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SEA Pitfalls – lessons from recent cases

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Introduction

- Key requirements of the SEA Directive and the pitfalls exposed by recent case-law
  - The environmental report
  - Consultation
  - Taking into account the ER and consultation
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- What happens where the LPA has been tripped up by one of the pitfalls? Consequences of non-compliance with the SEA Directive: the Supreme Court's judgment in ***Walton v. Scottish Ministers*** [2013] PTSR 51

The SEA Directive: meaning of "SEA"

- Article 2(b):

  "environmental assessment" shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4-9."

- 4 elements:
  - Preparation of an environmental report
  - Carrying out of consultations
  - Taking into account of the environmental report and the results of consultations
  - Provision of information on the decision
- The litigation so far has primarily focused on the first of these

The environmental report

- Article 5(1)
  - ER must identify, describe and evaluate *"the likely significant effects on the environment of implementing the plan or programme"* and *"reasonable alternatives taking into account the objectives and the geographical scope"* of the plan/programme
  - Cross-refers to list of necessary information set out in Annex I of the Directive (**failure to include this information risks legal challenge**)
- Article 5(2): the ER must include the information that may reasonably be required taking into account current knowledge and assessment methods, contents and level of detail of the plan/programme, its stage in the decision-making progress and extent to which matters are more appropriate assessed at different levels in that process
- Article 5(3): Natural England, English Heritage and EA must be consulted upon when deciding scope and level of detail of the information to be included in the ER

The environmental report

- Form of the ER:
  - The Directive does not specify whether the ER should be integrated within the plan/programme itself or a separate document. The Commission Guidance on SEA states *"if it is integrated it should be clearly distinguishable as a separate part of the plan or programme, and be easy to find and assimilate for the public and authorities"* (para. 5.4)
  - The ER can be part of a document on sustainability assessment eg. a sustainability appraisal: see para. 5.5 of the Commission Guidance
- Timing of the ER:
  - Art. 4: environmental assessment *"shall be carried out during the preparation of a plan or programme and before its adoption"*
  - Commission Guidance para. 5.7: *"the process of preparing the report should start as early as possible and, ideally, at the same time as the preparation of the plan or programme"*
  - ***Seaport Investments*** [2008] Env. L.R. 23 (Weatherup J, HCNI): the ER and the draft plan should be consulted upon in parallel so that the consultees can consider each in the light of each other . Cf ***Cogent Land*** [2012] EWHC 2542 (Admin) (see below): this is not an absolute rule

The environmental report: the list of mandatory information in Annex I

- NB para. 5.19 of the Commission Guidance states that each paragraph of Annex I *"is of a substantial nature"*. **Failure to comply with the Annex I requirements may leave the plan/programme vulnerable to legal challenge**
- The information required by Annex I is as follows:

  (a) an outline of the contents, main objectives of the plan or programme and relationship with other plans or programmes;

  (b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

  (c) the environmental characteristics of areas likely to be significantly affected;

  (d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any a areas of a particular environmental importance;

The environmental report: the list of mandatory information in Annex I (cont'd)

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

(f) the LSEs on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

The environmental report: the list of mandatory information in Annex I (cont'd)

(i) a description of the measures envisaged concerning monitoring in accordance with Article 10 (which requires Member States to monitor the SEEs of the implementation of plans and programmes);

[The significance of this requirement should not be overlooked: the Commission Guidance at para. 5.1: the ER *"forms the main basis for monitoring the significant effects of the implementation of the programme"*]

(j) a non-technical summary of the information provided under the above headings."

The environmental report: assessment of alternatives – the core requirements

- Article 5(1): requirement to assess *"reasonable alternatives taking into account the objectives and the geographical scope"* of the plan/programme
- Annex I(f):the duty is not just to deal with reasonable alternatives but to explain the reasons for selecting the alternatives dealt with
- Commission Guidance para. 5.6: *"the studying of alternatives is an important part of the assessment"* (therefore failure to comply will leave the plan/programme vulnerable to legal challenge)
- Commission Guidance para. 5.12: the LSEEs of the plan/programme and alternatives must be *"identified, described and evaluated in a comparable way"* and *"the information referred to in Annex I should thus be provided for the alternatives chosen".* Reiterated by Ouseley J in ***Heard*** (see below)

The environmental report: assessment of alternatives – the Commission Guidance (1)

What is a "reasonable alternative"? Commission Guidance para. 5.13:

"The first consideration in deciding on possible reasonable alternatives should be to take into account the objectives and the geographical scope of the plan or programme. The text does not specify whether alternative plans or programmes are meant, or different alternatives within a plan or programme. In practice, different alternatives within a plan will usually be assessed (e.g. different means of waste disposal within a waste management plan, or different ways of developing an area within a land use plan). An alternative can thus be a different way of fulfilling the objectives of the plan or programme. For land use plans, or town and country planning plans, obvious alternatives are different uses of areas designated for specific activities or purposes, and alternative areas for such activities. For plans or programmes covering long time frames, especially those covering the very distant future, alternative scenario development is a way of exploring alternatives and their effects."

The environmental report: assessment of alternatives - the Commission Guidance (2)

What is a reasonable alternative? (cont'd) Commission Guidance para. 5.14:

"The alternatives chosen should be realistic. Part of the reason for studying alternatives, is to find ways of reducing or avoiding the significant adverse environmental effects of the proposed plan or programme. Ideally, though the Directive does not require that, the final draft plan or programme would be the one which best contributes to the objectives set out in Article 1. A deliberate selection of alternatives for assessment, which had much more adverse effects, in order to promote the draft plan or programme would not be appropriate for the fulfilment of the purpose of this paragraph. To be genuine, alternatives must also fall within the legal and geographical competence of the authority concerned. An outline of the reasons for selecting the alternatives dealt with is required by Annex I (h)."

The environmental report: assessment of alternatives – caselaw

The environmental report: assessment of alternatives – caselaw (1)

- ***St Albans v. SSCLG*** [2010] J.P.L. 70: the ER for the East of England Plan assessed alternatives <u>for</u> proposed greenfield urban extensions to Hemel Hempstead, Welywn Garden City and Hatfield, but not alternatives <u>to</u> them. Mitting J held that this was unlawful. See para. 21:

  > "It is no answer to point to the requirement in the policies for green belt reviews to be undertaken at the local development framework stage. All that will do is to determine where within the district of the three towns erosion will occur, not whether it should occur there at all."

- ***Save Historic Newmarket v. Forest Heath DC*** [2011] J.P.L. 1233: Collins J considered the requirement to consider alternatives in the context of an iterative plan making process (various drafts consulted upon, sifting the options, then final draft consulted upon, examined and adopted)
  - Alternatives can be sifted out as the draft plan goes through its successive iterations without the need to re-examine them at each stage, but reasons must be given in the ER for their rejection
  - Where the reasoning given for rejecting alternatives was given at earlier stages of the iterative process, the ER accompanying the final draft of the plan must still summarise that reasoning

The environmental report: assessment of alternatives – caselaw (2)

- ***Heard v. Broadland DC*** [2012] Env. L.R. 23 – Broadland Joint Core Strategy held not to be unlawful because the alternatives to the proposed urban extension North East of Norwich had not been assessed in accordance with the SEA Directive. Ouseley J considered the various SAs/ERs were deficient because, inter alia:
  - Such assessment of alternatives as there was wasn't done on the same basis as the preferred option (para. 54)
  - No explanation of the alternatives selected (ibid)
  - No cross-reference to any other document where the identification and equivalent appraisal of alternatives could be found (ibid)
  - No explanation of the reasons for selecting the alternatives dealt with (para. 61) and without such reasons it was difficult to see whether or not the choice of alternatives was deficient (para. 66 – NB the requirement is to assess the plan against "reasonable" alternatives)
  - A purposive interpretation of the SEA Directive requires an outline of the reasons for the selection of the preferred option (even though not an express requirement of the Directive) and this was also missing (paras. 69-70)

The environmental report: assessment of alternatives – caselaw (3)

- ***R (Bucks CC) v. Secretary of State for Transport*** [2013] EWHC 481 – challenge to the Government Command Paper setting out its "decisions and next steps" in relation to HS2. Ouseley J held that, had the SEA Directive applied, the appraisal of sustainability accompanying the consultation paper that led to the Command Paper would not have met the requirements of the Directive due to the failure to consider reasonable alternatives to the "Y" network" and the provision of spurs to and from Heathrow Airport
- ***Ashdown Forest Economic Development LLP v. Wealden DC*** (pending) – developers' challenge to Wealden (incorporating part of the South Downs National Park) Core Strategy alleging failure to consider alternatives to:
  - Overall housing requirement of 9600 new dwellings, lower than the South East Plan requirement of 11000, on the purported basis that this figure was necessary to avoid harm to the Ashdown Forest SPA/SAC (no alternatives between 9600 and 11000 were assessed); and
  - Requirement for all new development within 7km of Ashdown Forest to provide SANGS (no alternatives to SANGS or 7km were assessed)

The environmental report: adequacy of the information provided

- Where a legal challenge is brought to a plan or programme on the basis that an environmental report in compliance with the SEA Directive was not published and consulted upon, a distinction is to be drawn between:
  - the question of whether there has been compliance or substantial compliance with the requirements of Art 5 and Annex I as to the matters to be addressed in the environmental report, which is a question of law for the Court to decide - see ***Bucks CC***; and
  - whether the degree of information provided was sufficient to enable the plan-making authority to assess the likely significant environmental effects of the plan or programme, which is a planning judgment challengeable only on *Wednesbury* grounds – see ***Shadwell Estates Ltd. v. Breckland DC*** [2013] EWHC 12 (Admin) per Beatson J (applying the case-law in the equivalent context under the EIA Directive). Note however that in the ***Port of Tyne*** case the Aarhus Convention Compliance Committee has expressed doubts about this approach.

The carrying out of consultations (1)

- Article 6:
  - Draft plan/programme and ER shall be made available to "the public" (including relevant NGOs) and the designated authorities (EH, NE & EA)
  - The public and the designated authorities *"shall be given an <u>early and effective opportunity</u> within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report"* before adoption
  - Scope for litigation over meaning of "early and effective" (see below)
- Article 7: transboundary consultations where LSEEs in another Member State (eg. transport infrastructure connecting to another MS – new airport / rail link / ferry terminal?)
  - Ouseley J in ***Bucks CC:*** the failure to undertake such consultation is unlikely to provide the basis for any relief from the Court if the affected Member State(s) do not express any complaint about their non-consultation

The carrying out of consultations (2)

- ***Cogent Land LLP v. Rochford DC*** [2012] 2542 (Admin).
  - Following judgment in ***Newmarket***, it became apparent that the SA/ER accompanying Rochford's draft Core Strategy did not adequately explain the reasons for selecting and rejecting alternatives
  - SA Addendum therefore published to provide *"a summary of the alternatives considered throughout the production of the plan setting out the reasons for selecting/rejecting those alternatives"*
  - Addendum published July 2011. By this time the examination into the submission draft Core Strategy had completed and the Inspector's report was pending.
  - Inspector did not reopen the examination hearings on the issue of the Addendum but allowed an opportunity for written representations
  - Cogent argued that the Addendum could not cure defects in the earlier stages of the process and that the failure to re-open the examination hearings was unfair

The carrying out of consultations (4)

- Singh J dismissed the claim
  - SEA Directive did not mean that if the ER accompanying a draft plan is not wholly adequate, it cannot be supplemented or improved later before adoption of the plan (para. 112)
  - No absolute requirement for simultaneous consultation of ER and draft plan (para. 118-121)
  - The inspector's failure to re-open the hearings was not unfair, as she had confirmed that she was prepared to consider additional hearing sessions if necessary and the claimant had not requested a re-opening of the hearing (paras. 132-139)

The taking into account of the ER and consultations

- Article 8: the ER and consultation responses *"shall be taken into account during the preparation of the plan or programme and before its adoption"*

- What is meant by taking SEA into account *"during the preparation"* of the plan/programme?

- Note also ***Cala Homes No. 2*** [2011] J.P.L. 1458: prior to the outcome of SEA it cannot be assumed that the adoption/modification/revocation of the plan or programme in question is bound to occur regardless of the process of SEA (para. 32 per Sullivan LJ). This is relevant to the weight to be given to eg. a draft plan or the proposed revocation/modification of a plan

Information on the decision

- Article 9: public and the designated authorities must be informed when the plan/programme is adopted and the adopting authority must provide a statement which:
  - Summarises how environmental considerations have been integrated into the plan/programme and how the ER and consultation responses have been taken into account;
  - Summarise the reasons for choosing the plan/programme as adopted in the light of the other reasonable alternatives; and
  - Sets out the measures decided concerning monitoring
- If not provided, would this be a reason in itself for the quashing of the plan/programme by the High Court?
  - Possible alternative relief: mandatory order requiring the authority to provide such a statement and interim suspension of the plan/programme's effect until the statement is provided - see ***Bucks CC***.

Consequences of non-compliance (1)

- Article 4(3) TEU (ex Art. 10 EC): duty of sincere co-operation.
  - Held by ***Berkeley*** (an EIA case but applied to SEA in ***St Albans***, ***Newmarket*** and ***Heard***) to mean that unless substantial compliance, court bound to quash

- ***Inter-Environnement Wallonie***: referring to its earlier decision in ***Wells***, the CJEU holds that Art. 4(3) & principle of effectiveness of EU law means that:

  > *"courts before which actions are brought… must adopt, on the basis of their national law, measures to suspend or annul the "plan" or "programme" adopted in breach of the obligation to carry out an environmental assessment."*

- This is expressed to be subject only to the EU law principle of *"procedural autonomy"* whereby national courts may adopt their own procedure for giving effect to EU law, provided that it does not render EU law rights ineffective (the principle of effectiveness trumps procedural autonomy: see ***Uniplex***)

- Does this mean that if a claim is brought in accordance with the procedure of the national court (e.g. within the applicable time limit), and the Court is satisfied that the plan/programme was adopted in breach of the SEA Directive, the effectiveness of EU law requires it to quash the plan??? ….

Consequences of non-compliance (2)

- (Perhaps) not always so, according to the Supreme Court in ***Walton*** (17.10.12)
- Conceded by the Scottish Government that if there had been a *"substantial failure"* to comply with the SEA Directive, then the Court should not withhold a remedy (see Lord Reed at para. 77)
- However, Lord Carnwath expressed the view (albeit technically *obiter*) view that ***Wallonie*** and ***Wells*** does not mean that quashing order must necessarily follow *"where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests"* (at para 137).
- See in particular para 139 (emphasis added):

  > "Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

Consequences of non-compliance (3)

- There remains scope for argument as to the proper interpretation of ***Walton*** (it is a live issue in the ***Bucks CC*** appeal), but the terms of para. 139 indicate that the conclusion that the Court may in some circumstances decline to quash was subject to the precondition that effect must nonetheless have been given to the substance of the obligations under EU law.
  - Cf ***Wells*** to which Lord Carnwath relied, where the CJEU reiterated that procedural autonomy is dependent on compliance with the principles of equivalence and effectiveness including the requirement that the national rules "*do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order*".
  - NB also Art 288 TFEU ("a directive shall be binding as to the result to be achieved"), Art 19(1) TEU (*"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law"*) and Art 47 CFR (*"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal"*.)
  - Is it *acte clair* that the CJEU would agree that Art. 4(3) and the principle of effectiveness permit a broader approach?

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