

SEA: scope of application and standard of review – an update



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Introduction

- Three topics today:
 - Consultation in the time of Covid-19
 - Scope of application of SEA: Friends of the Earth v SSHCLG [2019] P.T.S.R. 1540
 - Standard of review of environmental statements: Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214
- First, however, there are some questions to warm us up on these topics

Consultation Q1

Get ready to compete!



In principle, do you think that there should be an option for internet-only consultation on environmental statements, for example on a dedicated website?

Yes

No

In principle, do you think that there should be an option for internet-only consultation on environmental statements, for example on a dedicated website?

Yes

No

Questions

- If your answer was no, can you try to identify the main reason. I've given some options here:
 - The internet is not sufficiently accessible to enough, or all, members of the public;
 - Reviewing material online is not the same as (not as good as) reviewing a hard copy;
 - There should always be multiple ways to review environmental statements;
 - Some other main reason.

Consultation Q2

Get ready to compete!

What was your main reason for saying that there should NOT be an option for internet-only consultation?



What was your main reason for saying that there should NOT be an option for internet-only consultation?

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Reviewing material online is not the same as (not as good as) reviewing a hard copy

There should always be multiple ways to review environmental statements

Some other main reason



What was your main reason for saying that there should NOT be an option for internet-only consultation?

The internet is not sufficiently accessible to enough, or all, members of the public

Reviewing material online is not the same as (not as good as) reviewing a hard copy

There should always be multiple ways to review environmental statements

Some other main reason

Consultation provisions for ESs

- The consultation provisions relating to environmental statements (“ES”) are:
- EIA: regulation 23 of the EIA Regulations (Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571):
 - “23. Availability of copies of environmental statements
 - An applicant for planning permission or subsequent consent, or an appellant, who submits an environmental statement in connection with an application or appeal, must ensure that a reasonable number of copies of the statement are available at the address named in the notices published or posted pursuant to article 15 of the Order, articles 13 and 14 of the Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 20131 or regulation 20.”

Consultation provisions for ESs

- SEA: regulation 13 of the SEA Regulations (Environmental Assessment of Plans and Programmes Regulations 2004/1633):
 - “13.— Consultation procedures
 - (1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report (“the relevant documents”) shall be made available for the purposes of consultation in accordance with the following provisions of this regulation.
 - (2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall—
 - ...
 - (c) inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed, or from which a copy may be obtained;”

Scope of SEA - Questions

- Something for the planoraks: when may an SEA not be required? Is it when the plan or programme:
 - Relates to small areas?
 - Is a minor modification of an existing plan or programme?
 - Is a financial or budget plan or programme?
 - All of the above?

SEA Question

Get ready to compete!

When may an SEA not be required?

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Relates to small areas

Is a minor modification of an existing plan or programme

Is a financial or budget plan or programme

All of the above

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Relates to small areas

Is a minor modification of an existing plan or programme

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All of the above

Scope of SEA

- Much existing guidance:
 - 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) (<http://ec.europa.eu/environment/eia/sea-legalcontext.htm>)
 - CJEU caselaw – helpfully reviewed in Friends of the Earth – which has emphasised (unsurprisingly) a purposive approach to the scope of SEA and not compromising the objective in Article 1 of the SEA Directive to the effect that plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment.

Scope of SEA

- Friends of the Earth: the challenge was to the National Planning Policy Framework, and more particularly to the revised NPPF that was published on 24 July 2018. It was argued that the NPPF was a plan or programme as so defined in regulation 2 of the SEA Regulations and the SEAD.
- The Secretary of State’s arguments in response were that the NPPF fell in areas where a plan or programme is not required.
- Issues were:
 - First, was the NPPF “**required by** legislative, regulatory or administrative provisions”, within article 2(a) of the SEA Directive; and
 - Second, did the NPPF “**set the framework for** future development consent of projects”, within the meaning of article 3(2)(a) of the SEA Directive

Scope of SEA

- Was the NPPF “*required*” in the sense that the SEA Directive had been interpreted by the CJEU (in Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale C567/10 [2010] ECR I-5611 and following cases)?
- FoE sought to argue it was, since it was an integral part of the planning system: the preparation of local development plan documents are judged against national policy (see s. 19(2) of the PCPA 2004). And other provisions such as those relating to neighbourhood orders and plans, and the duty to contribute to sustainable development under section 39 of the PCPA 2004, were said to reinforce this submission by presuming the existence of that national policy

Scope of SEA

- The argument was rejected by Dove J. In respect of the s. 19(2) point:

“[T]he statutory provisions ... do not either mandate or regulate the production of national planning policy. For instance, in relation to section 19(2)(a) a development plan document could continue to be produced even if national policy did not exist. ... The absence of national policy would not mean that the preparation of local development documents would have to be abandoned. ... Thus, section 19(2)(a) and its reference to national policy does not regulate or prescribe the need for the existence of national planning policy”
- And while there is a power to produce national policy, that cannot be in effect read as either a duty or regulatory provision for the production of national planning policy.

Scope of SEA

- Does the NPPF “**set the framework for** future development consent of projects”?
- Yes: there are multiple areas in the NPPF which set a framework:
 - Green Belt policy, “which has its foundation in national planning policy...”



Scope of SEA

- Other areas in which a “framework” is set:
 - Sequential flood risk test;
 - Criteria and tests for development in national parks, the Broads and AONBs
 - Tests for approval relating, e.g., to irreplaceable habitats and heritage assets

Scope of SEA

- Ongoing issue? Potentially:
 - Required or regulated, in a post-Brexit world
 - Potential challenge to the Road Investment Strategy 2 by Transport Action Network includes a potential ground arguing SEA is required. This from its pre-action letter:
 - “54. It is clear that RIS2 is required by law (see: s. 3 of the IA 2005). It is nevertheless required in the sense that it is regulates funding commitments in relation to road building of this kind.
 - 55. It is also clear, from the following excerpts, that RIS2 sets a framework for future operations, maintenance and development consent:...
 - 56. ... it stipulates a locational and funding framework for the schemes that will be taken forward”
 - Other challenges?

Standard of review



Heathrow

Get ready to compete!

**By how much did passenger numbers reduce in
March 2020 compared to March 2019 at Heathrow?**



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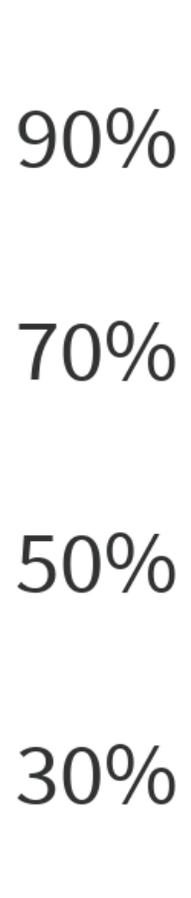
90%

70%

50%

30%

By how much did passenger numbers reduce in March 2020 compared to March 2019 at Heathrow?



Standard of review

- Plan B Earth
- The argument by the Boroughs / the Mayor / Greenpeace: there is a legal requirement under the SEA Directive that the information in an environmental statement is sufficient for the purposes of the SEA Directive. This is a question for the court. The decision maker needs to be given “as full a picture as possible”.
- Which meant:
 - in legal terms, a normal *Wednesbury* approach was insufficient;
 - in practical terms, competing expert evidence on topics, arguments about sufficiency of analysis, detailed evidence before the courts, and so the lengthening of hearings

Standard of review

- The Divisional Court (Hickinbottom LJ and Holgate J) rejected these submissions.
- The approach taken in the EIA can and should be applied by analogy to SEA. That approach is classically set out in Blewett [2003] EWHC 2775 (Admin), per Sullivan J:

“In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the “full information” about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting “environmental information” provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (Tew was an example of such a case), but they are likely to be few and far between.”

Standard of Review

- The Court of Appeal agreed. They pointed to the terms of Article 5 of the SEA Directive:
- Article 5(2) provides as follows:

The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

Standard of review

- Per the Court of Appeal, at [136]:
 “The court's role ... must reflect the breadth of the discretion given to it to decide what information "may reasonably be required" when taking into account the considerations referred to – first, "current knowledge and methods of assessment"; second, "the contents and level of detail in the plan or programme"; third, "its stage in the decision-making process"; and fourth "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment". These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. ...”

Thank you for listening

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