CURRENT ISSUES IN ENVIRONMENTAL ASSESSMENT

David Elvin QC
Heather Sargent[1]

INTRODUCTION

1. This paper explores current issues and recent developments in (i) environmental impact assessment ("**EIA**") and (ii) strategic environmental assessment ("**SEA**"). It will first address EIA, then SEA, before concluding with consideration of the court's discretion in respect of remedies, an issue which is relevant to both EIA and SEA.

I. ENVIRONMENTAL IMPACT ASSESSMENT

How wide is the purpose of the Directive? "Project" and *Brussels Hoofdstedelijk Gewest*

2. The EIA Directive[2] applies to the assessment of the environmental effects of public and private "projects" which are likely to have significant effects on the environment (Article 1(1)). "Project" is defined by Article 1(2) of the Directive as meaning:

> "the execution of construction works or of other installations or schemes,
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> other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".

3. In Case ***C-72/95 Kraaijeveld and others v Gedeputeerde staten van zuid-Holland***[3] (colloquially known as the "***Dutch Dykes***" case) the European Court of Justice had to consider the scope of the expression "canalisation and flood-relief works" in point 10(e) of Annex II to the EIA Directive. Having had regard to the purpose and general scheme of the directive,[4] the ECJ noted that "[t]he wording of the directive indicates that it has a wide scope and a broad purpose" and concluded that point 10(e) encompassed all works for retaining water and preventing floods, including dyke works.[5]

4. The apparently innocuous observation that the EIA Directive has "a wide scope and a broad purpose" has been relied on steadily ever since by parties seeking to rely upon an

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[1] Landmark Chambers, London EC4A 2HG.

[2] Now codified as Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

[3] [1997] All ER (EC) 134.

[4] At [30].

[5] At [31].

expansive interpretation of the provisions of the EIA Directive. However, it is now clear from the decision of the Court of Justice in Case ***C-275/09 Brussels Hoofdstedelijk Gewest v. Vlaams Gewest***[6] ("***Brussels Airport***") that, notwithstanding the decision in ***Dutch Dykes***, there are limits even to the "purposive" approach to the EIA Directive.

5. ***Brussels Airport*** concerned the interpretation of point 7(a) of Annex I to the EIA Directive, which referred to the "construction ... of airports with a basic runway length of 2100m or more". The Brussels Airport Company had been granted an environmental permit for the continued operation of Brussels airport (but not for its extension; an application in that regard had been rejected). The applicants argued that the grant of the environmental permit ought to have been subject to EIA.

6. In ***C-2/07 Abraham and Others***[7] the Court of Justice had held that it was "apparent from the very wording" of article 1(2) of the EIA Directive that the term "project" referred to works or physical interventions. In ***Brussels Airport*** the "project" was limited to the renewal of the existing permit to operate the airport and did not entail works or interventions which altered the site physically. The applicants, however, argued that the concept of physical intervention had to be broadly construed so as to encompass any intervention in the natural surroundings; they relied on the judgment in the ***Waddenzee*** case[8] in which the Court had held that an activity such as mechanical cockle fishing was within the concept of "project".

7. The Court rejected the applicants' argument.[9] It held that the activity in ***Waddenzee*** had been comparable with the extraction of mineral resources, an activity which was specifically referred to in Article 1(2) of the EIA Directive and which entailed genuine physical changes to the sea bed. The renewal of an existing permit to operate an airport could not, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a "project".[10] The term "construction" within point 7(a) of Annex I, moreover, was "not in any way ambiguous" and was to be understood as having its "normal meaning, namely as referring to the carrying out of works not previously existing or of physical alterations to existing installations".[11]

8. Significantly, the CJEU held:

> "...while it is established case-law that the scope of [the EIA Directive] is wide and its purpose very broad ... a purposive interpretation of the directive cannot, in any event,

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[6] [2011] Env LR 26.

[7] [2008] ECR I-1197.

[8] C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij **[2004] ECR I-7405.**

[9] At [23].

[10] At [24].

[11] At [26].

disregard the clearly expressed intention of the legislature of the European Union".[12]

9. The Court did, however, contemplate the possibility that the permit might constitute "a stage in a procedure the ultimate purpose of which is to grant the right to proceed with an activity which constitutes a project within the meaning of [article 1(2)] of the directive".[13] The Court observed that:

> "...where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment (see ***Wells*** (***C-201/02***) [2004] ECR I-723 at [53] and ***Abraham*** at [26]). It has also been held that a national measure which provides that an environmental impact assessment may be carried out only at the initial stage of the consent procedure, and not at a later stage in the procedure, would be incompatible with [the EIA Directive] (see, to that effect, ***Commission v United Kingdom (C-508/03)*** [2006] ECR I-3969 at [105] and [106]).
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> ...
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> If it should prove to be the case that, since the entry into force of [the EIA Directive], works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure".[14]

10. The decision in ***Brussels Airport*** highlights an interesting possibility regarding the purposive approach towards the EIA Directive espoused by the CJEU in the ***Dutch Dykes*** case and repeated frequently in this and other contexts, i.e. that a purposive approach will not lead ineluctably to an expansive reading of the provision of the Directive in question, particularly where purpose is identified by reference to the Directive's text. It is clear that the Advocate General in ***Brussels Airport*** considered that, in identifying the "purpose" of the Directive, it was not legitimate to disregard "the clearly expressed intention of the legislator".[15] That led him to define the purpose of the Directive more narrowly than he could otherwise have done, i.e. as being concerned to ensure that EIA was undertaken only where physical intervention was proposed.

11. The approach of the Advocate General leaves open the question of whether a material change of use which does not involve any physical works is a "project" for the purposes of the EIA Directive. On the approach of the Advocate General, whereby the purpose of the EIA Directive is defined narrowly by reference to the terms of the Directive so as to exclude non-physical interventions, such a material change would not be a "project". It might be

[12] At [29].

[13] At [32].

[14] At [33].

[15] At [28] of the AG's Opinion.

thought that a material change which resulted in physical consequences would fall within the definition of "project", but that suggestion runs counter to the Advocate General's response, in ***Brussels Airport***, to the applicants' argument that EIA should address not only the direct consequences of the activities to be carried out, but also the indirect consequences:

> "It appears clear to me that the applicants' position is ... vitiated by a fundamental error. It in fact confuses two separate aspects, namely the purpose of the impact assessment on the one hand, and the conditions under which an impact assessment is required on the other. In other words, it is evident that in the case of the construction of or significant alteration to an airport, the obligation to carry out an impact assessment will be triggered, and not only the immediate effects of the construction works, but also the indirect effects which may be caused to the environment due to the subsequent activity carried on at the airport, will have to be examined. If, however, as in this case, the basic prerequisite for carrying out an impact assessment is not satisfied, since no physical activity involving construction or any alteration to the structure of the airport is being carried out, the problem of the scope of the impact assessment does not even arise, since it is devoid of purpose".[16]

12. The question of "material change of use" and EIA and similar issues arose earlier in ***Commission v. UK*** Case C-199/04 [2007] E.C.R. I-1221 and in ***R (Edwards) v. Environment Agency (No. 2)*** [2008] Env. L.R. 34 both regarding a change of fuel to use a form of secondary fuel in cement manufacturing but was not resolved in those cases. In ***Commission v UK***, as recorded by the CJEU, the compliant in the infraction was

> "17 … the Commission took the view, first, that the use by the competent national authorities of the test of 'material change in the use of any buildings or other land' contained in the TCPA 1990 meant that certain projects, including in particular a change in the fuel burnt in a cement manufacturing plant, were not subject to the procedures provided for by Directive 85/337. Second, the United Kingdom had not coordinated its planning and pollution-control rules adequately so as to ensure compliance with the obligations and objectives laid down by that directive. For that reason, the Commission sent the United Kingdom a letter of formal notice on 7 May 2001."

13. However, the issue was not answered since the claim was dismissed as inadmissible:

> "23 In support of its action, the Commission puts forward two complaints: the first puts in issue sections 55 and 57 of the TCPA 1990 pursuant to which planning authorities use the nationally applicable test of 'material change in the use of any buildings or other land' when application is made for planning permission, having the effect, according to the Commission, of excluding certain projects from the field of application of Directive 85/337, while the second complaint alleges that, when Directive 85/337 was transposed into national law, the United Kingdom Government did not coordinate planning and pollution-control rules adequately so as to ensure compliance with all the obligations laid down in Articles 3 and 8 of that directive.
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> 24 However, in its application the Commission expressly acknowledged that, by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 and the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, the United Kingdom has adopted the necessary legislation to

[16] At [30] of the AG's Opinion.

implement Directive 85/337 into domestic law.

25 Consequently, since the present action for failure to fulfil obligations is founded on contradictory arguments, it does not satisfy the requirements of coherence and precision referred to in paragraph 21 of this judgment."

14. In ***Edwards***, the use of shredded tyres as fuel and whether that required EIA was lost in the wider arguments deployed on appeal. Since the original plant had been subject to EIA it was considered by the House of Lords that the permit application did not require EIA since it was not an amendment to an existing project within Annex I. Lord Hoffman held:

> "53 This distinction between the installation and the way it is used is in my opinion reinforced by two matters. First, the Annexes generally describe projects by reference to their purpose (in para.10 of Annex I, an installation for the incineration of waste) rather than the use to which they may from time to time be put. Secondly, the size of the installation is described by reference to its capacity (in para.10, over 100 tonnes a day) rather than the amount of waste actually incinerated. These features of the description both suggest that the relevant paragraphs are concerned with the creation of an installation of a particular size for a particular purpose rather than with the quantity of waste from time to time incinerated. No doubt the Lawford Road works had an enormous capacity in the sense that if the company had run it entirely on tyres, large quantities could have been incinerated. It would however be strange if the effect of that capacity, constructed for a different purpose, was that any use of waste as a fuel brought it within para.10 of Annex I.
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> 54 Mr Wolfe referred to *Commission v Italy* (November 23, 2006) Case C-486/04, in which a power station fuelled by combustible material derived from waste and biomass had been built at Massafra in Apulia without any assessment under the EIA directive. The Court of Justice had no difficulty in holding that the plant came within para.10 of Annex 1. It seems to me entirely reasonable to describe the project as having been the construction both of an installation for the incineration of waste and an installation for the generation of electricity. It fell within both descriptions. But the present case does not involve the construction of anything and therefore in my opinion falls outside the directive.
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> 55 Mr Wolfe says that it would be odd if one could build an installation which ran on, say, oil, and then change to using more than 100 tonnes a day of waste, without at either stage coming within para.10 of Annex I. It should not be possible to achieve in two stages what could not lawfully be done in one. I do not however find this a startling anomaly. First, Annex I provides a rule of thumb which identifies in a rough and ready way those projects which must necessarily be assessed. It does not say that other projects or changes in existing projects may not have environmental effects which require assessment. In particular, the possibility of a change in the nature or use of an installation which makes an assessment necessary is covered by Art.13 of Annex II:
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> > "13. — Any change or extension of projects listed in Annex I or Annex II, already authorized, executed or in the process of being executed, which may have significant adverse effects on the environment."
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> 56 Secondly, the EIA is only one weapon in the European regulatory armoury for the protection of the environment. There are other directives dealing with, for example, pollution (the IPPC directive) and waste disposal (the Waste Incineration Directive 2000/76/EC). In considering whether there are gaps or anomalies, it is necessary to consider the system as a whole and not just the EIA directive. It is no coincidence that, as I shall later explain, the application under the regulations included all the information

> relevant to tyre burning which an environmental statement under the EIA would have required.
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> 57 In this case, if the introduction of tyres as fuel has to be accommodated within the EIA directive at all, the heading under which it would most naturally fall is a "change" in a project within the meaning of para.13 of Annex II . But there is a finding of fact, which I have already mentioned, that the change would not have significant adverse effects on the environment. Thus it seems to me that to construe para.10 of Annex I to require an environmental assessment in addition to an application under the Regulations would be not purposive but pedantic."

15. The High Court came very close to having to consider the material change of use issue in ***R (Evans) v. Basingstoke and Deane BC***.[17] The claimant contended that a material change of use had occurred and was a development which required an EIA. The defendant and the interested party initially submitted that there was no "project", but subsequently (for reasons which are not relevant here) conceded that the change in use which had occurred was Schedule 2 development within the meaning of regulation 2(1) of the 1999 EIA Regulations, and thus required an EIA.

16. The material change of use issue which arises in the light of ***Brussels Airports*** thus continues to await resolution by the courts and is likely to turn at least in part on whether the use clearly brings the project within one of the categories of Annexes I or II to the Directive.

EIA and transboundary effects

17. In ***Alternative A5 Alliance's Application for Judicial Review***[18] the applicants contended, before the High Court (Northern Ireland), that there had been a breach of Article 7 of the EIA Directive, which requires that where a Member State is aware that a project is likely to have significant effects on the environment in another Member State, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public (*inter alia*):

    (1) A description of the project, together with any available information on its possible transboundary impact;

    (2) Information on the nature of the decision which may be taken.

    The affected Member State must be given a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures.

18. The applicants asserted that Article 7 had been breached in that a description of and information in relation to the scheme (the 85km off-line A5 Western Transport Corridor dual carriageway scheme) had not been sent to the Irish Government. Stephens J

[17] [2013] EWCA Civ 1635 upholding Stadlen J. at [2013] EWHC 899 (Admin).

[18] [2013] NIQB 30.

considered, however, that it was "readily apparent" that the Irish Government was a key partner in taking the scheme forward:[19]

> "...there was an A5 Technical Group being a cross-border group consisting of two senior members of the [Northern Irish] Department and two senior members of the National Roads Authority in the Republic of Ireland ... I consider that descriptions and information in relation to the scheme were being shared within this body set up by the Irish Government and the Northern Irish Executive. No suggestion has been made ... that the Irish Government was unaware of or had not been informed as to the descriptions and information set out in Article 7 or that they did not have an opportunity within an appropriate timescale to indicate whether they wished to participate in the environmental decision-making procedures."

19. Stephens J considered it unnecessary to decide whether there had been a breach of Article 7, except to indicate that if there had been, it was "of an entirely technical nature elevating form over substance", and that he would have no hesitation in exercising discretion by declining to grant any relief.[20]

Proposals to amend the EIA Directive

20. In October 2012 the European Commission published a proposal for a new Directive amending the existing EIA Directive.[21] The Commission proposal explains that the main amendments proposed are:

    (1) Clarifying the screening procedure, by modifying the criteria of Annex III and specifying the content and justification of screening decisions - the aim is to avoid unnecessary administrative burden in relation to small-scale projects;

    (2) The introduction of amendments to reinforce the quality of the EIA process, including mandatory scoping and "quality control" of EIA information; it is also proposed to specify the content of the EIA report (mandatory assessment of reasonable alternatives, justification of final decisions, mandatory post-EIA monitoring of significant adverse effects) and to "adapt the EIA to challenges" (biodiversity, climate change, disaster risks, availability of natural resources); and

    (3) Specifying the time-frames for the main stages of EIA required by the Directive (public consultation, screening decision, final EIA decision); it is also proposed to introduce a mechanism described as "a kind of EIA one-stop shop" to ensure "co-ordination or joint operation" of EIA with the environmental assessment required under other relevant EU legislation, including the SEA Directive and the Habitats Directive.

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[19] At [73].

[20] At [74].

[21] COM(2012) 628 final.

21. As regards the definition of "project" discussed in detail above, the only amendment proposed is to replace the reference to "the execution of construction works or of other installations or schemes" with "the execution of construction or demolition works, or of other installations or schemes" (emphasis added); thus the Commission proposal is not relevant to the issues raised in ***Brussels Airport***.

22. The proposed amendments evidence a clear desire to pursue greater alignment between the EU instruments which provide for various forms of environmental assessment. Thus it is explained that the possibility of not applying the EIA Directive will be limited to projects with national defence as their sole purpose and to civil emergencies, "as is already the case" under the SEA Directive. Similarly, it is proposed (via an amended Article 5(1)) to make the assessment of alternatives which is required as part of the EIA process significantly more onerous; as amended, the required assessment would substantially mirror the existing requirements of the SEA Directive as regards the assessment of reasonable alternatives (discussed in detail below). Most significantly in terms of "alignment" between the EU instruments which govern environmental assessment, the "one-stop shop" is found in the amended Article 2(3), which is in the following terms:

> "Projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Union legislation shall be subject to coordinated or joint procedures fulfilling the requirements of the relevant Union legislation.
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> Under the coordinated procedure, the competent authority shall coordinate the various individual assessments required by the Union legislation concerned and issued by several authorities, without prejudice to any provisions to the contrary contained in other relevant Union legislation.
>
> Under the joint procedure, the competent authority shall issue one environmental impact assessment, integrating the assessments of one or more authorities, without prejudice to any provisions to the contrary contained in other relevant Union legislation.
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> Member States shall appoint one authority, which shall be responsible for facilitating the development consent procedure for each project."

EIA and the NPPG

23. The National Planning Policy Guidance ("**NPPG**") published by the Government on 6 March 2014 contains several pages devoted to EIA, under the following headings:

(1) Legislation covering Environmental Impact Assessment;

(2) The purpose of Environmental Impact Assessment;

(3) The stages of Environmental Impact Assessment;

(4) Development covered by the regulations;

(5) Screening Schedule 2 projects;

(6) Preparing an Environmental Statement;

(7) The procedures for submitting an Environmental Statement;

(8) Considering and determining planning applications that have been subject to an Environmental Impact Assessment.

24. It will be apparent that the NPPG provides a relatively comprehensive overview of the EIA regime and is likely to be an invaluable starting-point for anyone unfamiliar with the operation and requirements of the EIA process or wishing to refresh their memory at a fairly "general" level, although certain points of detail (including a few case-law references) are included.

25. Of particular note is the following passage:

> "Environmental Impact Assessment should not be a barrier to growth and will only apply to a small proportion of projects considered within the town and country planning regime. Local planning authorities have a well-established general responsibility to consider the environmental implications of developments which are subject to planning control. The 2011 Regulations integrate Environmental Impact Assessment procedures into this framework and should only apply to those projects which are likely to have significant effects on the environment. Local planning authorities and developers should carefully consider if a project should be subject to an Environmental Impact Assessment. If required, they should limit the scope of assessment to those aspects of the environment that are likely to be significantly affected."

26. This has echoes of Carnwath LJ (as he then was) in ***Jones v. Mansfield DC*** [2004] 2 P & C.R. 14 at [58]:

> "58. It needs to be borne in mind that the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race. Furthermore, it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case."

27. If the hope underlying that passage was that it might deter would-be claimants possessed of an over-optimistic impression of the scope of the EIA regime and seeking to use it to stall development projects, it is perhaps likely to prove a vain one.

EIA and legislation

28. In ***R. (Buckinghamshire CC) v Secretary of State for Transport*** [2013] PTSR 1194 and [2014] 1 W.L.R. 324 ("***HS2***") both the Court of Appeal and Supreme Court rejected the contention that the EIA legislative exemption in article 1(4) of the Directive would clearly not be met by the Parliamentary procedure in Standing Orders for hybrid bills (which were amended during the court of the proceedings to meet some of the criticisms). Considering ***Boxus v. Region Wallonne*** (C-128/09) [2012] Env. L.R. 14 and ***Solvay v. Region Wallonne*** (C-182/10) [2012] 2 C.M.L.R. 19, which require the objectives of EIA to be met for legislative procedures to be exempt, Lord Reed (with whom the other members of the Court agreed) characterized the claim as follows:

> "67 At the hearing of the appeal, which was held before the Bill for phase 1 was introduced into Parliament, the claimants argued as follows. The Government intends to

seek development consent for HS2 through hybrid Bills in Parliament, without going through all the procedures required by the EIA Directive . The Government relies on the exemption granted by article 1(4) : "This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of *347 this Directive, including that of supplying information, are achieved through the legislative process." As construed by the Court of Justice of the European Union, however, that provision applies only where the objectives of the Directive are fulfilled by the legislative process.

68 In order to achieve the objectives of the EIA Directive , it is argued, the parliamentary procedure must allow effective public participation, as required by article 6(4):

> "The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in article 2(2) and shall for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken."

The procedure must therefore permit the public to produce information demonstrating why the HS2 project should not proceed, and that information must be capable of influencing the outcome of the decision-making process. In particular, these claimants must be able to provide information about their proposal for the optimised alternative, and Members of Parliament must be able to consider it and to be influenced by it.

69 It is however not possible, it is argued, for there to be effective public participation under the procedure envisaged. The Government has already taken the critical decision to accept the economic case for HS2 and to reject the optimised alternative. The Bill for phase 1 will reflect that decision. Parliament will be asked to approve the principle of the Bill at second reading. It will have available to it an environmental statement prepared on behalf of the Secretary of State. It will also have available to it the comments on the environmental statement and the assessor's summary of those comments. The Secretary of State has however confirmed in correspondence that the vote at the conclusion of the debate will be subject to the whip. Ministers will face the alternatives of resignation or dismissal from office if they vote against the Bill. Backbenchers will risk disciplinary sanctions."

29. He first considered the constitutional law issues (enlarged upon subsequently by Lord Neuberger PSC and Lord Mance) which had not been contested by the Secretary of State:

> "78 The argument presented on behalf of the claimants as to the implications of the EIA Directive, if well founded, impinges upon long-established constitutional principles governing the relationship between Parliament and the courts, as reflected for example in article 9 of the Bill of Rights 1689, in authorities concerned with judicial scrutiny of parliamentary procedure, such as *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710, *Lee v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576, *Pickin v British Railways Board* [1974] AC 765 and *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, and in other cases concerned with judicial scrutiny of decisions whether to introduce a Bill in Parliament, such as *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin); [2008] ACD 281. Neither the Bill of Rights nor any of the authorities I have mentioned was however referred to in the parties' printed cases; nor was this issue mentioned before us until it was raised by the court. Nevertheless, it follows that the claimants' contentions potentially raise a question as to the extent, if any, to which these principles may have been implicitly qualified or abrogated by the European Communities Act 1972.

> 79 Contrary to the submission made on behalf of the claimants, that question cannot be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the 1972 Act. If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom. Nor can the issue be resolved, as was also suggested, by following the decision in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603, since that case was not concerned with the compatibility with EU law of the process by which legislation is enacted in Parliament. In the event, for reasons which I shall explain, it is possible to determine the appeal without requiring to address these matters."

30. He then considered the role of debate and party politics and Parliamentary procedures in democratic decision making and went on to reject the claim:

> "107 It would be surprising if the EIA Directive required the adoption of a radically different approach. The fundamental objective of the Directive is, as the Court of Justice has explained, to ensure that the environmental effects of projects are assessed before consent is given. The achievement of that objective requires that appropriate environmental information should be available for consideration before consent is given. It does not require that the decision whether to give consent should be influenced solely or decisively by that information.
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> 108 In particular, the question whether it is in the public interest to proceed with a project of national importance, such as HS2, may be a matter of national political significance. It is partly for that reason that such decisions may be considered appropriate for determination by the national legislature rather than by the ordinary processes of development control. The national legislatures of the member states are of course political institutions, whose decisions are likely to be influenced, possibly decisively, by the policy of the dominant parliamentary party or parties. Article 1(4) of the EIA Directive is nevertheless based on the premise that the objectives of the Directive can be achieved where the decision is made by a body of that kind. That is not difficult to understand: the influence of party and Governmental policy does not prevent the members of national legislatures from giving careful and responsible consideration to the information, including environmental information, which is relevant to the matters that they have to decide.
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> 109 The contention that the procedure currently envisaged by the Government will not permit an adequate examination of the environmental information to take place appears to me to be equally unpersuasive. I observe in the first place that there is nothing either in the text of article 1(4) of the EIA Directive, or in the exegesis of that text by the Court of Justice, to suggest that national courts are required not only to confirm that there has been a substantive legislative process and that the appropriate information was made available to the members of the legislature, but must in addition review the adequacy of the legislature's consideration of that information, for example by assessing the quality of the debate and examining the extent to which members participated in it. These are not matters which are apt for judicial supervision. Nor is there anything to suggest the inevitable corollary: that national courts should strike down legislation if they conclude that the legislature's consideration of the information was inadequate.
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> 110 There is a further difficulty with the contention that EU law requires the internal proceedings of national legislatures to be subject to judicial oversight of this nature. The separation of powers is a fundamental aspect of most if not all of the constitutions of the member states. The precise form in which the separation of powers finds expression in

their constitutions varies; but the claimants' contentions might pose a difficulty in any member state in which it would be considered inappropriate for the courts to supervise the internal proceedings of the national legislature, at least in the absence of the breach of a constitutional guarantee.

111 Against this background, it appears unlikely that the Court of Justice intended to require national courts to exercise a supervisory jurisdiction over the internal proceedings of national legislatures of the nature for which the claimants contend. There is in addition much to be said for the view, advanced by the German Federal Constitutional Court in its judgment of 24 April 2013 on the Counter-Terrorism Database Act, 1 BvR 1215/07, para 91, that as part of a co-operative relationship, a decision of the Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order...

112 Counsel for the claimants relied however upon a statement made by Advocate General Sharpston in the *Boxus* case [2011] ECR I-9711 , para 84:

> "In my view, in order to assess whether that has happened in any particular case, the national court will need to examine the following aspects … (b) process: was the appropriate procedure respected and was the preparation time and discussion time sufficient for it to be plausible to conclude that the people's elected representatives were able properly to examine and debate the proposed project?"

Similarly in *Nomarchiaki Aftodioikisi Aitoloakarnanias v Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon* (Case C-43/10) [2013] Env LR 453 Advocate General Kokott referred, at paras 136–137, to a requirement that the legislature "performs its democratic function correctly and effectively", and to the need to clarify whether the legislature "was able properly to examine and debate the environmental effects of the project". I observe however, first, that those statements were not endorsed by the Court of Justice, and secondly, that their focus is upon the ability of the legislature to examine and debate the proposed project, rather than upon a qualitative assessment of the legislature's actual consideration of the proposal.

113 In the present case, there is in any event no reason to suppose that Members of Parliament will be unable properly to examine and debate the proposed project. Although the environmental statement made available to Members of Parliament may be of a size which reflects the scale of the project and the complexity of its impact upon the environment, it can be expected to include a non-technical summary of the information, in accordance with the 2011 Regulations (which transpose, in this respect, Annex IV to the EIA Directive). That can be expected to include information about the reasons for choosing HS2 rather than the main alternatives, as required by Annex IV to the Directive. Members of Parliament can also be expected to be provided with a summary of the comments received on the environmental statement, prepared by an independent assessor, in accordance with SO 224A. That summary can be expected to encompass any comments made by the claimants which advance the case for their optimised alternative.

114 Members of Parliament can be expected to have that information well in advance of the second reading debate on the Bill: as I have explained, the summary of the comments received must be submitted to the House at least 14 days prior to the Bill's receiving its second reading; and it is implicit in SO 224A that the environmental statement must itself have been submitted at least three months or so earlier (since the public must be allowed a period of at least 56 days to comment on the statement, and the assessor must be allowed at least 28 days to prepare the summary).

115 It is in any event unrealistic for the claimants to focus solely upon the second reading debate, as if it were the only opportunity for Members of Parliament to consider the

> environmental information. Active political debate on the HS2 project, including its environmental impact, has already been under way for some time, and it is reasonable to expect that Members of Parliament have been, and will continue to be, contacted about it by their constituents and lobbied by interested organisations, such as the claimants. As the Bill proceeds through Parliament, and political interest in the project becomes more intense, Members of Parliament will have even more reason to be, and to wish to be, well informed about the project. As counsel for the Secretary of State observed in relation to the opportunities for Members of Parliament to consider and discuss the proposal, the second reading debate is in reality the tip of the iceberg.
>
> 116 Without therefore considering the fundamental constitutional objection to this line of argument—that the court would be presuming to evaluate the quality of Parliament's consideration of the relevant issues, during the legislative process leading up to the enactment of a statute—I conclude that the argument is based on an incorrect interpretation of the EIA Directive, and is in addition unsupported by the evidence as to the procedure which might be followed."

31. This broad approach makes it highly unlikely that any future challenges with regard to the compatibility of EIA and hybrid (or private) bills is likely to find favour with the UK courts, absence a clear contrary view from the CJEU. The matter was considered *acte clair* and did not justify a reference for a preliminary ruling to the CJEU.

EIA and enforcement

32. It has been contended on several occasions[22] without definitive resolution, that the time limits for enforcement action under s. 171B of the 1990 Act were incompatible with the EIA Directive since they might allow time to expire, and lawful development to arise, effectively a development consent, without any prior EIA prior to the conferring of lawful use status. This might arise because a LPA simply did not take action, whether because it was unaware of the breach or otherwise, or determined not to enforce as a matter of expediency. Neither inaction nor a decision not to enforce necessarily leads to lawful development status since the objective requirements of the 1990 Act must still be met up to the expiry of the relevant period, but such decisions or failures to decide could be regarded as setting the context for development consent for the lawful development. An application for a lawful development certificate under ss. 191 or 192 of the 1990 Act could not be an application for development consent since those are merely applications to confirm an existing or future status, not to grant any form of consent.

33. The issue came before the CJEU in Commission v UK (C98/04) [2006] E.C.R. I-4003 and, whilst the Advocate General considered the enforcement time limits to breach the EIA Directive, the CJEU dismissed the application as inadmissible and did not endorse the AG's opinion.

34. The applications of time limits and limitation periods are not unknown in the EU or under EU substantive and procedural law and the rules which are applied to national law which seeks to preclude a remedy on such (and related) grounds must meet the requirements of

[22] e.g. Commission v. UK and ***Ardagh Glass v Chester City Council*** [2009] Env LR 34,

the principles of equivalence and effectiveness, as set out **in *R (Delena Wells) v. Secretary of State***[23] at :

> " "(64) As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany v Commission* [1990] ECR I-2321, paragraph 13).
>
> (65) Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and WWF and Others, cited above, paragraph 70). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.
>
> (66) The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.
>
> (67) The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) …"

35. In ***R (Evans) v. Basingstoke and Deane BC***[24] the point arose directly. Sullivan LJ, giving the judgment of the Court of Appeal upheld the judgment of Stadlen J. dismissing the judicial review. Having considered a submission that the issue should be determined by reference to the Advocate General's opinion in (which had not been followed by the CJUE), Sullivan LJ held:

> "12 The difficulty with that submission is that the Advocate General's Opinion was not accepted by the Court. In paragraphs 19 to 23 of its judgment, the Court said this:
>
> > "(19) During both the pre-litigation stage of the present procedure and the litigation itself, the Commission concentrated its criticisms on the issue of LDCs in so far as it allows by-passing of the procedures governing application for consent and environmental impact assessment required by Directive 85/337 for projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location.
> >
> > (20) The Commission has not put forward any complaints concerning the actual existence of time-limits for the taking of enforcement action against development

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[23] [2004] 1 CMLR 31. See also e.g. ***Peterbroeck v Belgium State*** Case C-312/93 [1995] ECR I-4599 at [12]-[14]

[24] [2013] EWCA Civ 1635 upholding Stadlen J. at [2013] EWHC 899 (Admin).

> which does not comply with the applicable rules, although the introduction of LDCs is by its very nature inseparable from the provisions laying down such rules of limitation. Pursuant to section 191 of the TCPA, an LDC is issued, in particular, when no enforcement action may then be taken against the uses or operations concerned, whether because they did not involve development or require planning permission or because the time for enforcement action has expired.
>
> (21) Consequently, the present action for failure to fulfill obligations, since it puts before the Court only one aspect of a legal mechanism composed of two inseparable parts, does not satisfy the requirements of coherence and precision referred to above.
>
> (22) That conclusion is all the more necessary because the arguments put forward by the United Kingdom Government to contest the failure to fulfill obligations are based, in essence, on the system of time-limits which the Commission failed to include in the subject-matter of the dispute and which, accordingly, could not form the basis of detailed discussion between the parties.
>
> (23) It follows from the foregoing that the action must be dismissed as inadmissible."

13 If the very existence of a system of time limits for taking enforcement action was incompatible with the Directive, it seems to me that the Court would surely have said so. The action was dismissed as inadmissible because the Commission had failed to complain about that aspect of the United Kingdom's two part legal mechanism.

14 For my part, I am far from convinced that the Advocate General was referring to both parts of the United Kingdom's legal mechanism in paragraphs 19 to 23 of his opinion, but if he was, as submitted by Mr McCracken, then he was doing so on an understanding of that mechanism which was necessarily incomplete because detailed discussion of the time limits aspect of the mechanism had not been possible because of the way in which the Commission had formulated its complaint.

15 The Court gave its judgment in *Commission v United Kingdom* in as long ago as May 2006. If the system of time limits in section 171B about which the Commission had not complained in that case, was felt by the Commission to be incompatible with the Directive, the Commission might have been expected to renew its complaint, dealing this time with both elements of the United Kingdom's legal mechanism.

16 Other than the opinion of the Advocate General in *Commission v United Kingdom*, Mr McCracken was not able to point to any decisions in the European authorities which supported his proposition that time limits for taking enforcement action were incompatible with the Directive.

17 Indeed, the submission would appear to me to fly in the face of well-established authority that provided they do not render the application of EU law impossible or excessively difficult "time limits are an application of the principle of legal certainty protecting both individuals and administrators." See paragraph 64 of the Opinion of Advocate General Jacobs in *Denkavit* [1996] 3 CMLR 504 to which we were referred by Mr McCracken.

18 Mr McCracken sought to derive some support for his submission that section 171B was incompatible with the Directive from the observations of HHJ Mole QC in *Ardagh Glass v Chester City Council* [2009] Env LR 34. In that case, the judge was considering a judicial review application for a mandatory order requiring the City Council to take enforcement action in respect of a substantial glass factory which had been constructed without planning permission. The judge granted the order.

19 Having determined that issue, the judge then considered the Claimant's application for

a declaration that it would be unlawful to grant retrospective planning permission for the factory because it would be incompatible with the Directive to do so. He rejected that aspect of the claim for judicial review and an appeal against that aspect of his judgment was dismissed.

20 When considering this second issue, the judge said this in paragraph 110 of his judgment:

> "In my judgment, a purposive interpretation of Article 2(1) strongly suggests that for the defendant Council to permit the Quinn Glass development to achieve immunity, whether by a positive decision not to take enforcement action or by mere inaction, would, as Schiemann LJ contemplated, amount to a breach of the UK's obligations under the Directive. It may be that the provisions of section 171B need to be re-examined and perhaps disapplied in the case of EIA development so that for such development immunity would never arise and pre-emptive EIA development could only become lawful by, after full public participation, undertaking a comprehensive EIA comparing both initial and current circumstances and establishing exceptional justification. However, the circumstances of the *Prokopp* case are very different from the present case and, in my view, distinguishable … "

21 The reference to Schiemann LJ is a reference to Schiemann LJ's judgment **in** *R (Prokopp) v London Underground Limited* [2004] Env LR 8 in which he said at paragraph 38:

> "I would accept for the purposes of the present appeal that if a project which falls within the Directive goes ahead without there having been an Environmental Impact Assessment and national authorities simply stand by and do nothing then this might well amount to a breach of our obligations under the Directive. That is not this case."

22 It is important to bear in mind that in both *Prokopp* and *Ardagh*, the time limit for taking enforcement action had not expired. In those circumstances, a decision not to take enforcement action in respect of EIA development carried out in breach of planning control and, therefore, in breach of the EIA Directive, might well amount to a breach of article 2(1) of the Directive, but those cases are not authority for the proposition that if the time limit for taking enforcement action has expired, the fact that the local planning authority is unable to take enforcement action is in breach of the directive. As Stadlen J observed in paragraph 384 of his judgment, "The obiter comments of HHJ Mole QC pose rather than answer the question raised in this case."

23 Although Mr McCracken sought to persuade us that Stadlen J erred in concluding that the time limits in section 171B were procedural rather than substantive (see paragraphs 397 to 400 of the judgment below), he was not able to identify any authority, either European or domestic, which supported that proposition or which called into question the judge's careful analysis of the authorities relevant to that issue.

24 In my judgment, the time limits imposed by section 171B fall squarely within the principles in *R (on the application of) Wells v Secretary of State for Transport, Local Government and the Regions* [2004] 1 CMLR 31. In that case the Court of Justice had to consider the scope of the United Kingdom's obligation to remedy a failure to carry out an environmental assessment of a permission for an EIA development when new conditions were imposed in respect of an old mining permission).

25 Having recorded the submission of the United Kingdom government that the minerals planning authority was under no obligation to revoke or to modify the permission, the Court said this in paragraphs 64 to 67…

In paragraph 70, the Court said:

> "The answer to the third question must therefore be that under Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337 . The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness). In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered."
>
> 26 If, as I have concluded, time limits on taking enforcement action are not in principle incompatible with a member state's obligations to ensure compliance with the Directive, then the precise nature of the time limits is a matter which falls within the principle of procedural autonomy of the member states, provided that the time limits imposed by the member state comply with the principles of equivalence and effectiveness."

36. It follows that although the issue of enforcement time limits is not generally considered to be incompatible with EU law are must be taken to distinguish cases where tome for enforcement action has expired and a situation where time has not expired and the LPA has to consider the issue, or it arises in the context of another decision. Sullivan LJ distinguished cases such as ***Ardagh Glass*** and ***Prokopp*** on the basis that they concerned decisions before the time period had expired.

37. LPAs should be careful therefore when making a decision not to take enforcement action, or which has that effect, to ensure that the requirements of EIA are met at that stage.

II. STRATEGIC ENVIRONMENT ASSESSMENT

The scope of SEA

38. A number of high profile recent cases have given detailed consideration to the question of the scope of the SEA process. The issue was addressed by the Supreme Court in ***Walton v Scottish Ministers***[25] and at significant length more recently by the High Court (Lindblom J) in ***R (West Kensington Estates Tenants and Residents' Association) v. Hammersmith and Fulham LBC***;[26] judgment in the latter was handed down whilst the ***HS2*** litigation was proceeding through the courts, culminating in judgment from the Supreme Court in January 2014.

[25] [2012] UKSC 44 [2013] 1 CMLR 28.

[26] [2013] EWHC 2834.

The legal framework governing the scope of SEA

39. As is well known, the SEA process applies to "plans and programmes". Pursuant to article 2(a) of the SEA Directive,[27] "plans and programmes" means "plans and programmes ... as well as any modifications to them" which are:

(1) "subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government"; and

(2) "required by legislative, regulatory or administrative provisions".

The term is defined to similar effect by regulation 2(1) of the SEA Regulations.[28]

40. Article 3 of the SEA Directive sets out the plans and programmes in respect of which SEA is required to be carried out, if those plans and programmes are likely to have significant environmental effects. The list includes "plans and programmes ... which are prepared for ... town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to [the EIA Directive]" (emphasis supplied).[29] Again, provision to the same effect is made by the SEA Regulations (regulation 5).

41. Article 4(3) of the SEA Directive provides that where plans and programmes form part of a hierarchy, Member States shall "with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive at different levels of the hierarchy". The corresponding provision in the domestic Regulations is regulation 12(3).

42. In ***C-567/10 Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale***[30] the Court of Justice of the European Union ("**CJEU**") had to decide whether plans and programmes which were provided for by national legislation but whose adoption was not compulsory were included within the phrase "plans and programmes ... which are required by legislative, regulatory or administrative provisions". A number of Member States (including the UK) submitted that administrative and legislative measures which were not required by rules of law were not subject to the SEA procedure. The Court rejected that argument, holding that an interpretation which excluded plans and programmes whose adoption was regulated by rules of law solely because their adoption was not compulsory in all circumstances would "appreciably restrict" the scope of the SEA Directive and would in part compromise its practical effect.[31] It followed that:

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[27] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

[28] Environmental Assessment of Plans and Programmes Regulations 2004

[29] The list also includes plans or programmes which have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive (Directive 92/43/EEC).

[30] [2012] 2 CMLR 30.

[31] At [28] – [30].

> "...plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down."[32]

The Supreme Court decision in ***Walton v Scottish Ministers*** (October 2012)

43. ***Walton***[33] concerned a challenge to the validity of schemes and orders made by the Scottish Ministers under the Roads (Scotland) Act 1984 to allow the construction of a "western peripheral route" ("**WPR**") around Aberdeen, on the ground (*inter alia*) that the Ministers had failed to comply with the requirements of the SEA Directive.

44. The claimant contended that the regional transport strategy (the "**MTS**") adopted by NESTRANS (the North East Scotland Transport Partnership, a non-statutory regional transport partnership established with support from the Ministers) was a plan or programme within the meaning of Article 2(a) of the SEA Directive. The decision to construct the Fastlink was a modification to that plan or programme, and thus itself a plan or programme; SEA ought therefore to have been undertaken. The Ministers accepted that had the MTS been prepared by a statutory body (at a time when the SEA Directive was in force) an SEA would have been required, but argued that because NESTRANS was a non-statutory partnership, the MTS had not been "prepared for adoption through a legislative procedure" or "required by legislative, regulatory or administrative provisions".

45. The Supreme Court did not find it necessary to reach a concluded view on the question whether the MTS was a "plan or programme" within the meaning of Article 2 of the Directive. Lord Reed, content to proceed on the hypothesis that the MTS did constitute a plan or programme, held that the Fastlink did not constitute a modification to that plan or programme (and thus a plan or programme in its own right).[34] Ministers had assumed responsibility for a specific development, the WPR. In the terminology of the EIA and SEA Directives, that development could aptly be described as a "project" and could not readily be regarded as a plan or programme. Ministers had not assumed responsibility for the preparation of a document setting the framework for future development consent of projects. The SEA Directive did not apply, but other EU legislation such as the EIA Directive.[35]

46. Lord Carnwath was, like Lord Reed, content to proceed on the assumption that the MTS was a plan or programme, but registered his "serious doubts on the point, even accepting the flexible approach required by the European authorities".[36] He continued:

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[32] At [31].

[33] [2012] UKSC 44 [2013] 1 CMLR 28.

[34] At [64].

[35] At [65] and [66].

[36] At [99].

> "I note ... that the passage from ***Inter-Environnement Bruxelles*** ... refers to regulation of plans and programmes by provisions "which determine the competent authorities for adopting them and the procedure for preparing them...". There may be some uncertainty as to what in the definition is meant by "administrative", as opposed to "legislative or regulatory", provisions. However, it seems that some level of formality is needed: the administrative provisions must be such as to identify both the competent authorities and the procedure for preparation and adoption. Given the relatively informal character of the NESTRANS exercise, it is not clear to me what "administrative provisions" could be relied on as fulfilling that criterion..."

47. Giving the final judgment, Lord Hope also reserved his opinion on whether the MTS formed a plan or programme within the meaning of the Directive, but observed[37] that even if it was, a careful analysis of the history showed that the decision to construct the Fastlink was taken purely and solely in furtherance of a specific project and did not seek to affect or modify the legal or administrative framework for the future development consent of projects as described in the MTS.

The High Court decision in ***West Kensington*** (October 2013)

48. The claimants in ***R (West Kensington Estates Tenants & Residents' Association) v. Hammersmith & Fulham LBC***[38] challenged the Earl's Court and West Kensington Opportunity Area Joint Supplementary Planning Document "**the SPD**" on a number of grounds, including that the SPD ought to have been subject to SEA, but was not. Resisting the challenge, the defendant and the interested parties submitted that the preparation of the SPD was not "required" by any "legislative, regulatory or administrative" provision and thus did not come within the scope of Article 2(a) of the SEA Directive. Voluntary plans and programmes did not require SEA; the relevant statutory provisions simply empowered authorities to adopt a supplementary planning document, but did not require it. Further, the SPD reflected the strategy set for the Opportunity Area in the development plan. SEA had been undertaken for the London Plan and for the core strategies and its lawfulness was not questioned.

49. Lindblom J, having held that the SPD was not a development plan document (i.e. an old-style AAP), gave detailed consideration to the "plan or programme" question. He noted that the preparation of an SPD was not mandatory, but that if an SPD were prepared it became a local development document (although not a DPD) and had to conform with the policies in the core strategy and in any other relevant DPD.[39] He agreed that the exclusion of SPDs from the requirement for a sustainability appraisal[40] seemed consistent with the view that Parliament did not expect SPDs to be assessed under the SEA regime and that an SPD seemed to fit the description of a "voluntary" plan or programme (which would not

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[37] At [149].

[38] [2013] EWHC 2834.

[39] At [171].

[40] As a result of the amendment of section 19(5)(a) of the Planning and Compulsory Purchase Act 2004 by section 180(5) of the Planning Act 2008.

require SEA) in the European Commission's guidance.[41] However – having considered the judgments at first instance and in the Court of Appeal in ***HS2***, discussed below, including the application of ***Inter-Environnement Bruxelles v. Région de Bruxelles-Capitale***[42] – Lindblom J concluded[43] that, "applying a broad interpretation to the concept of requirement by an administrative provision", the SPD had been required in that sense:

> "In several places in their core strategies LBHF and RBKC announced their intention to prepare a supplementary planning document ... All of [the relevant] passages in the core strategies make clear what the local planning authorities were going to do to provide detailed guidance supplementing the policies and provisions of the development plan, and thus finish the framework of policy and guidance within which proposals for development in the Opportunity Area would be considered. It follows that the framework of policy and guidance required the SPD if it was to be complete. The core strategies said as much. I think this is enough to amount to a requirement in an administrative provision within the ambit of article 2(a) of the SEA directive."

50. Lindblom J went on to consider whether the SPD "set the framework for future development consent".[44] He noted that in ***Walton*** Lord Reed had said[45] that it was implicit that a framework could be set "without the location, nature or size of projects being determined" and that in the Court of Appeal's decision in ***HS2*** both judgments had concentrated on the nature and degree of "influence" that a plan or programme might have on the subsequent decision, by narrowing the discretion that the authority making the decision would otherwise enjoy. He concluded that the SPD did "set the framework for future development consent" for proposals in the Opportunity Area, within the meaning of Article 3(2) of the SEA Directive:

> "184. If one asks oneself whether the SPD, together with the relevant policies of the development plan, is likely to influence decisions on proposals for development in the Opportunity Area, and is therefore to be regarded as setting the framework for such decisions, I think there can be only one sensible answer. Plainly it is. One sees this in the passages in the core strategies to which I have referred. [The SPD] is, and is meant to be, practical guidance for decision-making. In paragraph 1.4 it refers to the function of the "detailed guidance" that it provides on the application of development plan policy, which, it says, will be used to assess "any planning applications in the [Opportunity Area]". The fact that the London Plan and the two core strategies had between them set the development plan strategy for the Opportunity Area, a strategy with which proposals will have to comply if they are to earn the statutory presumption of a decision made in accordance with the plan, does not displace the influence of the SPD as a material consideration under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. That this influence will occur is not a "mere possibility". It is an intentional consequence of LBHF and RBKC having prepared and adopted the SPD, as guidance required by the plan.

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[41] "Implementation of Directive 2001/42 of the Assessment of the Effects of Certain Plans and Programmes on the Environment", European Commission, 2001, at 3.15.

[42] [2012] 2 CMLR 909.

[43] At [179].

[44] At [180] ff.

[45] At [17].

> 185 In my view, therefore, the SPD is a "plan or programme" that was both "required by … administrative provisions" under article 2(a) of the SEA directive and "set the framework for future development consent" for proposals in the Opportunity Area, under article 3(2)."

51. SEA of the SPD had therefore been required. However, Lindblom J noted that SEA had been undertaken both for the core strategies and for the SPD. He held that the appropriate content of an environmental report, if one had to be prepared, would depend on the place of the plan or programme in question in any hierarchy of plans and programmes to which it belonged: that was, in effect, what Article 4(3) of the SEA Directive provided. There was no need for assessment to be duplicated at different levels in the hierarchy; that principle was acknowledged by the Commission guidance[46] and had been recognised domestically.[47] Lindblom J concluded that the SEA conducted for the SPD was an adequate and lawful assessment sufficient to complement the SEA undertaken for the London Plan and the core strategies.[48] He accepted the submission of counsel for the defendant and interested parties that the requirements of the SEA Directive and the SEA Regulations were <u>in substance</u> fully complied with in the sustainability appraisals prepared for the draft SPD and subsequently for the final version; substantial compliance was sufficient. He held that:

> "194. In the process in which the SPD was prepared there was neither any legal requirement nor any justification for a duplication of the assessment already undertaken in the SEA for the core strategies. This case is a good example of article 4(3) of the SEA directive being put into practice...
>
> 198. The SEA in the sustainability appraisals for the SPD, including the non-technical summary in each, was, I believe, a lawful assessment. In my view, as a continuation of the SEA for the core strategies, it was complete, clear, sufficiently detailed and up to date. It was adequate given the status of the SPD as guidance supplementary to the development plan and the stage in the whole process at which SEA for the SPD came to be carried out."

52. However, as discussed below, a curiosity of the ***HS2*** judgment in the Supreme Court is the criticism directed by Lord Neuberger PSC at the ***Inter-Environnement Bruxelles*** case and the suggestion that it ought to be reconsidered by the CJEU.

<u>The ***HS2*** litigation and the scope of the SEA regime</u>

53. The first issue which arose in the HS2 litigation in the Court of Appeal and Supreme Court (see above) was the question whether the SEA Directive applied to the Government proposals for HS2 itself, which had not been subject to SEA but only a more limited "sustainability appraisal". challenges to the Government's Command Paper *High Speed Two – Decisions and Next Steps* ("**the DNS**") setting out the Government's strategy for the High Speed Two railway to follow a "Y" network from London to Birmingham, Manchester and Leeds as well as the details of Phase 1 of the route.

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[46] At 4.5.

[47] E.g. ***R (o.a.o. Howsmoor Developments Limited) v South Gloucestershire Council*** [2008] EWHC 262 (Admin).

[48] At 193.

54. In the Court of Appeal Sullivan LJ dissented on this issue (though not the EIA issue considered above). The Supreme Court dismissed all appeals. Lord Carnwath (with whom all of the Court other than Lady Hale agreed) gave the leading judgment on SEA issues gave the leading judgment on EIA issues. Lady Hale, Lord Sumption, and Lord Neuberger and Lord Mance jointly also gave judgments considering amongst other things the constitutional relationship between national law and EU law.

55. Whilst Lady Hale DPSC had originally supported the application for a reference of the SEA issue to the CJEU she had subsequently decided[49] not and the Court generally concluded that the issue of SEA and setting the framework was *acte clair* (notwithstanding the dissent of Sullivan LJ in the Court of Appeal and the apparent absence of direct CJEU authority on the issue).

56. At first Instance ([2013] EWHC 481 (Admin)) Ouseley J held that the *Appraisal of Sustainability* accompanying the White Paper did not amount to a strategic environmental assessment pursuant to SEA Directive 2001/42/EC. However, the SEA Directive was not engaged because the White Paper was not a "plan or programme" which "set the framework for development consent" and which was "required by administrative provisions" within the meaning of Articles 2-3 of the Directive. A reference to the CJEU on the interpretation of these terms was held not to be appropriate at first instance.

57. The Judge also found that it was premature to conclude that the proposed Hybrid Bill process, by which the White Paper proposed that development consent for HS2 would be obtained, would be incompatible with the requirements of the EIA Directive 2011/92/EU, since it was impossible to say with certainty how Parliament would approach its task. It would be unwise, and risk an interference with Parliament's constitutional position, for the Court to declare in advance that certain aspects of the probable or possible procedures would fail to meet the requirements of the Directive. Furthermore, there was no legal requirement either in domestic administrative law or under the EIA Directive for the Secretary of State to consult upon and seek development consent for the entire 'Y' network by a single Hybrid Bill and Environmental Statement, as opposed to the two-phase process proposed in the White Paper (Phase 1 being London-Birmingham and Phase 2 being the remainder of the 'Y' to Leeds and Manchester). There was no reason to conclude now that that the cumulative effects of Phases 1 & 2 in combination would not be assessed in accordance with the EIA Directive in the Environmental Statement for either phase.

58. The Judge upheld a challenge to the consultation process leading to the decision announced in the White Paper as to the process for compensating the owners of blighted properties on or near the route of HS2 which was held to be unfair and unlawful. The other grounds of claim based upon the common law requirements for a fair consultation process, the Habitats Directive, the Public Sector Equality Duty under s.149 of the Equality Act 2010 and irrationality were all dismissed.

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[49] See paras. [147]-[155].

59. In the Court of Appeal, Lord Dyson MR and Richards LJ held that the central issue on the SEA challenge was whether the DNS "*set the framework for development consent*". If it did, then it should be regarded as a "*plan or programme*" and, applying the purposive interpretation of "*required*" given by the CJEU in ***Inter-Environnement Bruxelles v. Région de Bruxelles-Capitale***[50], it should also be regarded as "*required by administrative provisions*" given that it was published pursuant to a commitment made in an earlier Command Paper published in March 2010. They held, however, that the DNS did not "*set the framework for development consent*" since it was to be inferred from AG Kokott's opinion in ***Terre Wallonne ASBL v. Région Wallone***[51] and from the CJEU's judgment in ***Inter-Environnement Bruxelles*** that this criterion envisaged that the plan or programme should have legal influence on the subsequent decision on whether or not to grant development consent, whereas in the present case the development consent decision-maker was Parliament, which was sovereign. They did not rule out the possibility that a plan or programme may set the framework where it had sufficiently potent factual influence, but not where the decision-maker is Parliament since it was impossible to second-guess in advance what factors a Parliament would or would not take into account. They rejected the contention that their conclusion resulted in any incompatibility with Article 7 of the Aarhus Convention. The requisite degree of public participation could be achieved through the requirements of the Environmental Impact Assessment Directive in the development consent procedure for the specific project. They considered a reference to the CJEU not to be appropriate, because the CJEU jurisprudence gave sufficient guidance on the broad approach that should be adopted.

60. Sullivan LJ dissented on this central issue, holding that the majority's approach would leave a significant gap in strategic environmental protection in EU law since it would mean that no plan or programme could set the framework for development consent where the subsequent development consent decision-maker was a sovereign legislature. He considered that it would also mean that the SEA Directive would fail to meet the requirements of Article 7 of the Aarhus Convention relating to public participation in plans and programmes, to which the EU was a signatory and in accordance with which the SEA Directive should be interpreted. He considered that AG Kokott's opinion in ***Terre Wallone*** could equally be read in a way that supported the Appellant's case (and was in any event not a judgment of the CJEU) and that the CJEU's judgment on ***Inter-Environnement Bruxelles*** was addressing a different question, and therefore the matter could not properly be said to be *acte clair*. He concluded that the majority had been wrong not to refer the case to the CJEU since it was for the CJEU and not the domestic court of a member state to decide whether the fact that a member state chooses to adopt a process of granting development consent for a major project which will have significant environmental effect by way of an act of national legislation is sufficient, of itself, to place the Government's

[50] [2012] 2 CMLR 909.
[51] [2010] ECR I-5611.

adoption of a plan or programme outwith the scope of the EU-wide strategic environmental protection conferred by the SEA Directive

61. The Supreme Court' view as the scope of SEA was more in line with Ouseley J.'s approach than the majority of the Court of Appeal in that the judgments appear to support the view that for a document to be a plan or programme which "sets the framework" for EIA project consents it has to be one which constrains the process and not one which merely influences it (despite the language of "influence" used by Advocate General Kokott in ***Terre Wallone***). The practical effect of this appears to be that this will generally only arise where there is a legal duty to apply or consider the plan or programme e.g. via s. 70(2) of the 1990 Act or s. 38(6) of the 2004 Act in the case of development plans.

62. Lord Carnwath held (emphases added):

> "36 Against that background, and unaided by more specific authority, I would have regarded the concept embodied in article 3(2) as reasonably clear. One is looking for something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects. That approach is to my mind strongly supported by the approach of the Advocate General and the court to the facts of the *Terre Wallonne* case [2010] ECR I-5611 and by the formula enunciated in *Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* [2012] 2 CMLR 909 and adopted by the Grand Chamber in the *Nomarchiaki* case [2013] Env LR 453 .
>
> 37 In relation to an ordinary planning proposal, the development plan is an obvious example of such a plan or programme. That is common ground. Even if as in the UK it is not prescriptive, it none the less defines the criteria by which the application is to be determined, and thus sets the framework for the grant of consent. No doubt the application itself will have been accompanied by plans and other supporting material designed to persuade the authority of its merits. In one sense that material might be said to "set the framework" for the authority's consideration, in that the nature of the application limits the scope of the debate. However, no one would for that reason regard the application as a plan or programme falling within the definition.
>
> 38 In principle, in my view, the same reasoning should apply to the DNS, albeit on a much larger scale. It is a very elaborate description of the HS2 project, including the thinking behind it and the Government's reasons for rejecting alternatives. <u>In one sense, it might be seen as helping to set the framework for the subsequent debate, and it is intended to influence its result. But it does not in any way constrain the decision-making process of the authority responsible, which in this case is Parliament</u>. As Ouseley J said, at para 96:
>
> > "The very concept of a framework, rules, criteria or policy, which guide the outcome of an application for development consent, as a plan which requires SEA even before development project EIA, presupposes that the plan will have an effect on the approach which has to be considered at the development consent stage, and that that effect will be more than merely persuasive by its quality and detail, but guiding and telling because of its stated role in the hierarchy of relevant considerations. That simply is not the case here."
>
> 39 With respect to Sullivan LJ, I do not think that position is materially changed by what he called the "dual role" of Government. Formally, and in reality, Parliament is

autonomous, and not bound by any "criteria" contained in previous Government statements.

40 I have noted that the majority and the minority in the Court of Appeal adopted the same test, turning on the likelihood that the plan or programme would "influence" the decision. The majority referred to the possibility of the plan having a "sufficiently potent factual influence": para 55. Although Mr Mould generally supported the reasoning of the majority, he submitted that "influence" in the ordinary sense was not enough. The influence, he submitted, must be such as to constrain subsequent consideration, and to prevent appropriate account from being taken of all the environmental effects which might otherwise be relevant.

41 In my view he was right to make that qualification. A test based on the potency of the influence could have the paradoxical result that the stronger the case made in favour of a proposal, the greater the need for strategic assessment. Setting a framework implies more than mere influence, a word which is not used by the court in any of the judgments to which we have been referred. It appears in Annex II of the Directive, but only in the different context of one plan "influencing" another. In *Terre Wallonne* [2010] ECR I-5611 Advocate General Kokott spoke of influence, but, as already noted, that was by way of contrast with the submissions before her which suggested the need for the plan to be "determinative".

42 Finally, Mr Elvin pointed to the fact that the DNS had specific legal consequences, notably in the safeguarding direction, and the consequent application of the related blight provisions, and also in providing the basis for the paving Bill, and for the allocation of resources under it. I accept that these points provide an arguably material distinction from the supporting material for a conventional planning application. However, they do not imply any further constraint on Parliament's consideration of the environmental impacts of the project as a whole, under the hybrid Bill procedure."

63. Curiously, although the Supreme Court rejected the view that "set the framework" should be referred and was *acte clair*, notwithstanding the absence of direct decisions of the CJEU on point, the Supreme Court did consider that the CJEU's judgment in ***Inter-Environnement Bruxelles*** was one which the CJEU ought to reconsider. Lord Neuberger PSC considered and clearly preferred the analysis of Advocate General Kokott in the Bruxelles case and not the view of the CJEU Chamber which did not follow it:

"187 Had the meaning of article 2(a) come before the Supreme Court without there being any Court of Justice decision to assist, we would unhesitatingly have reached the same conclusion as Advocate General Kokott, and for the reasons she (as well as the Governments and the Commission represented before the Fourth Chamber) so convincingly gave. We would, like her, have concluded that "the legislature clearly did not intend" plans and programmes not based on a legal obligation to require an environmental assessment, even though they might have significant effects on the environment: para 20.

188 We would also have regarded this as clear to the point where no reference under the CILFIT principles was required. The reasons given by the Fourth Chamber of the Court of Justice would not have persuaded us to the contrary. While they allude, in the briefest of terms, to the fact that the Governments made submissions based on the clear language of article 2(a) and on the legislative history, they do not actually address or answer them or any other aspect of Advocate General Kokott's reasoning.

189 In the result, a national court is faced with a clear legislative provision, to which the

> Fourth Chamber of the European Court of Justice has, in the interests of a more complete regulation of environmental developments, given a meaning which the European legislature clearly did not intend. For this reason, we would, had it been necessary, have wished to have the matter referred back to the European Court of Justice for it to reconsider, hopefully in a fully reasoned judgment of the Grand Chamber, the correctness of its previous decision."

64. This leaves decisions such as the West Kensington case, and those where policy is "regulated" like SPD, in an ambiguous provision. The CJEU has given a clear view in the ***Bruxelles*** case that mere regulation is sufficient to meet the "required" limb of article 2(a) yet the Supreme Court has expressed its doubts as to its correctness but recognised that it is for the CJEU to correct the apparent error.

The requirement to assess reasonable alternatives in SEA

65. The SEA Directive requires reasonable alternatives to the proposed plan or programme to be assessed (cf. the less onerous obligation in the EIA context, which requires the developer to provide an outline of the main alternatives studied and an indication of the main reasons for his choice taking into account the environmental effects[52]). The duty is found in Article 5(1), which is in the following terms:

> "Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which 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 or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I" (emphasis added).

66. The relevant provision within Annex I to the SEA Directive is paragraph (h), which provides that:

> "The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:
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> ...
>
> (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 corresponding provisions in the SEA Regulations are regulation 12 and paragraph 8 of Schedule 2.

67. It remains the case that there is as yet no CJEU authority on the proper interpretation of the duty to assess reasonable alternatives to the proposed plan or programme. However, the duty has recently been considered by domestic courts on several occasions. The resulting domestic jurisprudence sheds some light on the following elements of the duty:

[52] Article 5(3) and Annex IV of the EIA Directive.

(1) Which alternatives it is necessary to assess;

(2) The level of detail to which the selected alternatives must be assessed;

(3) The extent to which reasons must be given for (i) the selection of alternatives for assessment and (ii) the rejection of the selected alternatives in favour of the proposed plan or programme as adopted; and

(4) The format which the assessment of alternatives must take.

Which alternatives must be assessed?

68. The question which springs most immediately to mind in exploring the duty to assess alternatives is, what is meant by "reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme" and, more specifically, what constitutes a "reasonable" alternative?

69. It is clear that the requirement to assess "reasonable" alternatives does not require that every conceivable alternative be assessed, at each stage in the process: see the Commission's 2003 guidance[53] and the decision of the High Court (Ouseley J) in ***Heard v. Broadland District Council.***[54] The Commission guidance makes plain, however, that the reference to "alternatives" in Article 5(1) of the SEA Directive is not only (or even primarily) a reference to alternative plans or programmes to the plan or programme proposed, but encompasses alternative proposals which would secure the objectives of the plan or programme proposed within that plan or programme.[55]

70. In his judgment at first instance in ***HS2***[56] Ouseley J rejected the contention that the SEA Directive applied to the Government "Decision and Next Steps" paper under challenge,[57] but held that had it applied, there had been a failure to assess reasonable alternatives[58]. However, alternative objectives for the proposed plan or programme did not have to be assessed; the focus of the SEA was alternative ways of meeting those objectives.[59] The effect of the absence of any requirement that alternative objectives be considered upon the range of alternatives that must be evaluated is evident from the remainder of paragraph 162 of Ouseley J's judgment:

> "...The Government concluded that alternative strategies for motorways or a new conventional or enhanced existing rail network were not capable of meeting the plan

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[53] *Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment"*, European Commission, September 2003, 5.14.

[54] [2012] EWHC 344 (Admin) [2012] Env LR 23 at [67].

[55] *Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment"*, European Commission, September 2003, 5.13 and 5.14.

[56] [2013] EWHC 481 (Admin).

[57] *High Speed Rail: Investing in Britain's Future - Decisions and Next Steps.*

[58] See [2013] EWHC 481 (Admin) at [110]-[172]

[59] At [162].

> objectives set for high speed rail. It is obviously a contestable view as to whether those objectives should be met, or can be met to a large extent by means other than a new high speed rail network. These alternative strategies could not, however, have constituted reasonable alternatives to the plan for assessment in the SEA, since they are incapable by their very nature of meeting all the objectives for a new high speed rail network".

71. The Commission guidance also makes clear that it is not legitimate to select a set of alternatives which have obviously more significant adverse effects than the plan or programme as proposed in a bid to promote the latter.[60] However, the range of alternatives which it is necessary to consider in order to satisfy the requirement that "reasonable alternatives" be assessed may vary according to the scope of the proposed plan or programme. In ***DB Schenker Rail (UK) Ltd v. Leeds City Council***[61] the claimants sought to challenge the adoption of the Natural Resources and Waste Local Plan ("NRWLP") by the defendant City Council on the ground (*inter alia*) that the Sustainability Appraisal ("SA") undertaken for the NRWLP failed to appraise the use of the claimants' sites for any other purpose. HHJ Belcher accepted the defendant's submission that:

> "a thematic plan such as the NRWLP does not have to consider alternatives such as housing, provided that the thematic plan forms part of a series of relevant documents, one or more of which consider the alternatives such as housing, and provided that the series of documents are considered together, or to use the SA terminology, "acting cumulatively"."[62]

72. HHJ Belcher also rejected the argument that the SA was defective in that it failed to consider the option of "doing nothing", i.e. not safeguarding the relevant sites at all.[63]

73. In ***R (Chalfont St Peter Parish Council) v. Chiltern DC***[64] the Parish Council sought to quash a policy within the District Council's Core Strategy in relation to strategic housing allocation on a particular site. The Parish Council had put forward a "land swap" proposal pursuant to which an existing primary school would move to the allocation site and the site vacated by the primary school would be developed for housing. HHJ Foster held that the land swap proposal had never been considered as a deliverable policy by the District Council, but that the District Council had in that respect been entitled to rely upon the submissions received from the County Council to the effect that there was no policy or plan which would make the land swap proposal a realistic possibility. The District Council was under no duty to go behind what the County Council was saying and take its own view on the available material; it was the County Council alone (as Local Education Authority) which could make the land swap proposal deliverable.[65] There was ample evidence upon which the District

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[60] "*Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment*", European Commission, September 2003, 5.13 and 5.14.

[61] [2013] EWHC 2865 (Admin).

[62] See further Ouseley J in ***HS2*** [2013] EWHC 481 (Admin) at [162] and [163].

[63] At [74].

[64] [2013] EWHC 1877 (Admin).

[65] At [36].

Council could form the view that the land swap proposal was not deliverable; in the words of Ouseley J in the ***Broadland*** case (discussed below) it was a "non-starter" and it was reasonable for the District Council to decide not to treat the land swap proposal as a "reasonable alternative".[66]

74. ***Ashdown Forest Economic Development LLP v. Secretary of State***[67] was a statutory challenge[68] to the Wealden District Core Strategy ("**WDCS**"). Ashdown Forest is designated as a Special Area of Conservation ("**SAC**") under the Habitats Directive[69] and the Habitats Regulations[70] and as a Special Protection Area ("**SPA**") under the Birds Directive[71] and the Habitats Regulations. The draft WDCS included an overall housing requirement for its area of 9,600 (subsequently reduced by the Inspector to 9,440) and proposed measures of particular control in relation to new development close to the Forest in the form of a prohibition on new development within 400m of the edge of the Forest and a requirement that for new development within 7 km of the Forest suitable alternative natural green space ("**SANG**") should be provided. The claimant was an umbrella organisation representing the interests of a number of major landowners in the area covered by the WDCS who sought greater opportunities to develop their land than the WDCS allowed.

75. The grounds on which the challenge was brought included two which alleged that the requirements of the SEA Directive and SEA Regulations in relation to the assessment of reasonable alternatives had not been met, (i) in relation to the inclusion within the WDCS of a figure of 9,440 for overall housing requirement and (ii) in relation to the 7km SANG zone.

76. Sales J dismissed the challenge on all grounds. In respect of the scope of the duty to assess reasonable alternatives as part of the SEA process, he held that the SEA Directive did not require the authority to embark on:

> "an artificial exercise of selecting as putative "reasonable alternatives", for full strategic assessment alongside its preferred option, alternatives which could clearly be seen, at an earlier stage of the iterative process in the course of working up a strategic plan and for good planning reasons, as not in reality being viable candidates for adoption".[72]

77. As to the substance of the work to be done by a local planning authority ("**LPA**") in identifying reasonable alternatives for environmental assessment, the LPA had "a

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[66] At [38].

[67] [2014] EWHC 406 (Admin).

[68] Under section 113 of the Planning and Compulsory Purchase Act 2004.

[69] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

[70] The Conservation of Habitats and Species Regulations 2010.

[71] Directive 2009/147/EC on the conservation of wild birds.

[72] At [97].

substantial area of discretion as to the extent of the inquiries which need to be carried out to identify the reasonable alternatives".[73] The necessary choices were:

> "deeply enmeshed with issues of planning judgment, use of limited resources and the maintenance of a balance between the objective of putting a plan in place with reasonable speed (particularly a plan such as the Core Strategy, which has an important function to fulfil in helping to ensure that planning to meet social needs is balanced in a coherent strategic way against competing environmental interests) and the objective of gathering relevant evidence and giving careful and informed consideration to the issues to be determined".

78. Under the scheme of the SEA Directive and the SEA Regulations it was the plan-making authority which was the primary decision-maker in relation to identifying what was to be regarded as a reasonable alternative. In this respect the LPA had a wide power of judgment, with the court exercising a limited review function.[74] Sales J continued:

> "This interpretation is reinforced by the scope for involvement of the public and the environmental authorities in commenting on the proposed plan and to make counter-proposals to inform the final decision by the plan-making authority. The Directive contemplates that the plan-making authority's choices may be open to debate in the course of public consultation and capable of improvement or modification in the light of information and representations presented during that consultation, and accordingly recognises that the choices made by the plan-making authority in choosing a plan and in selecting alternatives for evaluation at the Article 5 stage involve evaluative and discretionary judgments by that authority which may be further informed by public debate at a later stage".[75]

The level of detail required

79. Article 5(1) of the SEA Directive requires the likely significant environmental impacts of reasonable alternatives to be assessed to the same level of detail as those of the proposed plan or programme. This is clear from the Commission guidance, which explains that:

> "In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives. The essential thing 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 Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well."(emphasis supplied).[76]

80. However, as regards "iterative" plan or programme making processes, the decision of Ouseley J in ***Heard*** should be noted. He accepted that:

> "...the plan-making process permits the broad options at stage one to be reduced or closed at the next stage, so that a preferred option or group of options emerges; there

[73] At [90].
[74] At [91].
[75] At [92].
[76] At 5.12.

> may then be a variety of narrower options about how they are progressed, and ... that too may lead to a chosen course which may have itself further optional forms of implementation. It is not necessary to keep open all options for the same level of detailed examination at all stages…".[77]

81. However, at each stage of the plan-making process, the preferred option and the alternatives must all be assessed to the same level of detail in the environmental report:

> "There is no express requirement in the directive ... that alternatives be appraised to the same level as the preferred option. ... [I]t seems to me that, although there is a case for the examination of a preferred option in greater detail, the aim of the directive, which may affect which alternatives it is reasonable to select, is more obviously met by, and it is best interpreted as requiring, an equal examination of the alternatives which it is reasonable to select for examination alongside whatever, even at the outset, may be the preferred option".[78]

The extent to which reasons must be given

82. As has been seen, Article 5(1) and Annex I(h) of the SEA Directive require "an outline of the reasons for selecting the alternatives dealt with" to be given (emphasis supplied). As to the reasons for preferring the proposed plan or programme as adopted, Article 9(1)(b) of the SEA Directive requires a statement to be made available upon the adoption of the plan or programme summarising (*inter alia*) the reasons for choosing the plan or programme as adopted "in the light of the other reasonable alternatives dealt with".

83. It is clear from the domestic authorities that reasons must be given for both (i) the selection of alternatives for assessment, and (ii) the selection of a preferred option. The requirement that reasons be given is particularly important where (as is usually the case) an iterative plan or programme making process is followed.

84. In ***Heard*** Ouseley J concluded that the requirement that an outline of the reasons for selecting the alternatives be given had not been met, and held that:

> "...No doubt there are some possible alternatives which could be regarded as obvious non-starters by anyone, which could not warrant even an outline reason for being disregarded. The same would be true of those which obviously could not provide what RS required, or which placed development in an area beyond the scope of the plan or the legal competence of the Defendants. But that is not the case here..."[79]

85. Where an iterative process of plan or programme making is followed, an outline of the reasons for the selection of the options to be taken forward for assessment at each stage is required, although that outline may legitimately be left to the final report: ***Heard***.[80]

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[77] At [67].

[78] At [71].

[79] At [66].

[80] At [67].

86. The "limited nature" of the information which the plan making authority is obliged to provide to explain the selection of the "reasonable alternatives" for examination was emphasised by Sales J in ***Ashdown Forest***. It was only "an outline of the reasons" directed to equipping the public to participate in debate about the plan proposed, not a fully reasoned decision of a kind which might be appropriate for a more intrusive review approach or exercise of an appellate function on the part of the court.[81] Sales J contrasted the requirement in paragraph (h) of Annex I to the SEA Directive (that an "outline" of the reasons be given) with the language in the text of the equivalent paragraph of the draft of the SEA Directive which was originally proposed for adoption,[82] which required that "the reasons for not adopting" "any alternative ways ... which [had] been considered" be given.

87. Sales J concluded that the legislator had chosen to reject that "more demanding standard in relation to the level of reasons" in favour of the narrower obligation to provide "only" an outline. In giving outline reasons WDC had been entitled to focus, as it did, on the "main reasons" why particular alternatives were not considered to be viable or attractive having regard to the full planning context (and hence were not "reasonable alternatives") without "descending into great detail to set out each and every aspect of the case or of impediments to adoption of such alternatives".[83]

88. However, the duty to give "only" an outline of the reasons for selecting the reasonable alternatives chosen does not appear to justify lessening the extent of the duty to assess the chosen alternatives. As was made clear by Ouseley J in ***Heard***, the preferred option and the alternatives under consideration must all be assessed to the same level of detail in the environmental report.

89. With regard to the requirement that reasons be given for preferring the proposed plan or programme as adopted, in ***Save Historic Newmarket Ltd v. Forest Heath DC***[84] Collins J held that it was open to a planning authority to adopt an iterative process of plan-making, i.e. "to reject alternatives at an early stage of the process and, provided that there is no change of circumstances, to decide that it is unnecessary to revisit them".[85] However, the proposition that "a prior ruling out of alternatives" during the iterative process could legitimately take place was:

> "subject to the important proviso that reasons have been given for the rejection of the alternatives, that those reasons are still valid if there has been any change in the proposals in the draft plan or any other material change of circumstances and that the consultees are able, whether by reference to the part of the earlier assessment giving the reasons or by summary of those reasons or, if necessary by repeating them, to know from the assessment accompanying the draft plan what those reasons are".

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[81] At [93].

[82] At [94].

[83] At [100].

[84] [2011] JPL 1233.

[85] At [16].

90. The extent of the duty to give reasons for the selection of the preferred option was also addressed by Ouseley J in ***Heard***. He observed that such a duty was not an express requirement of the SEA Directive or of the SEA Regulations, but held that:

> "...A teleological interpretation of the directive, to my mind, requires an outline of the reasons for the selection of a preferred option, if any, even where a number of alternatives are also still being considered. Indeed, it would normally require a sophisticated and artificial form of reasoning which explained why alternatives had been selected for examination but not why one of those at the same time had been preferred.
>
> Even more so, where a series of stages leads to a preferred option for which alone an SA is being done, the reasons for the selection of this sole option for assessment at the final SA stage are not sensibly distinguishable from reasons for not selecting any other alternative for further examination at that final stage. The failure to give reasons for the selection of the preferred option is in reality a failure to give reasons why no other alternatives were selected for assessment or comparable assessment at that stage. This is what happened here. So this represents a breach of the directive on its express terms."[86]

<u>The format of the assessment of alternatives</u>

91. The Commission guidance explains that, where certain aspects of a plan or programme have been assessed at an earlier stage of the planning process and the plan / programme maker wishes to use the findings of that earlier assessment at a later stage of the process, that approach will be legitimate if the earlier findings remain up-to-date and accurate and those findings are placed in the context of the new assessment. However, paragraph 4.7 of the Commission guidance emphasises (echoing Lord Hoffman in ***Berkeley***) that:

> "[i]n order to form an identifiable report, the relevant information must be brought together: it should not be necessary to embark on a paper-chase in order to understand the environmental effects of a proposal. Depending on the case, it might be appropriate to summarise earlier material, refer to it, or repeat it. But there is no need to repeat large amounts of data in a new context in which it is not appropriate."

92. In ***Newmarket,*** Collins J noted[87] that the requirement that earlier material be brought together so that it was identifiable in the final report was consistent with the requirement that members of the public must be able to involve themselves in the decision-making process and for that purpose receive all relevant information, for it could not be assumed that all those potentially affected would have read all (or indeed any) previous reports.

93. In ***Heard***, Ouseley J accepted that, in an "iterative" process, the requisite description (at each stage) of which alternatives were examined and why could be given simply by reference back to earlier documents, so long as the reasons there given remained sound, but the earlier documents had to be organised and presented in such a way that they could

[86] At [69] to [70].

[87] At [15].

readily be ascertained and no paper chase was required to find out what had been considered and why it had been rejected.[88]

94. The decision in ***DB Schenker*** provides an example of reliance successfully being placed upon reasons given in a different document rather than in the Sustainability Appraisal itself. HHJ Belcher held that:

> "Provided the reasons for the rejection of alternative uses ... is [*sic*] fully and properly explained and the document which does so is fully and properly identified in the SA ... (and is a document freely available to consultees), the fact that the information is contained in a different document and not set out again in this SA does not, in my judgment, mean that this SA fails to consider the alternative uses. The contrary approach argued for ... would effectively mean either that all DPDs relating to a given area would have to contain duplicate SA material or that it is impossible, in practical terms, to have separate thematic DPDs and that everything must be in one DPD. In my judgment neither alternative is sustainable".[89]

95. In the very recent decision in ***No Adastral New Town Ltd v. Suffolk Coastal DC***[90] Patterson J rejected the argument that the iterative plan making process undertaken involved an illegitimate "paper-chase". She held that:

> "...the pre-submission draft Development Plan included an updated SA which dealt with the main issues raised on housing distribution, the alternative sites which had been considered, and the increase in housing numbers at SP20 including their environmental impact. Although the claimant criticises that document and that in August 2011, which also went out for consultation, on the basis that they create an unacceptable paper chase the situation is very different from the case of ***Berkeley v Secretary of State for the Environment*** [2000] 3 WLR 420 which the claimant relies upon. In that case there was no environmental assessment at all. In the instant case there was a complete reference back to earlier documents and the reasons for rejecting earlier options. Applying the test of Collins J in ***Save Historic Newmarket Limited v Forest Heath*** [2011] EWHC 606 at [40] where he said,
>
> > "In my judgment, Mr Elvin is correct to submit that the final report accompanying the proposed Core Strategy to be put to the inspector was flawed. It was not possible for the consultees to know from it what were the reasons for rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified in the final report. There was thus a failure to comply with the requirements of the Directive and so relief must be given to the claimants."
>
> The consultees were well aware of the reasons for rejecting the alternatives to the development that was proposed here".[91]

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[88] At [12], with reference to the judgment of Collins J in ***Newmarket***.

[89] At [70].

[90] [2014] EWHC 223 (Admin).

[91] At [129].

96. In ***Ashdown Forest*** Sales J was satisfied that the LPA had met the requirement that reasonable alternatives be assessed by issuing a Habitats Regulations Assessment with (and incorporating it by reference into) the Sustainability Appraisal, and hence into the environmental report required under the SEA Directive and the SEA Regulations.[92]

97. It is established that defects in an environmental report can be cured by a later document, provided that it is not the case that no adequate assessment of alternatives was produced prior to adoption of the relevant plan or programme: ***Cogent Land LLP v Rochford DC***[93]. On a related point, Sales J in ***Ashdown Forest*** accepted the argument that since paragraph (h) of Annex I to the SEA Directive requires only an outline of the reasons for selecting the alternatives dealt with, it is open to the LPA to amplify the reasons set out in the Sustainability Appraisal for selecting the alternatives dealt with, if it proves necessary to do so to meet a rationality or other challenge directed against the merits of its choices.[94]

98. It was contended on behalf of the claimant in ***Ashdown Forest*** that since the environmental report published under Article 5 of the SEA Directive must be subjected to consultation under Article 6, documents published after the consultation had concluded were not relevant. Sales J held that the claimant required permission to introduce that argument in reply and that had permission been sought, it would have been refused because it would have required the case to be re-argued; he added that he was "far from being persuaded" that there was anything in the argument.[95] He explained that the procedures involved in independent examination of a plan by an inspector, including by examination in public, appeared to him to be a consultation process which was capable of fulfilling the consultation requirement under Article 6 of the Directive. Sales J emphasised that since he had not heard argument on that issue his view was to be regarded as provisional. It is questionable whether his view accords with the SEA Directive and the SEA Regulations, which require that the environmental report and the draft plan be developed in parallel so that the former is able to impact on the latter before, during and after the public consultation: see ***Seaport Investment Ltd's Application***[96] which recognises the need to ensure that public consultation on the environmental report and draft plan be capable of exerting the appropriate influence on the contents of the draft plan. The scope of the examination into the plan will be limited by reference to the objections that have been made; the examination may not, therefore, allow for the requisite "influence" to be exerted.

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[92] At [106].

[93] [2013] JPL 170 at [124].

[94] At [101].

[95] At [88] to [89].

[96] [2008] Env LR 23.

SEA and the NPPG

99. The initial version of the NPPG published on 6 March 2014 also includes guidance in relation to SEA, which is addressed under pages ("**the SEA pages**") devoted to "Strategic environmental assessment and sustainability appraisal". There are three such pages, entitled (i) "Strategic environmental assessment and sustainability appraisal", (ii) "Sustainability appraisal requirements for Local Plans" and (iii) "Sustainability appraisal requirements for neighbourhood plans".

100. The guidance provides a structured overview of what sustainability appraisal ("**SA**") is and how it relates to SEA. The focus of the SEA pages is on SA, although it is acknowledged that SEA alone can be required in some limited situations where SA is not needed, "usually" in the context of neighbourhood plans (to which one of the SEA pages is devoted) or supplementary planning documents which "could have significant environmental effects".

101. The NPPG guidance in relation to SEA will be most useful to those who are unfamiliar with SEA and the way in which it relates to concepts such as SA, Local Plans and neighbourhood plans; various flowcharts are provided to explain the interaction between e.g. SEA and the plan-making process. It contains few points of detail, although it does define "reasonable alternatives" in the following terms:[97]

> "Reasonable alternatives are the different realistic options considered by the plan-maker in developing the policies in its plan. They must be sufficiently distinct to highlight the different sustainability implications of each so that meaningful comparisons can be made. The alternatives must be realistic and deliverable".

III. THE COURT'S DISCRETION

102. The question of the court's discretion in respect of remedies in the context of environmental assessment remains a very live issue, the Supreme Court in ***Walton*** having recently considered the decision of the House of Lords on the point in ***Berkeley***[98] and the issue having also arisen during the ***HS2*** litigation.

103. ***Berkeley*** concerned a planning permission for the development of a site owned by Fulham Football Club close to the River Thames which the House of Lords held to be unlawful as it had been adopted in breach of the EIA Directive. The House of Lords further held that relief should not be refused merely because the relevant information was before the Secretary of State in other forms and compliance with the regulations would have made no difference to the result. Lord Hoffmann said:[99]

> "A court is ... not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach

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[97] At [18] in the SA context and again at [38] in relation to neighbourhood plans.

[98] [2001] 2 CMLR 38.

[99] At 616.

> a proper decision on the environmental issues. Although section 288(5)(b) [of the Town and Country Planning Act 1990], in providing that the court 'may' quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell LJ in ***Bolton MBC v Secretary of State for the Environment*** (1991) 61 P&CR 343, 353. [Counsel for the Respondent] was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld".

104. In ***Bown v. Secretary of State***[100] Carnwath LJ as he then was (with whom Lord Phillips MR and Waller LJ agreed) said that the speeches in ***Berkeley*** had to be read in context. Lord Bingham (in ***Berkeley***) had emphasised the very narrow basis on which the case was argued in the House; the developer had not been represented and there had been no reference to any evidence of actual prejudice of his or any other interests. Care was needed in applying the principles there decided to other circumstances, such as cases where there was clear evidence of a pressing public need for the scheme under attack.

105. That passage of Carnwath LJ's judgment in ***Bown*** was noted with approval by the House of Lords in ***R (Edwards) v Environment Agency (No. 2)***.[101] Agreeing with Carnwath LJ's observations, Lord Hoffmann added that:

> "Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered. In ***Berkeley***, the flaw was the complete absence of an EIA and the sole ground for the exercise of the discretion was that the result was bound to have been the same."

106. In ***Walton***, Lord Reed reserved his opinion on the question of the court's remedial discretion. Lord Carnwath, however, analysed the issue in detail. He accepted that the statements of the House of Lords in ***Berkeley*** carried "great persuasive weight", but again emphasised that care was needed in applying them in other statutory contexts and other factual circumstances. Not only did the statements rest in part on concessions by counsel for the Secretary of State, by the time the case reached the House of Lords the developer had abandoned the project and the decision had lost any practical significance.[102] The factual differences between ***Berkeley*** and ***Walton*** were "dramatic". In ***Berkeley*** there had been no countervailing prejudice to public or private interests to weigh against the breach

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[100] [2003] EWCA Civ 1170, 526.

[101] [2008] UKHL 22 at [63] to [65].

[102] At [127].

of the directive; the countervailing case advanced was one of pure principle. In ***Walton***, by contrast, the potential prejudice to public and private interests from quashing the order was "very great". Lord Carnwath observed that "[i]t would be extraordinary if, in relation to a provision which is in terms discretionary, the court were precluded by principles of domestic or European law from weighing that prejudice in the balance".[103]

107. Lord Carnwath further noted that the statutory context was significantly different from that applicable in ***Berkeley***:

> "...First, under the 1984 Act, even in respect of EIA, a breach of the regulations does not, as under the planning Acts, render the subsequent decision outside the powers of the Act. It is a breach of the requirements laid down by s.20A, and as such is within the second ground of challenge, but is thus also subject to the need to show "substantial prejudice". Secondly, and more importantly for the purposes of this case, there is nothing to assimilate the requirements of the SEA Directive to the requirements of the 1984 Act, breach of which alone may give rise to a challenge under that procedure. No doubt the adoption of a plan or programme in breach of the SEA Directive would be subject to challenge by judicial review at the appropriate time. But the legislature has not thought it necessary to provide for a separate right of challenge on those grounds in relation to the approval of a subsequent project made under the 1984 Act.
>
> Accordingly, subject to any overriding principles emerging from the European authorities (see below), it seems to me that, even if (contrary to what appears to be the effect of the statute) breach of the SEA Directive were a ground of challenge under the 1984 Act procedure, the court would retain a discretion to refuse relief on similar grounds to those available under domestic law".[104]

108. Lord Carnwath then considered the two European cases relied upon by counsel for the appellant, ***Wells***[105] and ***Inter-Environnement Wallonie***. In respect of ***Wells***, he considered that it was of interest that the court envisaged the payment of compensation (if possible under national law) as a possible alternative to revoking the consents. That possibility indicated that the public interest in nullifying an action taken in breach of European law was not absolute, and that the remedy might in some circumstances be tailored to the extent of the practical damage, if any, suffered by a particular applicant. As to ***Inter-Environnement Wallonie***, Lord Carnwath noted that the factual context of that case was again very different, but that even there "practical considerations had a part to play"; having found a breach, the court accepted that, to avoid a "legal vacuum" the order in question could "exceptionally" be left in operation for the short period required to carry out the SEA.

109. Lord Carnwath concluded:[106]

> "It would be a mistake in my view to read these cases as requiring automatic

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[103] At [131].

[104] At [132] to [133].

[105] [2004] 1 CMLR 31.

[106] At [138] to [140]

> "nullification" or quashing of any schemes or orders adopted under the 1984 Act 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. As [***Wells***] makes clear, the basic requirement of European law is that the remedies should be "effective" and "not less favourable" than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered "impossible in practice or excessively difficult". Proportionality is also an important principle of European law.
>
> 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.
>
> Accordingly ... I would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court's discretion are materially affected by the European source of the environmental assessment regime".

110. Lord Hope agreed with Lord Carnwath's analysis:[107]

> "...The fact that an individual may bring an objection on environmental grounds derived from European directives does not mean that the court is deprived of the discretion which it would have at common law, having considered the merits and assessed where the balance is to be struck, to refuse to give effect to the objection.
>
> The scope for the exercise of that discretion in that context is not therefore as narrow as the speeches in [***Berkeley***] might be taken to suggest. The principles of European law to which Lord Carnwath refers ... support this approach. Where there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great, as there are in this case, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck".

111. Although in ***HS2***, the Supreme Court referred at several points to Walton, the issue of discretion did not arise since the Court rejected the appeals on their substantive merits. The Secretary of State had failed to persuade the courts below that had the DNS been subject to SEA, then it would have complied in substance or that the Courts should have exercised the discretion not to quash. The failure to assess alternatives, had it been engaged through SEA, was too significant an issue. Lord Carnwath noted this:

> "46 There is also a measure of agreement as to what such additional consideration would involve. Ouseley J [2013] EWHC 481 (Admin) considered whether, in spite of the Government's position that such treatment was unnecessary, substantial compliance had been achieved: paras 160–172. In a passage the reasoning of which has not been challenged before this court, he concluded that it had not been achieved, for reasons

[107] At [155] and [156].

"essentially related to the Y-network and its alternatives, and the spurs to Heathrow …" On the other hand, as Mr Mould emphasises, he took a different view in relation to phase 1 in respect of which, viewed on its own, he would have found substantial compliance with the SEA Directive: para 168.

47 Furthermore, in his view, even if the SEA Directive had applied, it would not have required more detailed consideration of alternative strategies based on improvements to the existing network, such as the optimised alternative:

> "162. …The Government concluded that alternative strategies for motorways or a new conventional or enhanced existing rail network were not capable of meeting the plan objectives set for high speed rail. It is obviously a contestable view as to whether those objectives should be met, or can be met to a large extent by means other than a new high speed rail network. These alternative strategies could not, however, have constituted reasonable alternatives to the plan for assessment in the SEA, since they are incapable by their very nature of meeting all the objectives for a new high speed rail network. The sifting process whereby a plan is arrived at does not require public consultation at each sift. This whole process has been set out in considerable detail in the many published documents for those who wished to pursue it, but it did not all have to be in an SEA."

48 On that view, which was not challenged before us, application of the SEA Directive would result in more detailed consideration of alternatives such as the reverse S and reverse E configurations, but not of the optimised alternative. Since the optimised alternative is the only one for which the parties before us have expressed any positive support, the SEA process as such may not meet their particular needs (save possibly in respect of HHL's interest in the Heathrow Spur alternatives, although we were told that that aspect is affected by the current study of future airport capacity under Sir Howard Davies)."

DAVID ELVIN QC

HEATHER SARGENT

Landmark Chambers

London EC4A 2HG

4 April 2014