make a Scheme setting out how it proposes to implement the duty, to consult before making it, keep it under review, publish an Annual report on progress and evaluate its effectiveness every four years. Equivalent legislative provision was in Northern Ireland in 2006 under the *Northern Ireland (Miscellaneous Provisions) Act 2006* which requires all Government Departments and public bodies in the region to exercise their functions in a manner considered *'best calculated to contribute to the achievement of sustainable development….except to the extent that….any such action is not reasonably practicable in all the circumstances of the case'.* During the negotiation of the 2005 UK SD Strategy Defra considered adopting an equivalent legal obligation for England, which was ultimately rejected. Although these framework obligations are very loosely formulated, they nevertheless reflect a willingness to enshrine a version of the environmental integration obligation – albeit within the broader ambit of SD implementation – in general legislative frameworks.

2. Advice to UK Government on environmental integration

National Audit Office (2005) and Environmental Audit Office (2007) *Reports on Regulatory Impact Assessment as a tool of environmental integration:* In 2005 and 2007 the NAO[1] and EAC[2] published very critical reports of the operation of RIA as a mechanism for integrating environmental considerations into UK policy making. The EAC referred to RIA's predecessor - Integrated Policy Appraisal – as "ill-conceived and poorly supported". The EAC concluded that while RIAs may be an imperfect tool, they represented the best platform available to use for integrating sustainable development and environmental concerns into policy making. However, the Committee concluded that:

[1] National Audit Office, Regulatory Impact Assessments and Sustainable Development http:www.nao.org.uk/publications/nao_reports/05-06/ria_sustainable.pdf

[2] (2007) House of Commons HC 353, Regulatory Impact Assessments and Policy Appraisal

"…at present, RIAs are failing in this area. Environmental impacts are receiving neither the levels of or quality of attention they deserve. This can be attributed to many factors, not least the complexity and intangibility inherent in assessing environmental impacts, but also the difficulties of operating within a system conceived for dealing with economic impacts… The RIA system must be adapted to place environmental considerations on an equal footing with economic impacts, and it must be recognised that environmental impacts cannot necessarily be dealt with in the same way. We need a process which demands and facilitates full and accurate analysis of environmental effects… By improving the consideration given to environmental impacts, the quality and worth of RIAs overall will increase. The Government must not allow environmental concerns to remain marginalised and should take the necessary steps to ensure RIAs realise their potential as a vital platform for implementing its sustainable development strategy."

Royal Commission on Environmental Pollution, *Report on Environmental Planning (2002):* One of the strongest recommendations to UK Government concerning the need to strengthen implementation of the environmental integration principle was published in 2002 by the Royal Commission on Environmental Pollution (RCEP) report on *Environmental Planning*. The Commission pointed out that there is no coherent statement of environmental priorities for the UK. While the Commission acknowledged the role of the UK SD Strategy in identifying headline indicators with an environmental focus, it pointed out that this document was not comprehensive in so far as the environment was concerned, was expressed in very general terms and did not contain express policy commitments in terms of environmental priorities. It cited with approval the national environmental quality objectives adopted in Sweden and the Netherlands. The Commission recommended that a clear statement of environmental priority objectives should be published for the UK as a whole and for each part of the UK together with quantified targets for movement towards the objective by specific dates. One of the key purposes of these statements would be to aid environmental integration at national level and across the UK devolved administrations. It was also recommended that these statements should make clear that sustainable development cannot be achieved unless the environment is protected and enhanced. The Commission was critical of the formulation of environmental objectives in the UK's SD Strategy which it said were markedly less ambitious than those expressed for social and economic considerations. This approach was viewed as creating the impression that some deterioration in environmental quality could be tolerated in the interests of social progress or economic growth. The RCEP stated that this misconceived view was a commonly held understanding of the concept of SD. A statement of environmental priorities and objectives would ensure that the environment was not overshadowed by social and economic factors.

The Commission focused in particular on the central role of town and country planning in delivering environmental sustainability. It expressed serious concerns about the UK's policy commitment approach to Sustainability Appraisal (SA) in the context of land use planning which, prior to the implementation of the SEA Directive, was the principal mechanism for integrating environmental, economic and social considerations into decision-making in this context. In addition to lax science and practice, the RCEP concluded that SA risked marginalising the environmental and social considerations it was designed to mainstream, while enabling financial and economic considerations to dominate.

The Commission recommended that the system of town and country planning in the UK should have a new statutory purpose – however, it did not support a vague formulation such as 'contribute to sustainable development'. Instead the Commission recommended that the UK's town and country planning system should be given a new general statutory purpose – formulated in terms of 'facilitating the achievement of legitimate economic and social goals while ensuring that the quality of the environment is protected, and where appropriate, is enhanced.'

In addition, the Commission recommended that planning within the UK should be based on a new form of integrated spatial strategy (ISS), which had a statutory basis, was led by a designated authority and embraced economic, social and environmental objectives. It was recommended that all public bodies should be placed under a legislative duty to co-operate in the preparation of the ISS and comply with the ISS where it affects their activities. The Commission emphasised that ISS must address all activities and policies that have significant spatial implications for the environment (incorporating for example, transport, energy, forestry, agriculture and countryside recreation within the land use planning process) and all aspects of the environment that are spatially related (ie, air quality, noise, all dimensions of the water cycle, contamination of land, capacity and vulnerability of soils, amounts of energy obtained and used, amounts and kinds of wastes produced and disposed of and biodiversity. Protection of landscapes and townscapes were also envisaged as elements of ISS). The Commission recommended that ISS should be 4-dimensional, covering the atmosphere and groundwater as well land surface and looking at least 25 years ahead. The Commission also noted that draft ISS would have to be subjected to an SEA process; however, the environmental assessment would be much more meaningful and cost-effective if applied to ISS which have sought to take environmental considerations fully into account from the earliest stages. It is worth noting that the Commission cited the Regional Development Strategy adopted in 2001 by the newly devolved administration in Northern Ireland as a "pioneering exercise in integrated spatial planning".

Review of Environmental Governance in Northern Ireland (2007), *Foundations for the Future*: Following an extensive ENGO campaign, the Department of the Environment in Northern Ireland commissioned an independent analysis of the arrangements for environmental governance in

Northern Ireland. Following and 18 month review and extensive public consultation, the Panel published its report, *Foundations for the Future* in 2007. The fragmenting impact on environmental policy making of the power sharing arrangements put in place under the Northern Ireland peace agreement was a key focus of this review. Although the environment is inevitably affected by the activities of several Government Departments in any jurisdiction, this scenario is particularly acute in Northern Ireland. Despite its small size, it is governed by 11 Government Departments with policy responsibility for the environment spread across 9 of these. In particular, the Review recommended the creation of a cross-departmental Environmental Audit Committee (as exists in Westminster); the publication of a White Paper on the Environment setting out a coherent strategy for the region's environmental priorities; and a rationalisation of the currently fragmented distribution of policy responsibility on the environment. Government is expected to respond to this report later this year,

Governmental institutions playing a watchdog role

There are a range of governmental institutions within the UK tasked to play the role of environmental watchdog in the legislative process. Key bodies include:

(a) *Cabinet Committee on Energy and the Environment:* This Committee provides a high level, inter-departmental strategic forum for the discussion of energy and environmental policies, monitors the impact on SD of government policies and considers issues of climate change, security of supply and affordability of energy. The inclusion of energy issues within this committee's remit reflects the significance placed on the UK's climate change programme and the difficulty of co-ordinating these policies across many different areas.

(b) *Ministerial Sub-Committee on Sustainable Development in Government:* This committee replaces the Green Ministers Committee and is a sub-committee of the Cabinet Committee on Energy and the Environment. It has a dual role in that it considers the operational impacts of different government departments as well as considering cross-departmental sustainable development issues. The scope of the operational side of its work is shaped by the *Framework for Sustainable Development on the Government Estate*, which sets targets for environmental improvements in areas such as waste production, energy consumption and transport.

(c) *National Audit Office & Public Accounts Committee:* Although not exclusively focused on the environment, both of these bodies play important watchdog functions in scrutinising how government departments deliver their functions, including policy development and impact appraisal on the environment.

(d) *Parliamentary Select Committees:* Parliamentary Select Committees play a key role in holding government departments to account for the exercise of their functions and stimulate/inform public debate on policy making. In effect there is a select committee tasked to scrutinise the work of each government department. The Select Committee on the Environment, Food and Rural Affairs oversees the work of the Department for Environment, Food and Rural Affairs (Defra) and its associated public bodies, including the Environment Agency and Natural England, etc. The work of the Committee covers a wide range of policy areas, from farming and fisheries to biodiversity and climate change, pollution and waste disposal. It is comprised of 14 members and plays a key role in influencing the direction of environmental policy in the UK. However, other select committees have also published important reports on environmental issues –ie, the select committee focusing on town and country planning, transport, and trade and industry.

(e) *House of Commons Environmental Audit Select Committee (EAC):* The EAC is a Parliamentary audit committee comprising 15 backbench MPs. It was established in 1997 to consider the contribution of policies and programmes of <u>all</u> government departments and non-departmental public bodies to environmental protection and sustainable development – and its remit reflects very directly the concept of environmental integration. Whereas the Select Committee on the Environment (above) is tasked to focus on the specific activities of Defra and its associated legislative and policies, the EAC is tasked scrutinise the manner in which environmental policies are taken into account across other Government departments. However, there is inevitably a high degree of overlap between the EAC and the Environment Select Committee. The EAC has looked at Government's performance in integrating environmental considerations including the contributions made by the: (a) 'Greening Government Initiative', (b) individual policies (climate change, energy, housing, GMOs) and (c) multilateral negotiations (at the EU, OECD and WTO). The Committee is accredited with raising the profile of the environment across government and has contributed to the UK Treasury's growing recognition of environmental priorities. The EAC's priorities for the next 5 years are described as continuing to apply pressure on government at all levels (local, national, etc) to work together to combat the threat of climate change; to secure an effective infrastructure for environmental accountability within government for the impacts of its policies, programmes and operations; and to identify, assess and audit Government's targets and indicators related to sustainable development; and to watch for examples of good and bad practice on policy appraisal and the environment.

(f) *Sustainable Development Commission (SDC):* The SDC was established in 2000 to act as a 'critical friend' to UK Government on the implementation of its SD strategy. It is an evolution of two earlier

initiatives - the UK Round Table on Sustainable Development and the UK Government Panel on Sustainable Development. The work of the SDC is divided into ten policy areas: climate change, consumption, economics, education, energy, engagement, health, housing, regional & local government and transport. In 2005, the UK Government's Sustainable Development Strategy expanded the role of the SDC to embrace the role of 'watchdog for sustainable development', whilst retaining its advisory and advocacy roles. The SDC is not a legislative watchdog in the strict sense but plays an important function in holding Government to account in terms of progress towards sustainable development. The SDC delivers this role in a number of ways: (a) Reporting on how well UK Government has met its own targets to run its estate and travel operations more sustainably; (b) Reviewing the content of Government Department SD Action Plans and progress on these plans – these plans set out the contribution made by each government department and Executive Agency to delivering on the commitments and goals set down in the UK's SD Strategy; (c) Reporting on Government's progress against its Sustainable Procurement Action Plan and (d) the publication of a range of thematic reviews of public services. The Commission is led by a board of 18 Commissioners from a mix of academic, scientific, business and NGO backgrounds. It reports to the Prime Minister, the First Ministers of Scotland and Wales and the First Minister and Deputy First Minister of Northern Ireland.

Obligations to consult environmental agencies

The legislation implementing the Habitats, EIA and SEA Directives create the key obligations for environmentally remote bodies to consult with environmental agencies within the UK. Under the England/Wales, Scottish and Northern Ireland Regulations implementing the Habitats Directive, all government departments, public authorities, and statutory undertakers (ie utility companies, transport, energy, water and sewage service providers, etc) are required to conduct an appropriate assessment before deciding to undertake or grant permission for any plan/project likely to have a significant effect on an EU designated site. In making this assessment, these authorities are required to consult and have regard to the views of the relevant body responsible for nature conservation. This obligation has been applied to a range of environmentally remote bodies, most recently to the UK Ministry for Defence in carrying out operations on its estate. The Countryside and Rights of Way Act 2000 (which protects UK designated habitats and makes provision for public access to the countryside) also contains general obligations on all public authorities and utilities to take account of biodiversity considerations in the exercise of their functions and to comply with requirements concerning the protection and restoration of UK designated habitat sites.

In the context of the Regulations implementing the EIA and SEA Directives in the UK, a wide range of bodies are required to consult with environment agencies before exercising their powers to grant permission for, or undertake

activities/plans or programmes likely to have significant environmental effects. This includes environmentally remote bodies such as the Department of Finance/Treasury; Harbour Authorities; Public Procurement Authorities; Roads authorities etc…

Several pieces of utilities legislation place the Secretary of State for the Environment, Food and Rural Affairs under a statutory duty to provide environmental guidance to regulators with the aim of trying to ensure that in fulfilling their primary statutory duties to promote competition and protect consumers, utilities operators are also obliged to take into account the environmental costs of operations (ie, Utilities Act 2000 – s.10 Gas and s.14 electricity; and the Water Act 2003.)

Scientific and advisory groups

There are over 50 independent advisory bodies listed as providing formal advice to Defra; they are regarded as playing an increasingly important role in advising on the development of environmental law and policy. These bodies range from the Advisory Committee on Business and the Environment to the Pesticides Residue Committee, the Advisory Committee on Packaging and the Zoos Forum. However, key advisory bodies (including a mixture of those proximate to and more remote from the environment) include the following:

- **UK Sustainable Development Commission** – in addition to its watchdog function, it is also an advisor to Government on the implementation of sustainable development.

- **Royal Commission on Environmental Pollution** – this body is a standing body created to act as an adviser to Government on the environment. Although its title suggests a narrow focus, its reports are very wide ranging and strongly support the application of the integration principle in policy and law making.

- **Climate Change Committee** – this new body is proposed by the UK's Climate Change Bill which has recently been put before Parliament. Although the focus of the Committee is proximate to the environment, it will have a very wide remit in its role advising UK government on how best to reduce carbon emissions over time and across the UK's economy.

- **Consumer Councils** – the UK consumer councils are independent bodies established to advise the government and consumers on best value. They have focused on a range of issues related to the environment such as food quality, fuel and transport poverty, water pricing and other sustainability issues. The Northern Ireland Consumer Council has recently won a very controversial judicial review challenging government's approach to public consultation on legislative proposals for the introduction of water charging.

- **Food Standards Agency** – tasked to advise government on consumer interests in relation to food. This unusually independent body has addressed a range of environmentally related issues including GM and novel foods and food labelling.

UK Implementation of the Strategic Environmental Assessment Directive

1. **Overview of implementation:** The SEA Directive was implemented into UK law through the Environmental Assessment of Plans and Programmes Regulations 2004. Separate Regulations were produced for England (SI 2004/1633), Northern Ireland (SR 2004/280) and Scotland (SSI 2004/258) and Wales (WSI 2004/1656 (WI70)). The Scottish Regulations have since been replaced with primary legislation, Environmental Assessment (Scotland) Act 2005. The SEA Regulations for NI, Wales and England take the minimum action necessary to deliver compliance with the transposition obligation. In contrast, Scotland has adopted a much broader approach to implementation which is consistent with the pro-EU and pro-environment political position adopted by the Scottish Executive since devolution. Concerns as to England/Northern Ireland's approach to implementation have been raised (discussed below) particularly in relation to the interaction between Sustainability Appraisal in land use planning and SEA. The Scottish legislation goes beyond what is required by the Directive in applying SEA to all policy processes whether required by regulatory, administrative or legislative provision; and its practical strategy for supporting practical delivery of SEA reflects considerable political support for the process.

2. **Definition of 'plans and programmes'**:

- The definition of 'plans and programmes' used in the England, Wales and Northern Ireland Regulations is essentially 'cut and pasted' from the Directive.

- The Scottish implementation has adopted a more broad definition of plans/programmes and goes beyond the requirement of the Directive in two key respects. First, Scotland does not limit plans/programmes to those 'required by legislative, regulatory or administrative provisions'. Secondly, the SEA Directive is applied not only to 'plans and programmes' but also to all public sector "strategies" – in effect, SEA applies to public sector policies. The Scottish definition is formulated as follows:

  This Act applies to plans and programmes (including those co-financed by the European Community) which are—

i. subject to preparation or adoption (or both) by a responsible authority at national, regional or local level; or

ii. ….prepared by a responsible authority for adoption through a legislative procedure…..

…..In this Act, any reference to plans or programmes includes strategies.

3. **The concept of 'authority':** In the lead up to formal implementation the UK Government had initially indicated that it regarded the SEA Directive as only applying to public sector plans and programmes. This approach appeared to be inconsistent with the guidance published by the EU Commission which pointed out that the case law of the European Court of Justice has determined that an "authority" subject to the Directive can include a body providing public services under the control of the state. The English implementing Regulations do not explicitly resolve this apparent conflict but nor do they appear to limit the concept of a responsible authority to public sector actors. The English Regulations simply impose an obligation on the 'responsible authority' to 'carry out or secure the carrying out of an environmental assessment'. The concept of a responsible authority is not defined except to state that it is the body carrying out the EA or is the authority on whose behalf it is being done. It is worth noting however, that considerable controversy was caused when UK Government removed water resource plans from the indicative list of plans/programmes requiring an SEA, which raised suggestions that other plans made by privatised water (and other) utilities may be exempt.

   In contrast to the uncertainty concerning the English regulations, the Scottish Act makes clear that the SEA requirement applies to 'any person, body or office-holder exercising functions of a public character' – hence making clear that private sector actors carrying out functions of a public character may be required to carry out SEAs.

4. **Mandatory SEA (Article 3(2)):** Regulation 5 of the English SEA Regulations implements Article 3(2) of the Directive to only require an SEA where:

   - A plan or programme is being prepared for the purposes listed in Article 3(2) of the Directive and sets the framework for future development consent of projects listed in annexes I and II of the EIA Directive

     OR

   - Is a plan or programme, which in view of its likely effect on sites, has been determined to require an assessment under Articles 6 or 7 of the Habitats Directive.

The English Guidance Notes contain a diagram designed to guide responsible authorities in considering whether the need for EA exists. The diagram makes clear that an SEA is not required if the plan/programme fails to satisfy any of the following criteria:

(a) The PP must be subject to preparation and/or adoption by a national, regional or local authority OR prepared by an authority for adoption through a legislative procedure by Parliament of Government
(b) The plan/programme must be required by legislative, regulatory or administrative provisions
(c) The plan/programme must be prepared for agriculture, forestry, etc., AND set a framework for future development consent of projects in Annexes I and II to the EIA Directive.

In effect, the list of special issues in Article 3(2) and the requirement concerning the 'framework for future development consent' are both implemented in England as further limitations on the definition of qualifying plans/programmes set out in Article 2. The English Guidance Notes go on to quote the EU Commission guidance concerning the phrases 'framework for future development consent' and 'development consent' and provide an indicative list of plans and programmes which are likely to be subject to SEA in the UK. It states that it is impossible to give a definitive list and that the list will be updated as required.

In Scotland a more expansive approach has been taken. In Scotland an EA must be conducted by the responsible authority in respect of two categories of 'qualifying plan/programme'. The first category is identical to that described above in respect of England – in effect, applying the terms of the Directive specifically. However, the second category comprises plans/programmes of: (a) a public character which are being prepared by (b) Scottish Ministers, civil servants, Scottish Parliament, public authority or any other person specified by Scottish Ministers and (c) which are not excluded under subsequent parts of the legislation – ie, as not having a significant environmental impact, affecting a local area or being a minor modification etc. In effect, the Scottish implementing legislation requires SEA for all public sector strategies, plans and programmes likely to have a significant environmental impact regardless of whether (a) they are required by legislative, regulatory or administrative provisions or (b) they set a framework for future development consent.

5. **In what way does the outcome of the SEA procedure affect the final decision-making (implementation of Article 4(2)):** Although the SEA Directive has been implemented via separate legislation, the UK Guidance Notes point out that Environmental Assessment (EA) is already established practice for many types of plan and programmes – in particular Sustainability Appraisal (SA) now mandatory in England

and Wales in the context of regional spatial planning and some local development planning. As is permitted by Article 4(2), the UK Guidance Notes allow for the integration of SEA with other forms of appraisal conducted during the adoption of plans/programmes, but emphasise that “a combined procedure which meets the requirements of the SEA Directive must include the procedural steps required by the Directive.” Consistent with the terms of the SEA Directive, UK Guidance explicitly acknowledges that the SEA Directive goes beyond the more loose process of SA already applying to plans and programmes in the UK. In particular it points out that the Directive:

a. Places a greater emphasis on collecting and presenting baseline environmental information.

b. Introduces a mandatory "scoping" stage in the plan process. The Environment Agency, English Nature, the Countryside Agency and English Heritage are to be designated as bodies which planning authorities must consult about the contents of their assessments.

c. Lays stronger emphasis on the need to consider strategic alternatives to the preferred plan or programme, their environmental impacts and set out the reasons why they were rejected.

d. Places a stronger emphasis on addressing adverse environmental effects through mitigation measures.

e. Places planning authorities under a formal obligation to take into account responses to consultation on the environmental report prepared as part of the SEA process, and then to explain in a statement at the end of the process how environmental considerations were integrated into the finished plan and how they took account of the public responses.

f. Introduces a duty on authorities to monitor the environmental effects of the plan as it is implemented.

However, while the UK Guidance does acknowledge the more stringent and structured approach to environmental assessment posed by the SEA process, concerns remain about integrating the SEA and SA processes. For example, in setting out a proposed structure for the environmental report required for SEA purposes, the UK Guidance states that this is also suitable for reporting on a sustainability appraisal. The Guidance goes on to state that "if a responsible authority uses it in this way, it must show clearly the elements which meet the requirements of the Directive." It has been argued that this statement is insufficient to ensure compliance with the EU Commission’s guidance on SEA which requires that environmental reports should form "a coherent text or texts", and if this is not produced as a free-standing document it should nevertheless "be

clearly distinguishable as a separate part...and be easy to find and assimilate for the public and authorities."

Another area of potential inconsistency between the UK and Commission guidance concerns how the "reasonable alternatives" to a plan or programme should be handled. The UK's guidance puts forward a hierarchy of alternatives which should be considered in the plan-making process. This starts with "obviation" of demand - or options for avoiding the need for development - and then goes on to the how, where and when of development. The guidance then adds: "To keep the big issues clear, the alternatives considered at this early stage should not be elaborated in too much detail. Only the main differences between the alternatives need to be considered and documented." The EU Commission, by contrast, lays more emphasis on a level playing-field. It points out that the Directive makes no distinction between the assessment requirements for the proposed plan or programme and for the alternatives. "The essential thing," according to the Commission, "is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements [in the Directive] concerning scope and level of detail for the information in the [environmental] report apply to the assessment of alternatives as well." Indeed, the earlier draft of the UK guidance was much closer to this interpretation, stressing that options should be considered "thoroughly and even-handedly".

Efforts to minimise the Directive's impacts on planning authorities are evident in other parts of the UK's guidance. It stresses, for instance, that authorities should set themselves a time limit for collecting baseline environmental data for their first SEA exercises rather than aim to be comprehensive. And, other than a quality assurance checklist, it does not put forward any proposals for meeting the Directive's requirement that environmental reports are of "sufficient quality".

6. **Reports on SEA practice:** Scotland has led the UK in publishing the first report on SEA practice (Dec 2006). This report is limited in its analysis but highlights the publication of a detailed analysis due this year based on 3 years of SEA practice. The 2006 report notes that 53% of all SEAs in Scotland in 2006 applied to land use planning and 17% to transport plans/programmes. In addition the report notes the concerted efforts made by the Scottish Executive to support implementation and consistency of EAs through the creation of an online SEA Tool Kit which gives detailed guidance for responsible authorities and a structure for EAs. See http://www/scotland.gov.uk/publications/2006/09/13104943/0.
However, no substantive conclusions are drawn as to value of SEA or potentially widening its scope.

7. **Relationship between SEA and pre-existing EA:** Although the UK resisted the development of the SEA Directive at various stages in its development, it nevertheless introduced its own (albeit weaker) forms of SEA throughout the 1990s in the context of (a) land use plans (applying 'Environmental Appraisal'), (b) policy development (applying 'Policy Appraisal and the Environment' and subsequently IPA and RIA), and (c) regional land use planning (applying 'Sustainability Appraisal'). Consequently, when the UK was finally posed with the need to transpose the SEA Directive, it was faced with the complex challenge of reconciling the formal and rigorous environmental appraisal system represented by SEA with the more broadly based, loosely defined and non-statutory national systems of environmental appraisal. Although UK introduced a legal requirement to conduct Sustainability Appraisals for Regional Spatial Strategies and Local (land use) Development Documents under the *Planning and Compulsory Purchase Act 2004,* the process itself was more loosely defined than SEA.

   Whereas SEA has been described as an *advocative* approach in that it seeks to raise the profile of environmental considerations in decision-making, SA in contrast, represents what has been described as an *integrated* approach in that it aims to support the decision-making process with respect to all aspects of sustainable development and is therefore neutral with respects to the interests at stake.[3] Certainly the analysis of UK scrutiny and advisory committees raises clear concerns as to the marginalising impact of SA on the very environmental factors it is supposed to protect (discussed above). Analysis of SAs carried out in the context of three case studies of regions in England indicated that they fell far short of the key requirements of SEA – particularly they failed to undertake appropriate scoping; establish a baseline; consider alternatives; involve stakeholders; ensure public consultation re the appraisal report; introduce quality assurance measures and monitor implementation arrangements.

   During the debate surrounding the introduction of SEA in the UK, commentators expressed widespread concerns that the Government's plans to integrate SEA and SA in the context of land use planning would compromise the depth and breadth of environmental impact investigation unless considerably enhanced resources were provided to planning authorities. However, as outlined above, UK Guidance on the SEA process does appear to take cognisance of these key differences between SEA and SA and makes clear that the necessary steps to deliver SEA must be ensured where SA and SEA are integrated. Commentators take the view that this approach will necessarily lead to a marked improvement in the conduct of SAs in the UK.

[3] For example, Sheate, Byron and Smith, *Implementing the SEA Directive: Sectoral Challenges and Opportunities for the UK and EU* (2004) 14 European Environment 73-93.

8. **UK Case law on SEA:** In *An Application by Seaports Investments limited,* [2007] NIQB 62 the legality of the draft land use Area Plans was successfully challenged by a developer on the grounds that the Department of the Environment in Northern Ireland had failed to comply with the requirements set out in the SEA Directive concerning consultation with environmental authorities. Although the Planning Authority had submitted the environmental reports to the Northern Ireland Environment Agency for consultation during the plan making process as is required by the SEA Directive, it was argued that the Directive required consultation with an *independent* environmental authority. In Northern Ireland the Environment Agency is an Executive Agency of the central government Department of the Environment – as is the Planning Authority itself. It was therefore argued that this could not be considered to be an independent authority.

   The High Court of Northern Ireland ruled that the Directive required a separation between the authority responsible for preparing the plan and the consultation body. In the present case the court ruled that no such separation existed because the Planning Authority and the NI Environment Agency were divisions of the same central government Department. The Court ruled that in practice there had been integration between the two services in the preparation of documents. However, the court went on to rule that even if there had been a formal separation of their roles, the court would not have been satisfied that they were sufficiently separate for the purposes of the Directive while they remained part of the same Department and legal entity.

   The Court ruled that the purpose of the consultation process was not to simply ensure access to expertise; it was also to ensure transparent decision-making and the availability of comprehensive and reliable information, both of which required independence. The court concluded that consultation with an external environmental authority was implicit in Article 5(4) and 6(3) of the Directive and that it may be necessary to create such an authority if one did not already exist – a problem, he observed which did not exist in GB due to the existence of independent environmental bodies. Although this ruling has been cited by ENGOs in support of the campaign for an independent Environment Agency in Northern Ireland, it is likely to be appealed successfully by the Dept. Friends of the Earth have referred this to the EU Commission to seek infraction action re the EPA issue. It will be very interesting to see if the Commission pursues infraction against the UK in this context.