Landmark CHAMBERS

Local Plan making: Strategic Environmental Assessment June 2018

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The scope of SEA

- **Legislative**
  - SEA Directive – Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (**SEAD**)
  - The Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 (**SEAR**)
  - Parallel regulations in almost identical form for England & Wales and Scotland

The scope of SEA

- **EU Guidance**
  - http://ec.europa.eu/environment/eia/sea-legalcontext.htm
  - Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (2002)
  - Environmental Assessments of Plans, Programmes and Projects Rulings of the Court Of Justice of the European Union, 2017 – http://ec.europa.eu/environment/eia/pdf/EIA_rulings_web.pdf
  - See also **Study concerning the report on the application and effectiveness of the SEA Directive (2001/42/EC)** (2009)
    - "4.1 The two Directives are to a large extent complementary: the SEA is "up-stream" and identifies the best options at an early planning stage, and the EIA is "down-stream" and refers to the projects that are coming through at a later stage."

The scope of SEA

- **National guidance**
  - *SPPS* Sept 2015 §§3.31, 4.40, 5.32 – plan preparation and sustainability appraisal to include meeting SEA requirements
  - *DOE Development Plan Practice Note No. 4* Sustainability Appraisal incorporating Strategic Environmental Assessment (April 2015) and the other DP Practice Notes Nos. 1-9 generally
  - *A Practical Guide to the Strategic Environmental Assessment Directive* (Sept 2005) jointly issued by all UK authorities

The scope of SEA

- SEAD: “plans and programmes”.
- Article 2(a): “Plans and programmes ... as well as any modifications to them” which are:
  - “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
  - “required by legislative, regulatory or administrative provisions”.
- Reg. 2(2) SEAR replicates the SEAD definition

The scope of SEA

- Article 3 (reg. 2(2) SEAR): the list of 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, 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]”
- Local development plans (see s. 2011 Act) made under Part 2 of the 2011 Act fall within requirement for SEA since they
  - are required by legislative provisions since the components of the LD plans (the plan strategy and the local policies plan) are required to be produced by ss. 6-9 of the 2011 Act
  - “set the framework” for future projects given the presumption in favour of the local development plan in s. 6(4) of the 2011 Act (see also s. 45).

The scope of SEA

- Other policy may also require SEA given the duty imposed on the Department under s. 1 of the 2011 Act with regard to planning policy.
  - However, see Girvan LJ in ***Central Craigavon Ltd's Application*** [2011] NICA 17 at §§36-43 which suggests otherwise both on the basis that it was not "required" and because it did not "set the framework" both of which propositions are open to debate.
  - RDS must be subject to SEA since RDS is required by Strategic Planning (Northern Ireland) Order 1999 – reg. 3 imposes duty to formulate "a strategy for the long-term development of Northern Ireland".
  - See ***Alternative A5 Alliance's Application*** [2014] N.I. 96 at §§116-145, acceptance of the plan for the A5 scheme by the NI Executive should have been subject to SEA.

The scope of SEA

- ***Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale C-567/10*** [2010] ECR I-5611
- A broad approach is required. The fact that the adoption of a plan/programme is not compulsory does not mean SEA is not required:
  - "...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 [the SEA Directive]".
- ***R. (Buckinghamshire CC) v Secretary of State for Transport*** [2014] 1 W.L.R. 324 provides that to set the framework there must be a degree of prescription (missing from a Government policy paper preceding legislation) and the plan must at least limit the range of discretionary factors which can be taken into account in making that decision, or affect the weight to be attached to them (Lord Sumption at [123]-[124]).

The scope of SEA

- The specific approach in the ***Inter-Env. Bruxelles*** case disapproved by Lord Neuberger and Lord Mance though applied (pre-Supreme Court) by Stephens J. in the ***Alternative A5*** case and by Lindblom J. in ***R (West Kensington Estates Tenants & Residents' Association) v Hammersmith and Fulham LBC*** [2013] EWHC 2834 (Admin) (supplementary planning guidance)
- Lord Neuberger at §187 clearly preferred the analysis of AG Kokott in ***Inter-Environnement Bruxelles*** to that of the CJEU -
- CJEU has since reaffirmed the broad approach to the SEAD (without directly addressing the above issue)
  - ***Dimos Kropias Attikis v Ipourgos Perivallontos C-473/14*** [2015] CJEU §50 (referring to ***Inter-Env. Bruxelles***)
  - ***Patrice D'Oultremont v Région wallonne C-290/15*** [2016] AG §§28-35 (AG Kokott); CJEU §§38-41

Environmental report

- Reg. 11 SEAR sets out the requirements of the report including
  - "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of–

    (a) implementing the plan or programme; and

    (b) reasonable alternatives taking into account the objectives and geographical scope of the plan or programme."
- Information referred to in Schedule 2 may be provided by reference to relevant information obtained at other levels of decision-making (reg. 11(4)
- Information to be included is set out in Sched 2 SEAR (see reg. 11(3)) which includes an outline of the contents and main objectives of the plan, the current state of the environment and its characteristics likely to be affected, mitigation measures, monitoring and "an outline of the reasons for selecting the alternatives dealt with".

Environmental report: Sched 2 para 6

- "The likely significant effects on the environment, including short, medium and long-term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects, on issues such as–
  - (i) biodiversity;
  - (ii) population;
  - (iii) human health;
  - (iv) fauna;
  - (v) flora;
  - (vi) soil;
  - (vii) water;
  - (viii) air;
  - (ix) climatic factors;
  - (x) material assets;
  - (xi) cultural heritage, including architectural and archaeological heritage;
  - (xii) landscape, and
  - (xiii) the inter-relationship between the issues referred to in sub paragraphs (i) to (xii).

Consultation

- Environmental report to be consulted upon together with the draft plan (see ***Seaport***). See SEAR regs. 12 (general requirements) and 13 (transboundary – ***Alternative A5 Alliance's Application*** [2014] N.I. 96).
- ***Re Seaport Investments*** [2008] Env. L.R. 23 & Case C-474/10 [2012] Env. L.R. 21 (CJEU) -
  - **Weatherup J** - Issues about specifying time limits for consultation and whether a separate environmental regulator was required for consultation. SEAD envisaged parallel development of the environmental report and the draft plan with the report impacting on the development of the plan throughout the public consultation. Before public consultation the developing report would influence the developing plan and there would be engagement with the consultation body on the contents of the report. Simultaneous consultation not required but should be concurrent.
  - **CJEU** disagreed that a specified general time limit was required or a wholly independent consultation body as long as there was function separation and "real autonomy". The parallel consultation issue was not referred to the CJEU.

Consultation

- ***Kendall v Rochford DC*** [2015] Env LR 21 - allegation that the "affected public" not been given proper opportunity to express their opinions on the draft Plan together with "the accompanying environmental report" before the Plan was adopted, in breach of the SEAR. K argued that none of those who lived near proposed allocation sites had been directly consulted on the draft Plan and its SA together. The Council had not directly notified any individual members of the public or published any details of those consultations in any local newspaper. When it had consulted the general public it had relied solely on its website.
  - Lindblom J [89]-[95] – the council decides what steps to take to bring the plan and env. report to the attention of "public consultees". It is permitted—indeed, required—to decide who should be consulted, and how. The SEAR expressly permits the use of a website for this purpose. But concern where uses website alone and fails effectively to notify the public that it was using its website to consult and its failure to use an extra means of consultation, for those unable to use the internet, here amounted, to a breach
  - Discretion applies to refuse relief however since adequate public participation permitted in substance through the various stages of the plan and its examination

The requirement to assess reasonable alternatives

SEA: reasonable alternatives

- Critical aspect of SEA and a frequent basis of legal challenge.
- SEAD Article 5(1)
  - "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".
- Annex I (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".
- Replicated in SEAR reg. 11(2)(b) and Schedule 2 para. 8

SEA: purpose of assessing alternatives

- **Commission Guidance** at [5.11]:

  "The obligation to identify, describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption."

- UNECE Protocol on Strategic Environmental Assessment "**Applying the Protocol on SEA**":

  "SEA facilitates the improved consideration of environmental limits in the formulation of plans and programmes. It helps in considering alternatives and encourages the search for win-win options that open opportunities for new developments within the carrying capacity of ecosystems. SEA thus supports a shift of decision-making towards genuine sustainable development."

- ***Heard v. Broadland DC*** [2012] Env LR 23 at [71]

UK authorities on reasonable alternatives

- ***St Albans v. Secretary of State*** [2010] JPL 70
- ***Save Historic Newmarket v Forest Heath DC*** [2011] JPL 1233
- ***Heard v. Broadland DC*** [2012] Env LR 23
- ***R (Buckinghamshire CC) v Secretary of State for Transport*** [2013] EWHC 481 (Admin) (***HS2***) Ouseley J. who found breach of alternatives duty. Court of Appeal agreed [2013] P.T.S.R. 1194 at [72] and [183]-[185]. Not raised in Supreme Court.
- ***Ashdown Forest Economic Development LLP v Secretary of State*** [2014] EWHC 406 (first instance) – wide judgment
- ***Cogent Land LLP v Rochford DC*** [2013] JPL 170
- ***No Adastral New Town v. Suffolk Coastal DC*** [2015] Env. L.R. 28
- ***R. (Friends of the Earth Ltd) v Welsh Ministers*** [2016] Env. L.R. 1
- ***R. (RLT Built Environment Ltd) v Cornwall Council*** [2017] JPL 378

SEA: reasonable alternatives

- **Commission Guidance** at 5.13 and 5.14 and UK Guidance Section 5
  - Duty to consider alternative which would secure the objectives of the plan or programme proposed *within that plan or programme*
  - Not legitimate to select alternatives which have obviously more significant adverse effects than the plan or programme as proposed in a bid to promote the latter.
  - Consider both positive and negative effects.
- ***St Albans*** – failure to consider alternatives to late modification
- ***Newmarket*** – failure in the final report to consider any alternatives to changing housing position and no summary or reference back in the ER to the options process considered earlier
- ***Heard*** – Broadland DC and South Norfolk DC JCS unlawful because the SEA undertaken did not explain (i) which reasonable alternatives to urban growth had been selected for examination and why; and (ii) it had not examined reasonable alternatives in the same depth as the preferred option.

SEA: reasonable alternatives

- Reasons must be given for both (i) the selection of alternatives for assessment, and (ii) the selection of a preferred option.
- ***Newmarket*** – [16]-[17], [40] - alternatives can be sifted out as the draft goes through successive iterations without the need to re-examine at each stage but must give reasons in the report for their rejection, and where the reasoning had been given at earlier stages the ER accompanying the final draft must at least summarise that reasoning. No "paper-chase" (see Commission Guidance)
- ***Heard*** –
  - obvious non-starters could be ruled out [66] but outline of reasons for the selection of alternatives is required and alternatives have to be assessed.
  - There must be "a reasoned evaluative process of the environmental impact of plans or proposals" and the SEAD requires an outline of the reasons for selection of a preferred option even where alternatives also still being considered. Where only one option is under consideration, reasons must be given for that also [70]
  - alternative objectives do not have to be assessed; the focus of SEA is alternative ways of meeting those objectives

SEA: reasonable alternatives

- 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, e.g. thematic plans: see ***DB Schenker Rail (UK) Ltd v Leeds City Council*** [2013] EWHC 2865 (Admin). A minerals plan therefore did not need to consider housing.
- ***R (West Kensington Estates) v. Hammersmith & Fulham LBC*** [2013] EWHC 2834 - alternatives assessed in the local plans' SAs. Inappropriate for SPD to introduce different options not ventilated during the local plan-making process itself. However, the SPD there did not add to the options already considered during the plan-making process nor did it favour an option previously rejected.
- ***Ashdown Forest Economic Development LLP v SSCLG*** [2016] P.T.S.R. 78. Failure to assess reasonable alternatives to new provisions being added to the plan at a late stage. Not enough just to undertake HRA to meet SEA duty.

SEA: reasonable alternatives

- ***R. (Friends of the Earth) v Welsh Ministers*** Hickinbottom J. applied ***Heard*** - only need to consider viable alternatives, for the judgment of the plan maker. Other than the plan and the alternatives assessed in the report, none of the options came close to meeting the objective of solving the problems of the M4 around Newport.
- ***R. (RLT Built Environment Ltd) v Cornwall Council*** - draft plan policy designed to address local housing needs and the problem of dwellings used as second or holiday homes by requiring new market housing to restrict occupancy as a principal residence. RLT said that more market housing should have been considered. Hickinbottom J rejected the claim since the Council was entitled to have as an objective the reduction in the number of homes being used as second or holiday homes. At [46] -
  - "SEA is purely procedural in nature: it does not seek to drive or influence underlying policy, but only to require the proper assessment of (and, thereafter, consideration of) the potential environmental effects of a particular plan or programme before its adoption. "Reasonable alternatives" have to be seen through that, environmentally-focused, prism."

SEA: reasonable alternatives

The level of detail required

- 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.
- As regards "iterative" plan or programme making processes: ***Heard***, per Ouseley J:
  - it is not necessary to keep open all options for the same level of detailed examination at all stages ([67]).
  - However, at each stage the preferred option and the alternatives under consideration must be assessed to the same level of detail ([71]).

SEA: form of the assessment of alternatives

- **Commission Guidance** [4.7]:

  > "[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."

- ***Newmarket*** at [15] §4.7 of the Commission Guidance is consistent with the requirement that members of the public must be able to involve themselves in the plan process and for that purpose receive all relevant information. It cannot be assume all those potentially affected would have read previous reports.
- ***DB Schenker Rail*** – reasons for rejection of earlier options appropriately cross-referenced to the ER/SA

SEA: reasonable alternatives

The extent to which reasons must be given

- Reasons must be given for both (i) the selection of alternatives for assessment, and (ii) the selection of a preferred option.
- But no obligation to give even an outline reason for disregarding "obvious non-starters" - ***Heard***
- ***Ashdown Forest Economic Development LLP v SSCLG*** Sales J (reversed by the CA on the substance of compliance) emphasised the "limited nature" of the reasons which must be given for the selection of the "reasonable alternatives": only "an outline of the reasons" is required.
- ...but that does not lessen the extent of the duty to assess the chosen alternatives as is clear from the CA's decision.

SEA: reasonable alternatives

- As to the reasons for preferring the proposed plan as adopted: the proposition that a "prior ruling out of alternatives" may legitimately take place during the iterative process is 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": ***Save Historic Newmarket Ltd***.

- See also Ouseley J in ***Heard*** at [69] to [70].

SEA: defects in the assessment

- ***Cogent Land LLP v Rochford DC*** - defects in an environmental report can be cured by a later iteration of the 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. Also EIA authorities such as ***R. (Blewett) v Derbyshire County Council*** [2004] Env. L.R. 29 , as approved by the House of Lords in ***R. (Edwards) v Environment Agency*** [2008] Env. L.R. 34 applied and the report did not require perfection.
- ***No Adastral New Town Ltd v Suffolk Coastal DC*** Court of Appeal approved Singh J. in ***Cogent Land*** at [50]-[54]

Legal Challenges

Legal Challenges

- Usual judicial review grounds, applied in the context of the SEAR/SEAD. See ***R. (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers*** at [96]-[97]
- ***Kendall v Rochford DC*** [2015] Env LR 21 - as with JR generally, irrationality claims faced "a daunting and difficult task" –
  - "In this case the task is harder still because the allegation, in essence, is that it was impossible for the inspector rationally to conclude that the council had applied the approach to community involvement in plan-making described in a document which it had itself prepared and adopted under the relevant statutory procedure. That is a bold allegation to make."

Legal Challenges

- Automatic quashing for errors?
  - ***Berkeley v. Secretary of State*** [2001] 2 AC 603 at 615. Explained by Lord Hoffman in ***Edwards*** as turning on the complete absence of environmental assessment
  - ***Walton v. Scottish Ministers*** [2013] P.T.S.R. 51 at [137]-[139] (Lord Carnwath) and [156] (Lord Hope) applying at [135] the EU principles of equivalence and effectiveness -

    "139. 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"
- Followed in ***R (Champion) v. North Norfolk DC*** [2015] 1 WLR 3710 which applied CJEU in ***Gemeinde Altrip v Land Rheinland-Pfalz*** (Case C-72/12) [2014] PTSR 311

Examples of refusal to quash

- ***McGinty v Scottish Ministers*** 2014 S.C. 81, the Court of Session declined to quash for failures in consultation on Scottish national planning policy where failure did not have a substantial effect and issues of need and location of a power station to be considered as open question in the project EIA (paras. [55]-[59]).
- ***West Kensington Estate Tenants & Residents Association v. Hammersmith & Fulham LBC*** [2013] EWHC 2834 (Admin) where Lindblom J. refused to quash for a strict failure to comply strictly with SEA requirements (production of a statement of compliance with SEA process) since the technical error could be readily corrected by a direction (paras. [203]-[209]) which would not be as draconian.
- ***Kendall v Rochford DC*** [2013], above, where failure to consult (through use of internet alone) remedied by the process as a whole
- ***R. (Devon Wildlife Trust) v. Teignbridge DC*** [2015] EWHC 2159 (Admin) Hickinbottom J. refused to quash for failure to screen or undertake EIA because the authority had decided that the relevant information would have to be provided pursuant to HRA assessment.