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Re: Legislation, Case Law and Implementation of the Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) and Habitats Regulations Assessment (HRA) Regimes in England and Northern Ireland

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JOINT ADVICE

A INTRODUCTION

1. We are asked to advise the Office for Environmental Protection ("**OEP**") with regards to legislation, case law and implementation of the Environmental Impact Assessment ("**EIA**"), Strategic Environmental Assessment ("**SEA**") and Habitats Regulations Assessment ("**HRA**") regimes in England and Northern Ireland.

2. As noted in our instructions, the UK Government signalled its intention to replace or modify the HRA, SEA and EIA legislation in its March 2022 Nature Recovery Green Paper.[1] The Government has also proposed further potential reforms in two Bills currently proceeding through the UK Parliament:

    a. The first is the Levelling-up and Regeneration Bill ("**LURB**"), which proposes powers, through Environmental Outcome Report ("**EOR**") Regulations, to amend, repeal or revoke existing environmental assessment legislation.[2] The LURB also provides that EOR Regulations may include provision for a range of other matters, including disapplying or otherwise modifying any provision of existing environmental assessment legislation (i.e. EIA and SEA legislation) or the Habitats Regulations requirements in certain circumstances.[3]

[1] Available here: https://consult.defra.gov.uk/nature-recovery-green-paper/nature-recovery-green-paper/

[2] See Clause 129(3) of the Bill (as amended in Public Bill Committee) (20th October 2022), available here: https://bills.parliament.uk/bills/3155. "Existing environmental assessment legislation" is defined in Clause 132(1) and includes SEA and EIA legislation.

[3] *Ibid.* at Clause 129(2)(d) (and see Clause 129(4) for the definition of Habitats Regulations).

b. The second is the Retained EU Law (Revocation and Reform) Bill[4] ("**EU Law Bill**") which has the potential to affect retained EU law in relation to the SEA, EIA and HRA regimes in a variety of ways, including through sunsetting of EU-derived subordinate legislation, the assimilation of retained EU law (including the abolition of the supremacy of EU law and the general principles of EU law), provisions relating to the interpretation of EU law, and a variety of powers to change retained EU law and assimilated law.

3. As per our instructions, the OEP is keen to explore the efficacy of the current legislative arrangements so that it might better understand the risks and opportunities of the proposed changes to them. In particular, it wishes to understand:

a. The strengths and weaknesses of each of the legal frameworks and how they are implemented. We are also asked to consider any common themes of strengths or weaknesses across the assessment regimes (either across all of them or in England and Northern Ireland separately).

b. Recurring or significant issues in interpretation or implementation.

4. An accompanying Annex has been produced for each of the three areas (EIA, SEA and HRA) and these Annexes reflect a wide literature review which has been carried out. This Advice draws on that wide literature review and refers to information contained on the shared folder which has been created to accompany each Annex. In respect of EIA there are three separate Annexes given the scale of the literature review – those are: (i) screening; (ii) scoping and statements; and (iii) procedural requirements and determinations.

5. We are mindful in providing this Advice that the Annexes themselves are lengthy and provide more detailed references to the relevant legislation, case law and grey literature. The purpose therefore of this covering Advice is to extract some of the key themes from those Annexes – focusing on strengths and weaknesses which we consider to be particularly important, rather than seeking to pick up every strength and weakness which has been identified in the Annexes. We also note at the outset that, for each regime, strengths and weaknesses cannot always be neatly dichotomised: to take one example, the requirement for assessment of reasonable alternatives is a key strength

[4] Available at https://bills.parliament.uk/bills/3340

of the SEA regime[5] but it has also been something of a pitfall for decision takers and, in this respect, may be seen as a weakness.

6. The remainder of this Advice is structured as follows:

   a. Section B provides some preliminary observations of relevance to EIA, SEA and HRA;

   b. Section C addresses EIA;

   c. Section D addresses SEA;

   d. Section E addresses HRA;

   e. Section F addresses some common themes applying to all three regimes; and

   f. Section G offers a brief Conclusion.

B PRELIMINARY OBSERVATIONS

7. We observe that, in order to know whether a legislative regime is successful in delivering environmental outcomes, one first has to know what outcome or outcomes it is seeking to achieve. There may be good reason for some regimes to have clear and certain outcomes whereas others may be more flexible.

8. In this regard, the purposes of each of the regimes on which we have been asked to advise (addressed in sections C to F below) are well known. This is partly a consequence of their longevity: each has developed over decades – both through changes in the Directives and transposing legislation and, equally importantly, through development in the case law at both EU and domestic level. And it is partly a result of the clear exposition of their purposes in the Directives themselves, not least through the detailed recitals at the outset of each. The carefully articulated purposes set out in the Directives set the framework (to loosely repurpose an SEA phrase) for the various regimes and

[5] And also, since Directive 2014/52/EU, the EIA regime, though the requirement is less strong in the EIA context, being limited to reasonable alternatives studied by the developer/applicant.

provide important context for the interpretation and application of the relevant legal provisions, both EU and domestic.[6]

9. A clear theme which emerges in the accompanying Annexes and the wide literature review is that the understanding of EIA, SEA and HRA, both in terms of the practice of the courts and of practitioners, has developed over time. The existing regimes have developed over decades and are very detailed; they have been subject to frequent interpretation and explanation by the courts throughout their lifetimes; they have been applied in connection with a large number of plans, programmes and projects; as a consequence, they are now relatively well understood by decision makers, developers and other stakeholders.

10. It is important to bear the above in mind when contemplating potential changes to the existing regimes, since there are real risks that such changes could lessen existing environmental protections, *a fortiori* if replacement/changed regimes are less explicit in the exposition of their purposes.[7] For any substantial change, there would also inevitably be a (potentially protracted) period of uncertainty while understanding of a new/changed regime develops. This in itself could have serious consequences in terms of environmental protection.

11. That is not to say, however, that changes cannot be made, merely that they will need very careful consideration in advance. An understanding of the strengths and weaknesses of the current regimes is crucial to such consideration. We address what we consider to be the main ones below for each of the regimes, and provide further detail in the accompanying Annexes.

[6] Although directives are not themselves incorporated into domestic law by the European Union (Withdrawal) Act 2018, transposing legislation is saved by section 2. Moreover, section 5 of the 2018 Act preserves the principles of supremacy and of indirect effect (or conforming interpretation) for enactments or rules of law passed or made before 11pm on 31st December 2020 (IP completion day). The directives, as they were at IP completion day, therefore remain of central relevance when construing domestic transposing legislation. Rights etc. under directives are also themselves saved in certain circumstances by section 4 of the 2018 Act.

[7] In this regard, we note that the 15 clauses in Part 5 of the LURB could in principle provide the foundation for regulations replacing, in their entirety, the provisions of the complex and detailed EIA and SEA regimes, and important elements of the HRA regime (see paragraph 2(b) above). At this stage, the LURB itself does not provide much by way of detail. It also does not set out clearly the overarching purpose of the new regime, which, as stated previously at paragraph 7 above, is one important means by which success can be measured.

C EIA

EIA Regimes in England and Northern Ireland[8]

12. The first EIA Directive (85/337/EEC) ("**the 1985 EIA Directive**") came into force in 1985. It and various amendments to it were subsequently codified into the currently in force Directive 2011/92/EU ("**the 2011 EIA Directive**"), which has itself been amended by Directive 2014/52/EU ("**the 2014 EIA Directive**"). In both England and Northern Ireland, the approach to transposition involves multiple legislative instruments covering different types of project and different regimes for development consenting (for example forestry activities, port and harbour works, water abstraction and reservoirs). In the time available, we have not reviewed all the transposing legislation in detail, though we can do so if that would assist. Since the majority of projects within the scope of the Directive require planning permission or development consent, the principal transposing regulations are: (a) in England, the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571[9]) and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572); and (b) in Northern Ireland, the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 (SI 2017/83). These regulations do not diverge in such a way that material differences in strengths and weaknesses have developed between England and Northern Ireland in respect of EIA. We do note, however, that there has been academic commentary to the effect that *"historically, there is a well-known and problematic practice of directly replicating Westminster's environmental legislation into Northern Irish environmental law with minimal local input"*.[10] It is therefore an issue which we are sensitive to in our review.

Purpose and requirements of EIA

13. Broadly stated, the purpose of EIA is to assess the significant effects of certain projects upon the environment. As noted at paragraph 7.1 of the Explanatory Memorandum to

[8] Scotland and Wales are outside the scope of this advice, but have their own legislation, which in some cases differs from that in force in England.
[9] Regulation 62 of the 2017/571 Regulations makes limited provision concerning Northern Ireland in connection with projects serving national defence purposes in that country.
[10] *Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland* by Ciara Brennan, Mary Dobbs and Viviane Gravey S.P.E.L. 2019, 194, 93.

SI 2017/571, the "*objective of the Directive is to provide a high level of protection of the environment and to help integrate environmental considerations into the preparation of proposals… to reduce their impact on the environment*". In practice, the fact that the applicant for permission will need not only to identify significant adverse environmental effects but also consider and describe how to avoid or mitigate them provides important protection. As noted in paragraph 7.2 of the same Memorandum:

> *"EIA is a process. It involves- (i) the preparation of an environmental statement by or on behalf of the developer; (ii) public consultation on the application for planning permission or development consent, the environmental statement and any other relevant information; (iii) examination by the relevant authority of the information presented in the environmental statement and other relevant information including that received through the consultation; (iv) the authority coming to a reasoned conclusion on the significant effects of the proposed development on the environment; and (v) the authority integrating the reasoned conclusion into the decision on whether to grant consent for the development."*

14. The EIA regime only applies to certain projects. Consistent with the terms of the EIA Directive, for each of the 2017/83, 2017/571 and 2017/572 Regulations, the categories of projects which are required to undergo EIA are: (a) those set out in Schedule 1 to the Regulations; and (b) those which meet the thresholds in Schedule 2 and are *"likely to have significant effects on the environment by virtue of factors such as [their] nature, size or location"* (Regulation 2). The term 'project' has been broadly defined in the jurisprudence.[11]

15. In practice, the proportion of projects requiring EIA is low relative to total applications for planning permission. As noted in paragraph 7.5 to the Explanatory Memorandum to SI 2017/571:

> *"There are around 500 - 600 environmental statements submitted each year in England through the planning system, representing about 0.1% of all planning applications. There*

[11] *Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland (Case C-72/95)* [1996] E.C.R. I-5403, at paras 31 and 39. However, it was found in *Brussels Hoofdstedelijk Gewest v Vlaams Gewest (C-275/09)* [2011] Env LR 26 that the term "project" in the EIA directive referred to "works or physical interventions". This is narrower than the definition of "project" in the HRA regime (see *Cooperatie Mobilisation for the Environment UA v College van Gedeputeerde* (C-293/17) [2019] Env LR 27 at [61]-[66].

are between 10 - 20 applications for a development consent order under the nationally significant infrastructure planning regime subject to EIA each year."

16. However, where EIA is required, it is a demanding process covering a wide range of matters (the range having widened with successive iterations of the EIA Directive). Recital 14 to Directive 2011/92/EU encapsulates the nature of the required assessment as follows:

"The effects of a project on the environment should be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life."

17. Consistent with the broad purposes of the Directive, the requirements for Environmental Statements ("**ESs**"), set out in Schedule 4 to each of the 2017/83, 2017/571 and 2017/572 Regulations, are broadly cast.

18. Crucially, the environmental information gained by assessment – comprising both the developer's ES and the outputs of consultation with specialist statutory bodies and the public – informs but does not dictate the ultimate decision. The process is designed to inform project design and decision-making, including informing measures which may be necessary to avoid, mitigate or compensate for certain effects. Such measures could include the imposition of planning conditions or the securing of planning obligations, as well as changes to the location or design of the project. In reality, the identification and securing of mitigation measures is one of the most important benefits of the regime.

Strengths of the current EIA regime

Role in Ensuring Environmental Protection

19. As outlined above, the current EIA regime is largely procedural in nature. The identification of adverse effects under EIA does not mean that permission or consent should necessarily be withheld. However, the process ensures that such effects, and potential means of avoidance/mitigation/compensation, are considered in scheme design and in decision-taking. As a result, our view is that the current EIA regime plays

an important role in environmental protection by forcing applicants to think through environmental implications, by ensuring the comments of expert agencies are obtained, by enabling the public to have the relevant information on environmental effects to make properly informed representations on applications, and by requiring that information on effects is properly reported to the decision maker, for example in the officer's report to the relevant planning committee.

20. As noted at paragraphs 14 and 15 above, EIA only applies to a relatively small proportion of projects. The thresholds could be set at lower levels to capture more projects, but the advantages of this would need to be weighed against the disadvantages of imposing a time-consuming and possibly expensive process on smaller projects. As for the detailed approach to thresholds under Schedules 1 and 2 of the various Regulations, this strikes us as potentially helpful to decision-makers, and also enables close supervision by the courts, since the meaning of the statutory expressions used is a matter of law (*R (Goodman) v London Borough of Lewisham* [2003] EWCA Civ 140) (as opposed to questions of whether effects are "likely" and "significant", which are matters of judgement for decision-takers, amenable only to lighter-touch *Wednesbury* review).

21. A comparison of the cases in which negative screening decisions relying on mitigation measures were successfully challenged (*R (on the application of Lebus) v South Cambridgeshire District Council* [2002] EWHC 2009 (Admin); *Gillespie v First Secretary of State* [2002] EWCA Civ 400; *R (on the application of Champion) v North Norfolk District Council* [2015] UKSC 52; and *R (on the application of Swire) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin)) and those in which the decisions were upheld (*Catt v Brighton and Hove* [2007] EWCA Civ 298; *R (Long) v Monmouthshire County Council* [2012] EWHC 3130 (Admin); *Rayner Thomas v Carmarthenshire Council* [2013] EWHC 783 (Admin)), show reasonably satisfactory outcomes in terms of environmental protection by recognising the risk that screening out applications from EIA on the basis of what could be potentially controversial mitigation measures can have the effect of removing what should be a major plank of protection of the regime.

22. Determinations will be fact-specific, and inevitably much depends on the expertise and ability of the individual decision-taker, but the case-law is clear that authorities need a

robust and credible case in order to rely on mitigation measures; that cases of material doubt should be resolved in favour of EIA; and that the courts will not be afraid to strike down decisions made on inadequate evidence. *R (on the application of Swire) v Secretary of State for Housing, Communities and Local Government*, in which the developer had not told its experts about the site's former use as a carcass rendering facility for cows infected with BSE, is a particularly striking example, but *R (on the application of Champion) v North Norfolk District Council,* relating to river run-off, indicates a robust approach to scrutinising mitigation measures across a range of areas.

23. As for the process of EIA, summarised at paragraph 13 above, this provides, in our view, a sensibly staged approach, with detailed assessment required in preparing the ES, and a process which then engages expert consultees and the public, and which then requires the decision-taker to examine all of the environmental information, come to a reasoned conclusion on it, and integrate this into the decision on whether to grant consent (and, if so, the terms of such a consent).

Environmental awareness

24. Survey results suggest that EIA is now widely accepted as an instrument that enhances environmental awareness. We are aware that the OEP has instructed consultants to review this issue and that their work is ongoing. However, we note that in a previous study undertaken in 2016 the results reflected that acceptance.[12] In that study, more than a quarter of respondents stated that EIA had led to an explicit consideration of the environment in decision-making. 42% of respondents thought EIA had mainly led to limited changes in project planning and 13% were of the opinion that it had led to extensive changes. Just over 4% suggested that EIA had led to the most environmentally friendly option being adopted within a project. Finally, we note that only about 2% thought EIA had no effect on a project or on decision-making.

25. Further, it has also been expressed in the academic commentary that the EIA process can lead to a positive "dialogue" between developers, consultants and decision makers.[13] This reflects our experience in practice. From an initially very low base of

[12] *25 years of the UK EIA System: Strengths, weaknesses, opportunities and threats* by Urmila Jha-Thakur, Published in 2016 – online resource.
[13] *Mitigation and screening for environmental assessment* by Donald McGillvray, J.P.L. 2011, 12, 1539-1559.

expertise when the EIA regime came into effect in the 1980s, when only a tiny minority of major projects were subject to any form of EIA, a sort of "virtuous circle" has developed where consultants have developed expertise in techniques of assessment, where professional bodies such as IEMA have raised standards, where planning and other authorities have expectations of the quality of environmental information required, and where by and large most applicants accept the need to undertake EIA adequately. It is also worth stating that the role of NGOs and members of the public in challenging what are seen as defective EIA processes through the courts has been beneficial – while there have of course been unmeritorious challenges, equally some of these cases have established important points of law, and the threat of challenge means that parties to the process are less likely to risk cutting corners.

Interaction with planning conditions and obligations

26. As mentioned already, the current EIA regime has as one of its core focusses the avoidance/mitigation of impacts. In the planning sphere this can be reasonably easily secured through scheme details and through controls secured by planning conditions and planning obligations. This is a benefit of the EIA regime as it has developed, though it is dependent on adequate monitoring and enforcement of ongoing requirements.

27. However, we observe that this is different to achieving "outcomes", as suggested by Part 5 of the LURB. This would therefore be new territory and would be more demanding, if done properly, in terms of forecasting, monitoring, reporting and enforcement, quite possibly on a very long term basis. This will present significant challenges for local planning authorities, particularly if they are not provided with additional resources.

Enforcement by the courts

28. From our review of the authorities, it is evident that the courts are often invited by developers/planning authorities to decline to exercise their discretion to quash a permission which they have found non-compliant with the EIA regime.[14] The results of

[14] See, for example, *R (on the application of Burridge) v Breckland District Council* [2013] EWCA Civ 228; *R (on the application of Brown) v Carlisle City Council* [2010] EWCA Civ 523; *R (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888.

our review to date indicate that the courts will often reject these arguments and quash non-compliant permissions,[15] but will not invariably do so.[16]

29. Over time the courts have developed the concepts in EIA in a way which has, in some cases, strengthened the protection offered. A good example is the relatively stringent approach to whether significant effects are "likely" in cases such as *R (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, *R (on the application of Evans) v SSCLG* [2013] EWCA Civ 114 and *R (An Taisce) v SSECC* [2014] EWCA Civ 1111.[17]

30. On occasion, the courts quash decisions for substantive errors (see, for example *R v Cornwall County Council ex parte Hardy* [2001] Env. L.R. 25), but the *Wednesbury* approach is applied to matters of discretionary judgement (such as the adequacy of ESs). In addition, courts allow a "*substantial margin of appreciation to judgments based upon scientific, technical or predictive assessments by those with appropriate expertise*" (see *R (GOESA Ltd) v Eastleigh BC* [2022] P.T.S.R. 1473 at [101]-[102]). This presents formidable difficulties for claimants in some cases. However, the courts are robust in mandating compliance with the procedural requirements of the EIA regime if it appears that the public's ability to access the relevant environmental information and thus participate in the process has been prejudiced, for example where information has to be pieced together from multiple sources (sometimes referred to as a "paperchase"). The following examples illustrate this point:

    a. *R (Burkett) v Hammersmith and Fulham LBC (No.2)* [2004] Env. L.R. 3: Newman J outlined as follows: "*The democratic right of a member of the public to make representations must be meaningful and therefore the information which is made available must be sufficient to enable a member of the public: (a) to respond to the significant effects*

[15] See, for example, *R (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888; *R (on the application of Brown) v Carlisle City Council* [2010] EWCA Civ 523.
[16] See, for example, *R (on the application of Burridge) v Breckland District Council* [2013] EWCA Civ 228; *R (on the application of Champion) v North Norfolk District Council* [2015] UKSC 52 at [54] to [61] *per* Lord Carnwath.
[17] The approach to whether significant effects are "likely" under the EIA regime is nonetheless less stringent than that under the HRA regime, in which the test is satisfied if such effects cannot be excluded on the basis of objective information beyond a reasonable scientific doubt (see the *An Taisce* case, applying *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw* [2004] ECR I-7405).

on the environment to which it is suggested the project may give rise (b) to examine the project to see whether it is likely to give rise to significant effects which have not been identified."[18]

b. *R (Buglife) v Medway Council* [2011] EWHC 746 (Admin): Buglife complained that adequate surveys had not been completed before the ES was finalised. It was held that there had been a lack of full consultation in the weeks prior to the grant of planning permission and the ES had gone through a process of rapid and repeated change during that period.

c. *R (Halebank PC) v Halton BC* [2012] J.P.L. 56: The court held that the Borough Council had deprived the Parish Council of the opportunity to participate effectively in consultation. The court explained that: *"[i]t is not enough that some comment or opinion could be expressed: the Article anticipates that the maker has had sufficient opportunity to be able to make an informed comment or opinion. If not, then it could not be said to be an "effective" opportunity to participate or to make a comment of utility for consideration when the authority makes its decision."*[19]

d. *R (on the application of Friends of Hethel) v South Norfolk Council* [2009] EWHC 2856 (Admin): Cranston J emphasised the importance of publicity of decisions. Informing the public by putting the material on the Council's website is insufficient.[20]

Level of burden

31. In the grey literature review, it has been suggested that developers view the EIA process as an expensive and time intensive process which they would wish to avoid.[21] The issue has also been raised that there is a risk that screening can sometimes lead to an unnecessary administrative burden where projects with minor environmental impacts are screened in.[22]

[18] [2004] Env. L.R. 3 at [8].
[19] [2012] J.P.L. 56 at [62].
[20] Council [2009] EWHC 2856 (Admin) at [89]-[94].
[21] *Back to the future: Brexit, EIA and the challenge of environmental judicial review* by Maia Perraudeau, Env. L. Rev. 2019, 21(1), 6-20; *EIA, SEA and AA, present position: where are we now?* by Robert McCracken, J.P.L. 2010, 12, 1515-1532.
[22] *Commission seeks to streamline EIA rules* by EU Focus, EU Focus 2012, 302, 12-13.

32. However, there is a balance to be struck in practice between protecting the environment and ensuring that the system is not unduly burdensome. Commentary has been published to the effect that decisions on screening have struck that balance and have not been overly burdensome.[23] Discussing the judgment of Dove J in *R (Birchall Gardens LLP) v Hertfordshire County Council* [2017] Env LR 17, the author observed that the case law struck the right balance in not being too "*onerous*". As observed on page 142 of the article: "*while further information concerning a development may have become apparent to a planning officer after a screening opinion has been made, that fact did not automatically place the relevant planning officer under an automatic, reflexive, duty to reconsider a report to the planning committee, to the effect that the development did not require an EIA. To have imposed such an onerous requirement on the official would indeed, in the author's view, have run counter to the very purpose of a screening opinion, that is, a screening opinion simply reflects the opinion of the decision-maker, at an early stage of the planning process, and therefore, of necessity, often does not represent a decision which is based on the 'full picture', as it were.*"

33. The courts have been mindful of the risk of imposing burdensome requirements. However, the Schedule 4 requirements for ESs are undoubtedly extensive. There is therefore a key role for effective scoping to ensure that ESs are appropriately targeted, but in our experience, this is not always achieved in practice. We query whether developers fully embrace their ability to request scoping opinions and directions, this being a wholly voluntary component of the EIA regime, or whether developers fail to see the benefits in terms of producing targeted ESs which have been pointed out by commentators.[24]

34. Finally, we note that commentary suggests that the time spent in carrying out the assessments may vary greatly. The average duration of an EIA ranges, according to one source, from 5 to 27 months. [25] We appreciate that there may be more recent information available on this and that the environmental consultants instructed may be able to consider this point. In practice much of the time involved relates to information

[23] *Timing of assessment of environmental effects* by Francis McManus, S.P.E.L. 2021, 208, 141-142.
[24] *Planning Permission,* Richard Harwood KC, 2016 (Bloomsbury) notes at paragraph 7.55 that preparing an ES is potentially a time consuming and expensive exercise, but that it only needs to cover *significant* effects, not all environmental effects. There is considerable benefit in being able to ascertain what is required before preparation begins.
[25] *Commission seeks to streamline EIA rules*, EU Focus 2012, 302, 12-13.

gathering, for example to establish baseline conditions, which in some cases may involve wildlife surveys which can only be carried out at specific times of year.

Weaknesses of the current EIA regime

Legislative complexity

35. The highly detailed nature of the existing EIA regime is in part a strength, but the complexity is also partly a weakness, and particularly the "multiple and fragmented legislation".[26] There is a considerable range of legislative instruments addressing EIA in both England and Northern Ireland, and we consider there is scope for consolidation to make the regime clearer for decision takers and other stakeholders.

The Wide Role of Discretionary Judgement

36. The courts recognise that EIA decisions are highly fact-specific. This has been emphasised in the following areas:

    a. Defining the scope of the 'project' to be assessed, and in particular, whether a development proposal is a stand-alone project or, in reality, part of a larger scheme;[27]

    b. Decisions as to whether a Schedule 2 development is likely to have significant effects on the environment;[28]

    c. Whether a decision-maker has sufficient information to produce a negative screening opinion;[29]

[26] See *25 years of the UK EIA System: Strengths, weaknesses, opportunities and threats* by Urmila Jha-Thakur, published in 2016 – online resource at page 12.
[27] See the recent consideration and summary of the case law, and application to the facts, in *R (on the application of Wingfield) v Canterbury City Council* [2019] EWHC 1975 (Admin) at [50]-[77].
[28] *R (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408, at paras [17] and [39].
[29] *R (on the application of Jones) v Mansfield District Council* [2003] EWCA Civ 1408; *Younger Homes (Northern) Ltd v First Secretary of State* [2003] EWHC 3058 (Admin) at [59]; *R (on the application of Noble Organisation Ltd) v Thanet District Council* [2005] EWCA Civ 782 at [28]-[30].

d. Decisions as to whether mitigation measures are sufficiently defined and robust that they can legitimately be relied on in 'screening out' a Schedule 2 development proposal (as explored in paragraphs 21-22 of this Advice);

e. Decisions by LPAs as to whether certain effects are 'indirect'[30] or 'cumulative'[31] effects of a proposal, such that they need to be assessed in an ES.

37. The wide role for discretionary judgement can lead to unpredictability. It also raises issues for claimants seeking to challenge decision-making by local planning authorities or the Secretary of State, as areas of discretion are challengeable only on *Wednesbury* or other public law grounds. Further, while the courts will quash decisions which take an incorrect legal approach to EIA requirements (see, for example, *R (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888 and *R (on the application of Brown) v Carlisle City Council* [2010] EWCA Civ 523), the scope of discretion means it is important to drive good-quality decision-making 'in the first instance' within local planning authorities and other primary decision takers.

Salami-Slicing and Cumulative Effects

38. Defining the scope of the project is, in our view, one of the most significant issues from an environmental protection perspective. If two development proposals are considered separately, rather than as a single project, there may be an assessment of their 'cumulative effects' but the courts have recognised that this will be a less comprehensive assessment. Two important judgments from this perspective are *R (on the application of Wingfield) v Canterbury City Council* [2019] EWHC 1975 (Admin) ("***Wingfield***") and *R (Larkfleet) v South Kesteven DC* [2015] EWCA Civ 887 ("***Larkfleet***").

39. *Wingfield* concerned a challenge to a scoping decision. The sites were near Stodmarsh, a protected area. The court rejected the argument that the two adjacent developments were in fact a single project. This has been picked up in the grey literature, which has observed that *Wingfield* provides a good example of the confusion which often exists as to first, whether a project or development is simply part of a larger project, and,

[30] *R (on the application of Finch) v Surrey CC* [2022] EWCA Civ 187.
[31] *Brown v Carlisle City Council* [2010] EWCA Civ 523; *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321 at [27]-[28].

secondly, the cumulative effects of the respective projects.[32] In *Wingfield* at [57]-[59] and [71], Lang J helpfully distinguishes 'salami-slicing' and 'cumulative effects' cases and makes the sequential analysis that must be undertaken clear.

40. The issue as to whether a given project is part of a larger project is inextricably linked, but, at the same time, is conceptually quite separate from the issue as to whether one project has a significant effect on the environment by virtue of its cumulative effects with other projects. The first issue has been addressed by the courts, both at EU and national level, in so-called "salami-slicing" cases. These cases have sometimes revolved around attempts, or alleged attempts, of developers to "slice" larger projects into smaller ones, in order to avoid environmental assessment at the very outset. However, this was not the case in *Wingfield*. Indeed, in *Wingfield* both projects had been the subject of EIA.

41. The court held that on the facts, the two developments had separate owners, no functional interdependence, and each was justified on its merits and would be pursued independently: they were clearly distinct projects [63]-[69]. It was true that there were overlapping environmental effects, but these could be addressed by an assessment of cumulative effects.

42. There is no suggestion in *Wingfield* that there were really serious environmental concerns about the combined impact of both developments on Stodmarsh, the nearby designated area. However, the case does serve to emphasise that just because there has not been a deliberate, artificial splitting of one project in order to avoid EIA scrutiny, that does not mean that nothing will be lost in terms of scrutiny where two adjacent projects undertake separate "cumulative effects" assessments as part of separate EIA processes (as acknowledged in *Larkfleet*).

43. It has been said that the courts are 'energetically concerned' to prevent the salami-slicing of proposals at the screening stage (*Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321 at [32]), in line with the early domestic case of *R v Swale BC ex parte RSPB* [1991] 1 PLR and leading CJEU case of

[32] See, for example, *What constitutes a single project? (Case Comment)* by Francis McManus S.P.E.L. 2020, 198, 45-46.

Ecologistas en Accion v Ayuntamiento de Madrid [2009] PTSR 458. The case law shows a mixed picture:

a. In the early case of *R (on the application of Candlish) v Hastings Borough Council* [2005] EWHC 1539 (Admin), concerning a two-phase development project for 700 residential homes, offices and retail use, it was held that the first phase of infrastructure development was a distinct project which did not require EIA.

b. However, in another early case, *BAA plc v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1920 (Admin), two grants of planning permission by the Secretary of State were quashed for wrongful failure to consider the two together, which 'screened out' the applications from requiring EIA.

c. In *R (on the application of Burridge) v Breckland District Council* [2013] EWCA Civ 228, the Court of Appeal overturned the first instance findings that two 'functionally inter-dependent' proposals were not part of the same substantial development scheme, and emphasised the need for environmental assessment to be carried out within the EIA regime.

44. Where challenges are brought at the stage of ESs, and therefore at least one of the allegedly related projects is within the EIA regime, the courts are generally content not to interfere with the judgement that the two projects are distinct:

a. *Davies v Secretary of State for Communities and Local Government* [2008] EWHC 2223 (Admin) – the question was whether a 'park and ride' scheme was a separate project to a link road. The link road had been subject to EIA. The court held that whether the park and ride scheme was separate was *"very much a matter of planning judgment"*; it had been considered by the decision-makers; and their conclusion was not irrational.

b. *Bowen-West v Secretary of State for Communities and Local Government* concerned the distinction between a current planning proposal and a hypothetical future phase of development. It was permissible for the ES only to consider the former. The decision not to treat the larger future scheme as an indirect or cumulative effect of the instant proposal was also upheld.

c. Similarly, in *R (on the application of SAVE Britain's Heritage) v Secretary of State for Communities and Local Government and Sefton Metropolitan Borough Council* [2013] EWHC 2268 (Admin), the court rejected an argument that the proposed demolition of a chapel was part of a larger redevelopment project.

d. In *Buckinghamshire CC v Secretary of State for Transport* [2013] EWHC 481 (Admin) – the court rejected the submission that the decision to promote the two phases of HS2 in two separate hybrid bills breached the EIA Directive. It concluded that, as in *Bowen-West*, it was the project for which consent was sought – Phase 1 – which was to be assessed. There was nothing to suggest that this approach was irrational or otherwise unlawful.

e. In *Larkfleet*, a residential development and the road giving access to it were held to be separate developments, despite the fact that the residential development depended on the construction of the road and that the sites were in common ownership, on the basis that there was an independent planning need for the road.

f. *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9 – exploratory fracking works were properly a distinct project: any future extraction works would be subject to their own EIA, and did not need to be considered as indirect or cumulative effects.

45. From the above we draw the following observations:

a. The majority of the case law arises at the statement stage, rather than the screening stage, where applicants may have more success.

b. It is clear that there is no requirement to include hypothetical future developments in EIA assessment.

c. *Larkfleet* is a potentially troubling case, but overall the courts have broadly reached sensible conclusions.

d. However, we observe that from an environmental consultants' perspective, it has been suggested that there are practical limitations about undertaking cumulative assessment with early stage development proposals for which details are not available.[33]

Indirect effects

46. GHG emissions are typically raised in relation to the selection of activities that need to undergo a thorough assessment (screening stage) and to the identification of the issues to be documented (scoping). However, the issue which has been raised in the grey literature review is the problem that, taken in isolation, a single activity is unlikely to have a measurable impact on planetary systems, as the increase in the GHG concentrations in the atmosphere results from innumerable sources scattered among and within countries.[34]

47. Currently, the position is that the decision as to whether an effect constitutes a 'cumulative effect' or 'indirect effect' is a matter of judgment for the planning authority (*Bowen-West*; *R. (on the application of Finch) v Surrey CC* [2022] EWCA Civ 187 (appeal outstanding to the UKSC). Notwithstanding this, the court in *Finch* opined at length on the determination of indirect effects. In our view, and with respect, the approach of Sir Keith Lindblom SPT in *Finch* at [65] in attempting to distinguish *R. (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888, for example, is questionable. In *Squire*, the development of intensive poultry infrastructure would result in significant quantities of manure, which would ultimately be used as fertiliser on third party land: this 'end-use' was accepted to be an indirect effect of the development. It is not clear, in our view, that the existence of intermediate processes of oil refinement in *Finch* ought to be the determinative factor in deciding that combustion emissions did not constitute an 'indirect effect' of an oil extraction project.

48. In our view, the outcome of *Finch* raises serious concerns about the ability of the EIA regime to capture climate impacts as 'indirect, secondary or cumulative' effects, and/or transboundary effects, notwithstanding the amendments to the 2014 Directive.

[33] *EIA: the "project" and cumulative effects* by Neil Collar, S.P.E.L. 2015, 171, 115-116.
[34] *Climate assessment as an emerging obligation under customary international law* by Benoit Mayer, I.C.L.Q. 2019, 68(2), 271-308.

49. Clause 119(4)(a) of the LURB[35] provides that an EOR means a written report which assesses (among other things) "*the extent to which the proposed relevant consent or proposed relevant plan would, or is likely to, impact on the delivery of specified environmental outcomes*". This current wording is not very clear but it could provide the opportunity to clarify some of the ambiguity around indirect effects. However, the high-level wording of clause 119(4)(a) as currently drafted means it is not clear whether the consumption of the products from the oil would fall within its ambit or whether similar arguments would be run as in *Finch* that one is limited to the "project" being consented. Given the primary issue in *Finch*, and one which has been raised in other cases, was the adequacy of the EIA and whether there was a requirement to include within the EIA an assessment of the significant indirect effects of the development on the climate, this provision could be an opportunity to make this clear in the legislation.

Quality of information

50. In terms of ESs there has been criticism that the form and contents of ESs can be inadequate either in terms of quality or because information is missing or inadequate.[36] As noted at paragraph 30 above, the courts apply a *Wednesbury* approach to challenges founded on the adequacy of ESs.

51. So far as screening is concerned, a *Wednesbury* approach to adequacy is also applied, but in principle a planning officer may have a thinner basis on which to reach a reasoned screening opinion – see, for example, *Younger Homes (Northern) Ltd v First Secretary of State* [2003] EWHC 3058 (Admin), in which the opinion author's personal knowledge of the site alone justified his conclusion on contamination, and this was upheld as reasonable by the courts.[37] However, generally the courts have relied on expert or consultee evidence when concluding that information has been sufficient to rationally adopt a negative screening opinion. We observe that Schedule 3 of the

[35] As amended in Public Bill Committee) (20th October 2022), available here: https://bills.parliament.uk/bills/3155.

[36] *Urban regeneration projects – the risk of legal challenge* by June Gilles, S.P.E.L. 2005, 111, 106-109 *Environmental Impact Assessments* by Friends of the Earth, September 2020.

[37] See also, for a recent example, *R (Hough) v SSHD* [2022] EWHC 1635 (Admin) at [62]-[63], upholding a cursory assessment of in-combination effects in a screening opinion. Although we note the context that this ground of argument formed only a small part of the claimant's submissions and of the court's consideration, it is still authority that a cursory assessment of cumulative effects may suffice at the screening stage.

2017/83, 2017/571 and 2017/572 Regulations now set out more detailed statutory criteria which have to be taken into account when adopting a screening opinion, which likely reduces the possibility of a negative opinion being adopted on a thin basis. However, this emphasises that were EIA to be replaced with a different regime, this is evidently a risk that would exist.

52. The grey literature review also interrogates the level of detail required for the screening exercise to be sufficient.[38] Prior to the 2017/83, 2017/571 and 2017/572 Regulations the criticism was also made that the level of detail required at the screening stage is not always clear.[39] We have seen no clear criticism on the same basis since those Regulations were made; however this may be an area in which the OEP's consultants have practical experience.

53. The case of *R (Mortell) v Oldham MBC* [2007] J.P.L. 1679 is an example of the importance of genuine consideration being given to each application being screened. In the *Mortell* case, Sir Michael Harrison quashed three outline planning permissions where negative screening opinions had been produced. The Council had granted three separate planning permissions for urban redevelopments at sites all governed by the same Masterplan. Each screening opinion simply referred (in identical terms in each case) to the fact that the proposal formed part of a wider redevelopment, then concluded that, in comparison to the existing uses of the sites, the proposal would have no greater impact on the environment.

Excessive Amount of Information in ESs

54. Criticism is often made that there is a tendency in ESs to include more information than is necessary – so-called "*technical obesity*" or "*kitchen sink*" approach.[40] The use of disproportionately lengthy and wide-ranging documentation can obscure the real relevant issues and limit the effectiveness of the consultation process. The non-technical summary of an ES has a very important role to play in counteracting such problems.

[38] See, for example, *Environmental law and planning: the road ahead* by David Elvin KC, J.P.L. 2019, 13 Supp (Shining a Light), OP33-OP70.
[39] *Reasons for EIA screening decision (Case Comment)* by Colin T. Reid, S.P.E.L. 2011, 148, 139-140.
[40] *25 years of the UK EIA System: Strengths, weaknesses, opportunities and threats* by Urmila Jha-Thakur, Published in 2016 – online resource at page 11.

Expertise

55. Under the EIA regime it is for the developer to conduct the relevant assessments. These may be informed by scoping opinions from the local authority. The local authority will then take the assessments into account when they make a decision as to whether to grant consent or permission for the proposed project. Some criticisms in relation to quality and expertise include:

a. Regulators and local authorities may lack the relevant expertise and knowledge.[41]

b. The quality of ESs and the assessment process in the UK (and Europe) is variable. It has been suggested that in the USA, the Environmental Protection Agency carries out most environmental impact assessments of either public or private projects. This has generally been regarded as a positive factor in ensuring that the quality of ESs in the USA is superior to that elsewhere: the expertise and experience is focused mainly in one independent government agency rather than, as in Europe, dispersed amongst a number of professional consultancies (which may be more susceptible to commercial pressures).[42]

c. It has been suggested that problems arise where consultants and planning officers, under pressure from clients or political masters, see the EIA process as a formality which has to be undertaken in order to "*justify*" the proposed development, rather than to genuinely assess it against relevant environmental criteria.[43] Others have described the quality of EIAs and associated ESs as "*highly variable*" with ESs more akin to "*a sales brochure for the applicant*", rather than setting out a clear, technical, objective statement of environmental effects. There have therefore been calls for an independent commission of EIAs, to take them out of the hands of those with a vested interest in seeing schemes approved.[44]

d. The need for training and education has also been raised as a concern.[45]

[41] *Screening for environmental impact assessment projects in England: what screening?* By Dr Joe Weston, Impact Assessment and Project Appraisal, 29(2), June 2011, pages 90–98 (Online resource).
[42] *EIA - getting it right!* by Paul Winter, J.P.L. 2000, Supp (pluscachange.com), 18-47.
[43] *Ibid.*
[44] *Environmental Impact Assessments* by Friends of the Earth, September 2020.
[45] *Screening for environmental impact assessment projects in England: what screening?* By Dr Joe Weston, Impact Assessment and Project Appraisal, 29(2), June 2011, pages 90–98 (Online resource).

56. As set out above, historically there has been considerable criticism of the variable quality of ESs and insufficiency of expertise. However, the 2017/83, 2017/571 and 2017/572 Regulations each contain a new requirement that the ES be prepared by competent experts, and the 2017/571 and 2017/572 Regulations also require that the ES be accompanied by a statement from the developer outlining the relevant expertise of these experts, in order to ensure the completeness and quality of the ES.[46] This reflects amendments made by the 2014 Directive. However, some more recent commentary from civil society postdating the 2017 changes[47] continues to describe the quality of EIAs and ESs as 'highly variable' and a 'sales brochure'. We therefore query: (i) the extent to which the new legal requirements on expertise have embedded within the practice of developers and competence of local planning authorities; and (ii) whether an expertise requirement is sufficient, or whether there ought also to be an additional requirement of independence.[48]

Procedural weaknesses

57. Finally it is worth mentioning the following potential procedural weaknesses, which have been raised in the context of EIA:

a. Some have also suggested that limited time periods may mean that the potential for public participation is reduced.[49]

b. Inaccessibility of documents can be a great obstacle to public participation within the EIA process.[50] The suggestion has been made that taking into account time pressures and the fact that sometimes the "public" is distant from the relevant authorities, initiatives for increasing accessibility of documents would improve the participation in EIA.[51] The ability to provide documents online, and to utilise hyperlinks to more detailed documents, enabling the public to "drill down" to

[46] Regulation 11(3) of the 2017/83 Regulations, Regulation 18(5) of the 2017/571 Regulations and Regulation 14(4) of the 2017/572 Regulations.
[47] See, for example, *Environmental Impact Assessments* by Friends of the Earth, September 2020.
[48] *Ibid*. A requirement of independence is also a suggestion which was made by Friends of the Earth in the above report.
[49] *Justice & Environment (J&E) 'Good Examples of EIA and SEA Regulation and Practice in five European Union Countries'* Published in 2008.
[50] *Ibid.*
[51] *Ibid.*

levels of detail on particular matters could in principle greatly assist, though in practice we have observed a reluctance of applicants to allow access to raw data, for example modelling, perhaps on the basis that it could be misinterpreted.

D SEA

SEA Regimes in England and Northern Ireland

58. The SEA Directive (2001/42/EC) is transposed in England by the Environmental Assessment of Plans and Programmes Regulations 2004 and in Northern Ireland by the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004. The Northern Irish Regulations apply as regards a plan or programme relating solely to the whole or any part of Northern Ireland (see Regulation 3(1)). The English Regulations apply to a plan or programme relating: (a) solely to the whole or any part of England; or (b) to England (whether as to the whole or part) and any other part of the United Kingdom. We note that these regulations are materially very similar and we refer to them in this Advice as the **"SEA Regulations"**. The references below to the specific regulations are the same in both sets of regulations unless otherwise indicated.

Purpose and key requirements of SEA

59. Broadly stated, the purpose of SEA is to inform preparation of and decision making on certain plans and programmes. It is an iterative process which is undertaken as the plans and programmes evolve. It is therefore designed to shape the plans and programmes as they are developed and to ensure that significant environmental effects, of both preferred options and reasonable alternatives, are properly taken into account while the proposals are still at a formative stage. The purpose behind the SEA Directive is set out at Article 1, which states:

> *"The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."*

60. The SEA regime applies to certain plans and programmes. Plans and programmes are defined in Regulation 2 of the SEA Regulations as meaning plans and programmes (as well as modifications to them) which: (a) are subject to preparation or adoption by an authority at national, regional or local level; or (b) are prepared by an authority for adoption through a legislative procedure by Parliament or Government; and, in either case (c) are required by legislative, regulatory or administrative provisions.[52] The terms plans and programmes are not to be interpreted narrowly.[53]

61. Regulation 5 sets out the types of plans and programmes which must be subject to SEA (where the first formal preparatory act was taken on or after 21 July 2004). By Regulation 5(2), these include plans or programmes which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annex I or Annex II of the EIA Directive (2011/92/EU).[54] By Regulation 5(3), it also includes plans or programmes which are determined to require assessment pursuant to laws implementing Article 6 or 7 of the Habitats Directive. Regulation 5(6) and (7) carve out limited exceptions.

62. Schedule 1 to the SEA Regulations sets out the criteria for determining the likely significance of effects on the environment. Schedule 2 sets out information for environmental reports. The information to be contained within environmental reports is broadly cast. For example, it includes "*[T]he relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme*" (para.2 Schedule 2) and "*[T]he 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 (a) biodiversity, (b)*

[52] The term 'required' does not mean that its adoption must be compulsory (see *Inter-Environment Bruxelles ASBL v Region de Bruxelles-Capitale* Case C-567/10, [2012] Env LR 30, though the reasoning in this decision was doubted in *R (Buckinghamshire County Council) v Transport Secretary* [2014] UKSC 3, [2014] 1 WLR 324). See also *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51.
[53] *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51.
[54] Whether or not a particular plan or programme sets the framework for future development consent is a matter which has been considered by the Courts on a number of occasions (see e.g. *Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 and, more recently, *R (oao Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 1954.

population, (c) human health, (d) fauna, (e) flora, (f) soil, (g) water, (h) air, (i) climatic factors, (j) material assets (k) cultural heritage, including architectural and archaeological heritage, (l) landscape and (m) the inter-relationship between the issues referred to in (a)-(l)" (para.6, Schedule 2).[55]

63. Under the SEA regime, the environmental report must identify, describe and evaluate not only the likely significant effects on the environment of implementing the plan or programme, but also those of "*reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme*".[56] This has proven to be an important requirement in practice.

64. As with the EIA regime, the SEA regime includes consultation[57] and publicity[58] requirements, restrictions on adoption/submission unless the process has been followed,[59] and post-adoption requirements.[60]

Strengths of the current SEA regime

Clear purpose

65. The main goal of SEA is to provide "*for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development*" (Art. 1 of the SEA Directive). Its scope is wide and applies to plans and programmes (including those co-financed by the European Community, as well as any modifications to them) likely to have significant effects on the environment.

66. This clear purpose means that SEA is considered most effective in addressing environmental issues such as biodiversity, including fauna and flora, and water.[61] However, it is considered rather less effective for material assets, population, human

[55] Note that the issues provided are the same in the Northern Ireland Regulations but the Northern Ireland Regulations use numbering of (i)-(xiii) rather than (a)-(m).
[56] Regulation 11 of the Northern Ireland Regulations; Regulation 12 of the English Regulations.
[57] Part 3.
[58] Regulation 10 of the Northern Ireland Regulations; Regulation 11 of the English Regulations.
[59] Regulation 8.
[60] Part 4.
[61] REFIT evaluation of SEA by the European Commission (22 November 2019), at pg 22.

health, climatic factors and emerging environmental concerns in SEA, such as climate change, ecosystem services and natural capital.[62]

67. It has been observed in the academic commentary that the European Court has shown itself unsympathetic to arguments that particular forms of plan technically fall outwith the scope of the SEA Directive.[63] Its aim has been to safeguard the practical effect of the SEA Directive by taking a broad approach to scope, so as to avoid lacunae in assessment of significant effects on the environment. The domestic courts have on occasion shown themselves to be uneasy with such a strongly purposive approach.[64] Again, this underlines the importance of a clear statutory purpose that is capable of enforcement by the courts, and a clearly articulated (and sufficiently broad) scope.[65]

Interaction between EIA and SEA

68. We note at the outset that the purposes of EIA and SEA are broadly similar – however, they are focused on different stages of the process, with SEA operating "upstream" and EIA "downstream". Moreover, while the SEA regime applies to public plans and programmes, the EIA regime applies to both public and private projects. When the original EIA Directive was adopted in 1985, it was the first EU attempt to promote environmental considerations at an early stage of the process of preparing and determining applications for consent for projects. However, it soon became clear that decisions made at higher policy levels influence projects' development, meaning that

[62] As outlined below under 'weaknesses' the REFIT evaluation of SEA by the European Commission (22 November 2019), at pg 76, noted that the reasons for this are that the targeted and public consultation, as well as the evaluation workshop, showed that the effectiveness of the SEA Directive depends on how the SEA procedure is implemented. Respondents often mentioned that the ability of SEA to prevent the negative environmental impacts of planning was hindered by issues related to the timing of the SEA (i.e. frequent late start of the SEA in the plan preparation process); the lack of feasible alternatives and predefined options; the fact that implementation of the plan is not monitored, and challenges with understanding the SEA requirements (i.e. lack of clear definition of 'plans and programmes' and ambiguity in what is meant by 'set the framework for' projects subsequently subject to the EIA Directive) leading to higher level strategies not being subject to SEA. In the targeted consultation, stakeholders reported that effective consultation with relevant environmental authorities and the public is one of the key factors in supporting the effectiveness of the SEA Directive.

[63] As observed, for example, in *Strategic environmental assessment* by Colin T. Reid S.P.E.L. 2018, 189, 113-114.

[64] See, for example, *R (Buckinghamshire County Council) v Transport Secretary* [2014] UKSC 3, [2014] 1 WLR 324

[65] *Strategic environmental assessment* by Colin T. Reid S.P.E.L. 2018, 189, 113-114.

environmentally less satisfactory outcomes could become entrenched by plans and programmes before EIA was required to be carried out on projects. This led to the adoption of the SEA Directive in 2001, the primary objective of which is to ensure that environmental considerations are taken into account in the preparation and adoption of a wide range of plans and programmes.

69. This has resulted in two regimes with complementary scopes. The SEA regime applies to plans and programmes, focusing on the more strategic level of assessment, while the EIA regime applies to projects, allowing for more detailed and specific assessment.

70. The aims of SEA are laudable (upstream assessment of environmental effects so as to embed a high level of environmental protection in policymaking). Moreover, carrying out an assessment under the SEA regime does not negate the requirement for an assessment under the EIA regime. This is established by Article 11(1) of the SEA Directive, which specifies that an environmental assessment carried out under that Directive is without prejudice to any requirements under the EIA Directive (or under any other EU law). The CJEU has confirmed that the application of the EIA Directive *"does not dispense with the obligation to carry out such an assessment under Directive 2001/42"*.[66]

71. Where both assessments must be carried out, there are opportunities for synergies. Throughout the early development phase of plans, programmes and projects, authorities and project promoters should ideally identify the type of environmental assessment and the point at which it should take place. This has the potential to improve both the speed, efficiency and quality of the assessment.[67] To support synergies, Article 5(3) of the SEA Directive[68] allows for the use of relevant information from other EU legislation – including the EIA Directive – in the preparation of the environmental report. Sharing information not only reduces the potential for duplication and improves efficiency, but also supports better quality assessments under each regime. Further, in the REFIT evaluation of SEA carried out by the European Commission (22 November 2019), in the targeted consultation questionnaire, 48 respondents (63.2%) agreed that

[66] *Valčiukienė and Others*, C-295/10, ECLI:EU:C:2011:608, paragraphs 60-63.
[67] REFIT evaluation of SEA by the European Commission (22 November 2019), at pg 44.
[68] Transposed by Regulation 11(4) of the Northern Irish Regulations and by Regulation 12(4) of the English Regulations.

the SEA Directive is consistent with and supportive of HRA. 59 respondents from the national environmental authorities (74.3%) were in particular agreement.[69] Stakeholders identified four main areas where synergies can be found: common environmental reporting; data-sharing; more efficient and effective public participation; and higher quality assessments.

72. However, we observe that some stakeholders in the SEA REFIT evaluation reported that the distinction between the two assessments was unclear or not well understood, potentially leading to overlaps in the scope of assessments. Practitioners in a number of Member States similarly observed that the distinction between EIA and SEA is not always well understood, potentially resulting in overlaps or poor-quality SEAs that miss opportunities to achieve synergies with EIA.[70] The general criticism has been made that it is not always clear how SEA interacts with other control mechanisms.[71] On the whole, we consider that this is something that SEA does do well but this is a criticism that has been raised by some.

Weaknesses of the current SEA regime

Uncertainty as to scope

73. The SEA regime has helped to achieve a high level of environmental protection but the lack of a clear definition of its scope has hindered effectiveness.[72] There was a wide agreement throughout different phases of the SEA REFIT evaluation that this lack of clear definition represents a significant challenge to effective implementation of the Directive. It was observed that as a result, some "high" level "plans and programmes" (*sensu lato)* that may have a significant environmental impact are not subject to an SEA, either because they are not regarded as "setting the framework" directly or because there is no clarity on whether they fall within the definitional scope of "plans and programmes".

[69] *REFIT evaluation of SEA by the European Commission (22 November 2019)* at pg 48.
[70] *Ibid.* at pg 46.
[71] *Strategic environmental assessment guidance* by Frances McChlery S.P.E.L. 2013, 160, 130-132.
[72] *REFIT evaluation of SEA by the European Commission (22 November 2019)* at pg 10 onwards.

74. The uncertainty as to the scope of the SEA regime is a key theme in the domestic jurisprudence, and academic commentary has also focused on this point.[73] The key cases include *R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2010] EWHC 2866 (Admin), *R (Buckinghamshire County Council) v Transport Secretary* [2014] 1 WLR 324), *Walton v Scottish Ministers* [2013] PTSR 51, *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] PTSR 1334, *R (on the application of Berks Bucks and Oxon Wildlife Trust) v Secretary of State for Transport* [2019] EWHC 1786 (Admin), *R (Friends of the Earth Ltd) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 1540, and *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 1954.

75. In determining whether any measure falls within the scope of the SEA Directive, the courts have encountered difficulties in relation to both Articles 2 and 3 of the Directive, as transposed in Regulations 2 and 5 of the Regulations. The difficulties stem from a number of factors, of which the most important seem to us to be: first, that the terms "plan" and "programme" (which, despite the use of the conjunction "or", have tended to be construed conjunctively by the courts) are semantically vague terms which are not defined in the legislation; and second, the inherent vagueness in the concepts of setting the framework for future development consents and of being "required" by legislative, regulatory or administrative provisions.[74]

76. This uncertainty as to scope strikes us as a key weakness of the current SEA regime. Any future legislation should give careful consideration to matters of scope. There are clearly choices to the range of measures which should be subject to such a procedure, but whatever choices are made, they should be reflected in clearly expressed purposes and definitions.

[73] See, for example, *The end of the road for Walton (Case Comment)* by Colin T. Reid Jur. Rev. 2013, 1, 53-61; *Environmental challenges and opportunities* by Tom Cosgrove and Ashley Bowes, J.P.L. 2017, 2, 135-140.

[74] *Strategic environmental assessment and the National Planning Policy Framework (Case Comment)* by Francis McManus S.P.E.L. 2019, 193, 62, 64.

Consideration of reasonable alternatives

77. As noted at paragraph 5 above, the requirement for assessment of reasonable alternatives is a key strength of the SEA regime,[75] since it encourages the homing in on environmentally preferable solutions as a key part of the preparation of plans and programmes and should provide a clear audit trail as to options considered, taken forward and rejected. However, it has also been something of a pitfall for decision takers and the difficulty faced by decision makers in navigating the requirement may be seen as a weakness (though it is perhaps a weakness of the relevant processes rather than the "alternatives" requirement itself). There are numerous cases on reasonable alternatives, including *City and District Council of St Albans v Secretary of State for Communities and Local Government* [2009] EWHC 1280 (Admin), *Save Historic Newmarket Ltd v Forest Heath DC* [2011] EWHC 606 (Admin), *Heard v Broadland DC* [2012] Env LR 23, *R (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers* [2016] Env LR 1, *Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government* [2015] EWCA Civ 681, *R (on the application of Stonegate Homes Ltd) v Horsham DC* [2016] EWHC 2512 (Admin) and *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 (Court of Appeal) and [2020] UKSC 52 (Supreme Court). The issue of assessment of reasonable alternatives also, in our experience, arises frequently in the examination of Local Plans. To take an example, in the examination of the Eastleigh Local Plan 2016-2036, the Inspector recommended the excision from the Plan of a strategic growth option on the basis, among other things, of defects in the assessment of reasonable alternatives to it.[76]

78. The requirement for reasonable alternatives to be identified, described and evaluated in a comparable way and to the same degree as any preferred option[77] is, in our view, an important strength of the current SEA regime. However, the difficulty faced by decision makers in complying with the requirement is a potential weakness, and may

[75] And also, since Directive 2014/52/EU, the EIA regime, though the requirement is less strong in the EIA context, being limited to reasonable alternatives studied by the developer/applicant.
[76] See Inspector Masters' letter of 1st April 2020 (available at https://www.eastleigh.gov.uk/media/7309/ed71-eastleigh-post-hearings-final.pdf) and her Final Report of 14th March 2022 (available at https://www.eastleigh.gov.uk/media/11093/eastleigh-local-plan-final-report.pdf).
[77] See *Heard v Broadland DC* [2012] Env LR 23 at [69] and *R (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers* [2016] Env LR 1 at [88(viii)]

be ameliorated by a more detailed exposition of the requirement in legislation, or perhaps clearer guidance.

Timing

79. One significant issue is the timing of the SEA, whereby it is often launched relatively *"late in the development process of the plan or programme"* or there are procedural delays in consulting the public.[78]

80. In academic commentary on the decision of *R (on the application of Berks Bucks and Oxon Wildlife Trust) v Secretary of State for Transport* [2019] EWHC 1786 (Admin), it was noted that major developments often involve a complex series of inter-linking decisions taken over a prolonged period. Identifying when the threshold has been crossed so as to trigger an assessment can be difficult, in terms of both complying with the legal requirements and delivering meaningful consideration of the position. If the assessment is carried out too early, the proposals may be too vague for a thorough review; if too late, certain important choices may have been made without their impact ever being properly considered.[79]

81. The courts have recognised the need for SEA to proceed iteratively so as to inform the plan making process (see, for example, *Save Historic Newmarket Ltd v Forest Heath DC* [2011] EWHC 606 (Admin) at [16]-[17] and *Seaport Investments Ltd's Application for Judicial Review* [2007] NIQB 62). However, the legislation does not explicitly set this out, merely providing that the assessment shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure (Article 4(1) of the SEA Directive and Regulation 8 of the SEA Regulations). A more explicit approach in legislation to the requirement for an early start to the SEA process and an iterative approach throughout the preparation of the plan or programme would, in our view, be welcome.

[78] *REFIT of the SEA Directive* by Aleksandra Cavoski, Env. L. Rev. 2020, 22(2), 108-118.
[79] *No need for assessments of proposed road corridor (Case Comment)* by Colin T. Reid S.P.E.L. 2019, 196, 136.

Administrative and cultural practices

82. The aims of the SEA regime are laudable; however, any guarantee of ensuring better environmental outcomes requires decision makers to be proactive in using its processes for those purposes.

83. As the SEA Directive leaves wide discretion to Member States in implementation, the 2017 implementation report[80] recognised that the legislative framework for transposing the Directive varies across Member States and is dependent on different administrative and cultural practices. This is clearly demonstrated by a large discrepancy between the numbers of SEAs conducted by national authorities in Member States. According to the data collected in 2016, some Member States undertook 5 SEAs per year for the implementation period 2007-2014, while others undertook 2,700 SEAs per year. A good illustration is that in Finland on average 1,500 SEAs are conducted per year, while only 2 SEAs are conducted in Portugal. Ireland is somewhere in-between with 287 SEAs conducted between July 2004 and November 2011.[81] The UK is relatively high at 400-500.[82] The discrepancy between countries can be explained by differences in available expertise and available resources for conducting the SEA, as well as differences in data collected and provided by Member States that vary in quality, sometimes considerably.

Potential lack of flexibility by the courts

84. As noted at paragraph 67 above, the domestic courts have on occasion shown themselves to be uneasy with the strongly purposive approach adopted by the CJEU to the scope of the SEA regime.[83] There is therefore a risk that a more black-letter approach to interpretation will diminish the scope of the current regime as the influence of the CJEU fades. More generally, as with EIA, the domestic courts adopt a more exacting approach to compliance with procedural requirements than to matters of judgement, where a *Wednesbury* approach is applied (see *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52 at [144]).

[80] European Commission Report on the assessment of the effects of certain plans and programmes on the environment (15 May 2017).
[81] *REFIT of the SEA Directive* by Aleksandra Cavoski Env. L. Rev. 2020, 22(2), 108-118
[82] See https://www.eia.nl/en/countries/european+union/sea-profile
[83] See, for example, *R (Buckinghamshire County Council) v Transport Secretary* [2014] UKSC 3, [2014] 1 WLR 324.

85. Flexibility is, however, now exhibited by courts when considering whether to quash decisions for breach of SEA requirements (see *Walton v Scottish Ministers* [2012] UKSC 44). Courts are also able in some cases to be flexible in crafting sensible, targeted remedies, although this depends on the context.[84] Lord Carnwath considered the issues in the context of Schedule 2 of the Roads (Scotland) Act 1984 in the *Walton* case, commenting as follows at [144]-[145]:

> *"144. However, where such an order is promoted by Ministers, the statute normally (as in the present case) provides for it to be made first in draft, pending the completion of the statutory procedures, and only "made" when the Minister reaches a final decision. Logically, therefore, (although it is not clear why there is a difference from the position in local authority cases) quashing the "order" affects directly only that last step, and does not necessarily invalidate the whole process. How much can be salvaged from the earlier procedures will no doubt depend on the nature of the breach, and how it can effectively be remedied.*
>
> *145. I mention this point because it may be an issue of great practical importance in some cases, and it has not received much attention in the authorities or the textbooks (or even in the 1994 Law Commission report: Administrative Law: Judicial Review and Statutory Appeals, Law Com 226). It is hard to see any policy justification either for the rigidity of the powers given to the court, or, still less, for the curious variations as between similar statutory schemes. As I observed in Whitworth, there is a strong case for statutory reform to provide a more flexible and coherent range of powers in such cases, akin to those available in judicial review."*

86. It may be that any future regime could consider this as an area of improvement, ensuring that remedies under any statutory route of challenge are adequately flexible to provide an adequate remedy, while in suitable cases avoiding unnecessary future administrative effort and consequent delay and expense.

[84] Section 113(7)-(7C) of the Planning and Compulsory Purchase Act 2004, for example, allow considerable flexibility in crafting remedies.

Expertise

87. This is a point which emerges across the three regimes. The point has been raised, in the context of SEA, that since the SEA process had been developing elsewhere in the world, there were experienced consultancy skills available, and so there was an initial trend towards externalising all or part of the SEA process. However, that externalisation was a trend away from the spirit of SEA regime, which is fundamentally about integrating environmental effect analysis into the central core of the plan-making process. The observation has been made that effective integration will be less easily achieved if somebody else is doing the environmental assessment of a plan as a separate exercise.[85] Given the wide variety of plan and programme making bodies, ranging from large government departments and unitary authorities, through to small local authorities, it is to be expected that internal expertise, experience and resources will vary considerably.

Duplication of other regimes

88. There is some duplication of the SEA regime in the requirement for sustainability appraisal of local development documents under section 19(5) of the Planning and Compulsory Purchase Act 2004. This does not, in our experience, tend to give rise to practical difficulties, but it is perhaps legislatively inelegant.

E HRA

HRA Regimes in England and Northern Ireland

89. At a European level, the provisions for what in England and Northern Ireland are referred to as HRA are contained in Article 6(3) and (4) of the Habitats Directive (92/43/EEC). They sit within a broader system of habitats protection under the Habitats Directive and the Birds Directive (2009/147/EC), which have established an EU-wide Natura 2000 ecological network of protected areas. Articles 6(3) and (4) have been transposed: (a) in England by the Conservation of Habitats and Species Regulations 2017; (b) in Northern Ireland by the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995; and (c) offshore by the Conservation of Offshore Marine Habitats and Species Regulations 2017 and the Offshore Petroleum Activities

[85] *Strategic environmental assessment guidance* by Frances McChlery S.P.E.L. 2013, 160, 130-132.

(Conservation of Habitats) Regulations 2001. In the time available, we have not conducted a detailed comparison of these various regulations, but could do so if required. In this Advice, we focus on the Conservation of Habitats and Species Regulations 2017 (hereafter "**the Habitats Regulations**").

Purpose and requirements of HRA

90. Broadly stated, the purpose of HRA is to provide strict protection for European sites and European marine sites from the effects of plans and programmes in furtherance of an overarching aim of contributing towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora (see Article 2(1) and 6 of the Habitats Directive).

91. The requirements of HRA have now been considered in numerous cases, leading to a good degree of consensus as to the applicable principles. For example, in *R (Mynydd y Gwynt Ltd) v SSBEIS* [2018] PTSR 1274, at paragraph 8, Peter Jackson LJ set out the following propositions on the proper approach to HRA[86]:

> *"(1) The environmental protection mechanism in article 6(3) is triggered where the plan or project is likely to have a significant effect on the site's conservation objectives: see Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Case C-127/02) [2005] All ER (EC) 353, para 42 ("Waddenzee").*
> *(2) In the light of the precautionary principle, a project is "likely to have a significant effect" so as to require an appropriate assessment if the risk cannot be excluded on the basis of objective information: see Waddenzee, at para 39.*
> *(3) As to the appropriate assessment, "appropriate" indicates no more than that the assessment should be appropriate to the task in hand, that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned. It requires a high standard of investigation, but the issue ultimately rests on the judgment of the authority: R (Champion) v North Norfolk District Council [2015] 1 WLR 3710, para 41 per Lord Carnwath JSC.*
> *(4) The question for the authority carrying out the assessment is: "What will happen to the site if this plan or project goes ahead; and is that consistent with 'maintaining or restoring the favourable conservation status' of the habitat or species concerned?": see the opinion of*

[86] See also, the principles set out by Lindblom LJ in *R (Wyatt) v Fareham BC* [2022] EWCA Civ 983.

Advocate General Sharpston in Sweetman v An Bord Pleanala (Galway County Council intervening) (Case C-258/11) [2014] PTSR 1092, point 50.

(5) Following assessment, the project in question may only be approved if the authority is convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains, authorisation will have to be refused: see Waddenzee, at paras 56-57.

(6) Absolute certainty is not required. If no certainty can be established, having exhausted all scientific means and sources it will be necessary to work with probabilities and estimates, which must be identified and reasoned: see Waddenzee, points 107 and 97 of the Advocate General's opinion, endorsed in Champion's case, at para 41 and by Sales LJ in Smyth v Secretary of State for Communities and Local Government [2015] PTSR 1417, para 78.

(7) The decision-maker must consider secured mitigation and evidence about its effectiveness: European Commission v Federal Republic of Germany (Case C-142/16) EU:C:2017:301, para 38.

(8) It would require some cogent explanation if the decision-maker had chosen not to give considerable weight to the views of the appropriate nature conservation body: R (Hart District Council) v Secretary of State for Communities and Local Government [2008] 2 P & CR 16, para 49.

(9) The relevant standard of review by the court is the Wednesbury rationality standard (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) and not a more intensive standard of review: see Smyth's case, at para 80."

92. On the third to sixth propositions, for a competent authority to be "*certain*" that the plan or project in question will not adversely affect the integrity of the site concerned, absolute certainty is not required, but there should be no reasonable scientific doubt remaining as to the absence of such effects: *R (An Taisce) v SSECC* [2015] PTSR 189 at [17]-[18] *per* Sullivan LJ, and *R(oao Keir) v Natural England* [2021] EWHC 1059 (Admin) at [40]-[41]. Necessary elements of this are that the appropriate assessment "*cannot have lacunae and must contain complete, precise and definitive findings and conclusions*" (*Wealden DC v SSCLG* [2017] Env L.R. 31 at 44(vi)) and that the data and information on which an appropriate assessment is based must be "*reliable*" and "*up-to-date*" (*Nomarchiaki Aftodioikisi Aitoloakarnanias* (Case C-43/10) [2013] Env LR 21 at [115]).

93. The term 'integrity' is not defined in the legislation. It is considered at section 4.6.4 of the EC Managing Natura 2000 Sites Guidance on Article 6 of the Habitats Directive (2019)[87], which ends with the following summary:

> *"The integrity of the site involves its constitutive characteristics and ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the habitats and species for which the site has been designated and the site's conservation objectives."*

94. In our experience, there can sometimes be confusion and controversy at planning and other inquiries in identifying the conservation objectives for a site and distinguishing them from guidance on conservation by nature conservation bodies. This is an area where legislative clarification might be beneficial in future.

95. The seventh *Mynydd* proposition must now be read subject to Case C-323/17 *People Over Wind v Teoranta* [2018] P.T.S.R. 1668, in which the CJEU found that measures intended to avoid or reduce the harmful effects of a plan or project (i.e. mitigation measures) could not be taken into account at the screening stage (but they can and should be at appropriate assessment stage). This differs from the position under EIA regime, where mitigation measures can in principle be taken into account at screening stage (see *R (Champion) v North Norfolk DC* [2015] UKSC 52).

96. The eighth *Mynydd* proposition is well established: see, for example, *Smyth v SSCLG* [2015] PTSR 1417, in which Sales LJ held that *"the authorities confirm that in a context such as this a relevant competent authority is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not)"*. However, the views of Natural England[88] are not binding on a competent authority, and where good reasons for departing from Natural England's views exist, an authority may err in law in following its views, as happened in *Wealden DC v SSCLG* [2017] Env L.R. 31.

[87] Available at: https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/EN_art_6_guide_jun_2019.pdf

[88] By Regulation 63(3) of the Habitats Regulations, a competent authority must consult Natural England on every appropriate assessment. By Regulation 63(4) a competent authority has a discretion whether to consult the general public.

97. If, following an appropriate assessment, a decision maker is not certain that a plan or programme will not have an adverse effect on the integrity of a European site or European offshore marine site, the consent, permission or other authorisation must be refused unless strict derogation tests, set out in Regulations 64 and 68 of the Habitats Regulations, are met, namely:

a. There must be no feasible alternative solutions which are less damaging;
b. There must be imperative reasons of overriding public interest; and
c. Compensatory measures must be secured to ensure that the overall coherence of Natura 2000 is protected.

98. As can be seen, therefore, the purpose of HRA is not only to inform decision-making but also to provide stringent constraints on the decisions that can be taken. If a proposal risks adversely impacts the integrity of a European site or European offshore marine site and does not meet the derogation tests under Regulations 64 and 68 of the Habitats Regulations then consent cannot be granted. Mitigation (often in the form of conditions or planning obligations) may be relied upon in an appropriate assessment (though not at screening stage) but to be taken into account it must be certain and therefore secured.

Strengths of the current HRA regime

HRA is effective

99. The HRA regime is, in our view, a broadly effective part of the protection afforded to European sites and European offshore marine sites. The requirements of the HRA regime are clear, and there is generally, in our experience, a reasonable understanding of the requirements by applicants and competent authorities at screening and appropriate assessment stages (if not always a full appreciation of the stringency of the requirements). There is perhaps less understanding of the IROPI derogation tests, which are much less frequently considered (though in any event decisions on IROPI are likely to be taken at central government level, for example in the context of DCO applications).

100. The network of sites to which the HRA regime applies (the UK's national site network, previously Natura 2000) is also established and relatively extensive, running to millions

of hectares.[89] Recent studies have drawn a direct scientific link between protected site designations flowing from EU law and improved biodiversity[90], suggesting that the UK "*must strengthen, not dismantle, the protected area network*"[91], among other things to meet its flagship '30 by 30' biodiversity target. Natural England has, in its response to the Nature Recovery Green Paper, advised Defra that there is a "*clear justification for increasing SSSI coverage*" to meet the 30 by 30 target, and advised against sweeping changes to the HRA regime, which is "*an important and effective tool for nature's recovery*".[92] There therefore appears to be consensus between green civil society groups and the English nature regulator that the reforms proposed in the Nature Recovery Green Paper have not produced the right answers, and that part of the right answer for effective environmental protection is rather to designate more protected sites.[93]

Strong level of protection offered

101. The nature of HRA is that, unless the IROPI derogation tests are met, for consent to be granted for a qualifying plan or project, any risk of an adverse effect on the integrity of the protected site must be excluded beyond a reasonable scientific doubt. The stringency of these tests offers a strong level of protection to European sites and European offshore marine sites. This approach of strong statutory protection is quite different from the approach under the EIA and SEA regimes, which are primarily procedural, aiming to ensure that significant environmental effects are taken into account in decision-making but not mandating a particular outcome.

Weaknesses of the current HRA regime

Level of review by the courts

102. Despite the stringency of the HRA tests, the domestic courts have resolutely held to a *Wednesbury* standard, and the burden to demonstrate that a decision was unreasonable

[89] See https://hub.jncc.gov.uk/assets/a3d9da1e-dedc-4539-a574-84287636c898, https://jncc.gov.uk/our-work/special-areas-of-conservation/ and https://jncc.gov.uk/our-work/special-protection-areas/#latest-changes-to-the-spa-network.

[90] Tess Colley, *Direct link between protected sites and biodiversity improvements, new 'landmark' studies show* (ENDS Report, 5 December 2022).

[91] Katie-Jo Luxton, RSPB executive director for global conservation, cited in the above article.

[92] Tess Colley, '*Natural England urged DEFRA to rein in Habitats Regulations reforms, documents reveal*' (ENDS Report, 7 Dec 2022).

[93] As further commented by Richard Benwell of Wildlife and Countryside Link: Tess Colley, 'Defra's Nature Recovery Green Paper: 9 Things You Need to Know' (16 Mar 2022).

is a high one.[94] This is particularly true in cases involving scientific, technical or predictive assessments (as HRA cases tend to), in which the domestic courts apply a wide margin of appreciation and are consequently slower to intervene. The difficulties for claimants in HRA cases are well illustrated by the Court of Appeal's striking decision in *R (Wyatt) v Fareham BC* [2022] EWCA Civ 983, in which the court was at pains to emphasise the limits of its supervisory jurisdiction and upheld the rationality of an HRA premised on the use (for nutrient budget calculation purposes) of the average national occupancy rate of 2.4 persons per dwelling for a development comprising houses with four or five bedrooms. In the past, such cases might have been referred to the CJEU, where a more interventionist approach, based on securing the environmental objectives of those processes, might well have been adopted. Those routes are, however, now closed. Professor Colin T Reid has commented that the likelihood is that, without the CJEU's supervision, the margin of discretion allowed to planning authorities and Ministers is not going to narrow. Moreover, he observes that in the case of *Abbotskerswell Parish Council v Secretary of State for Housing, Communities and Local Government and others* [2021] EWHC 555 (Admin), although the precautionary approach required by the CJEU in habitats cases is mentioned in the background discussion, it does not feature at all in the judge's detailed consideration of the arguments over the assessment in that case, which Professor Reid says would not be the case in Luxembourg. There is a risk that after Brexit, even though the legal framework may not change, the level of environmental protection could be eroded through the recognition of administrative discretion, which may not be exercised in favour of the environmental goals behind that framework and may rather be influenced by political, social or economic considerations.

[94] See, for example, *Environmental impact and habitats assessments (Case Comment)* by Colin T. Reid S.P.E.L. 2021, 206, 91-92. The case comment uses the example of *Abbotskerswell Parish Council v Secretary of State for Housing, Communities and Local Government and others* [2021] EWHC 555 (Admin). See also for example, the case of *Canterbury CC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin) and its approach to the Court's discretion whether or not to quash the decisions. Dove J found that, in circumstances where detailed and comprehensive information about likely significant effects had been provided (albeit not in the form of an appropriate assessment and where Natural England had been satisfied with the mitigation measures and those measures had been the subject of a lengthy public inquiry, the Court could exercise its discretion not to quash.

103. Further, David Elvin KC notes that there have been suggestions, supported by examination of CJEU authority,[95] that the manifest error criterion may involve a more intensive consideration of the issues by the CJEU than would be the case in judicial review.[96] David Elvin KC uses the examples of *R (on the application of Evans) v Secretary of State* [2013] J.P.L. 1027, [32]–[43] and *Smyth v Secretary of State* [2015] P.T.S.R. 1417, where Sales LJ (as he then was) said at paras 79-80:

> *"79. Mr Jones submitted that Patterson J erred in treating the assessment by the inspector of compliance of the proposed development with the requirements of article 6(3) as being a matter for judicial review according to the Wednesbury rationality standard: Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223. He said that in applying EU law under the Habitats Directive the national court is required to apply a more intensive standard of review which means, in effect, that they should make their own assessment afresh, as a primary decision-maker.*
>
> *80. I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment ('EIA') Directive and Regulations, this court has held that the relevant standard of review is the Wednesbury standard, which is substantially the same as the relevant standard of review of 'manifest error of assessment' applied by the Court of Justice in equivalent contexts: see R (Evans) v Secretary of State for Communities and Local Government [2013] JPL 1027, paras 32–43, in which particular reference is made to Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-508/03) [2006] QB 764, paras 88–92 of the judgment, as well as to the Waddenzee case [2005] All ER (EC) 353. Although the requirements of article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts …"* (emphasis added)

[95] Other commentators have also noted the difference that can exist between the mindset of the CJEU and domestic courts: see, for example, *Mitigation measures and appropriate assessments: a change in the wind from Luxembourg: People Over Wind v Teoranta* by Stephan Tromans KC and Victoria Hutton J.P.L. 2018, 8, 896-903.

[96] *Environmental law and planning: the road ahead* by David Elvin KC J.P.L. 2019, 13 Supp (Shining a Light), OP33-OP70.

104. Further, Professor Richard Macrory, in evidence to the House of Commons,[97] stated that in environmental cases:

> *"… the approach of the UK courts in JR has been largely based on the Wednesbury irrationality principle – was the decision so unreasonable that no reasonable person could have made it? In contrast, the CJEU has tended to be less deferential, adopting a proportionality test involving a more structured examination of the balancing interest involved. The position is made a little more complex because in cases involving human rights and some EU law the British courts have in recent years been using the proportionality test, and in other cases, depending on the issue in hand, have applied the Wednesbury test with different degrees of intensity. Nevertheless, despite some academic arguments, it seems clear the two approaches are not exactly the equivalent. …*
>
> *I therefore have concerns that reliance on JR before the Administrative Court will not bring the same degree of review as currently adopted by the CJEU in infringement proceedings. In many infringement cases, the CJEU is prepared to engage in quite complex evidential issues. As Wenneras concluded in a major study on EU environmental enforcement, 'If one looks at the intensity of review which the ECJ has applied in infringement cases it quickly becomes obvious that it has not been deferential in its approach, but in fact applied a quite stringent review of legality'. Furthermore, more recent case-law of the CJEU indicates that while the burden of proving an infringement initially rests with the Commission, this can shift to Member States once a prima facie case is established. It is by no means clear that this approach would be adopted in ordinary JR proceedings."* (emphasis added)

105. A recent example of that intense scrutiny is *Commission v Poland (Białowieża Forest)* (Case C-441/17) EU:C:2018:255, which concerned wood harvesting and forest management measures to deal with the spread of the spruce bark beetle, in a site designated both under the Habitats Directive and Wild Birds Directive. The Commission commenced infraction proceedings, alleging that the measures were unjustified and that the Polish Government had failed to ascertain that the measures would not adversely affect the integrity of the site. The CJEU, in a judgment of 269 paragraphs, subjected the decision of the Polish authorities to detailed evidential scrutiny, disagreed in part with the assertions of the Commission, and found at least four significant breaches of the Habitats and Wild Birds Directives notwithstanding the stability or growth in the

[97] Professor Richard Macrory's Written Evidence to the House of Commons Environmental Audit Committee and Environment, Food and Rural affairs Committee dated 15 January 2019.

relevant bird populations. This level of scrutiny is consistent with Professor Macrory's evidence, and is very unlikely to be replicated in national judicial review.

Creation of dialogue

106. We observe that in the context of the HRA regime, we have not seen the same level of positive commentary that the regime creates a constructive dialogue between developers and authorities. This may be because the HRA regime is more binary in its application compared with EIA or SEA, and will be seen as a complete bar to development rather than simply another procedural requirement to be met. This view has been reinforced by the effect the HRA regime has had on preventing housebuilding projects because of concerns, for example, over effects on protected heathland and more recently on nutrient inputs to sensitive areas. Indeed, we have also observed instances where there has, or may have, been a lack of cooperation and dialogue. For example, in the case of Wealden DC's local plan, Inspector Louise Nurser's central concern was what she considered to be the lack of constructive engagement with neighbouring authorities and Natural England, with particular regard to the impacts on habitats and landscape and unmet housing need in Eastbourne.[98] She concluded that, because of the council's failure to cooperate on several issues, the plan could not proceed further in the examination[99] and it was subsequently withdrawn. The Wealden DC examination is, perhaps, exceptional, however, since the Council's approach to Natural England was founded at least in part on issues as to the required approach to air quality in light of the Dutch Nitrogen Case (Joined Cases C-293/17 and C294/17 ECLI:EU:C:2018:882), on which it took a different (and more precautionary) view than Natural England.

Evidence and methodologies

107. At the Oxford Joint Planning Conference in 2021, Sarah Cary presented a paper outlining how climate change considerations and environmental considerations were evaluated and incorporated into a revised local plan for Enfield, highlighting its key features.[100] Cary gives the view that it is entirely possible that the evidence bases on which the environmental and habitats assessments are done could be changing faster than the policies themselves. As an example, officers could spend five years evaluating and planning to protect a Site of Importance for Nature Conservation which will not be

[98] *Wealden local plan halted on duty to cooperate* by Ashley Bowes J.P.L. 2020, 4, 354-355.

[99] Stephen Tromans KC and Ned Helme (as well as Paul Stinchcombe KC) acted for Wealden DC.

[100] *Between sustainable development and the climate emergency: implications for policy making and planning practice* by Sarah Cary J.P.L. 2021, 13 Supp (Planning Back Better?), OP53-OP73.

functional as an ecosystem by the end of a 15-year plan, due to climate change. She does not challenge the need for evidence-based policy; but she challenges the methods and methodologies themselves. *"Just as the industry is now finally tearing up the practice book on forecasting retail floorspace needs, are there smarter ways of documenting environmental matters, and new ways of forecasting them?"*

108. We observe that this issue may be particularly relevant in the habitats context as the UK will no longer be part of the Natura 2000 network, nor send data to the Commission.[101]

Series of decisions

109. Under the EIA regime, problems arose concerning the approach to ROMPs, reserved matters and other subsequent applications (see, for example, *R (Barker) v London Borough of Bromley*, C-290/03 [2006] 3 W.L.R. 492, *Wells v Secretary of State for Transport, Local Government and the Regions*, C-201/02 [2004] 1 C.M.L.R. 31 and *R v Durham CC ex parte Huddleston* [2000] 1 WLR 1484) which were addressed in amendments to the 1999 EIA Regulations then in force. The current 2017 EIA regime includes express treatment of both ROMP applications and "subsequent applications" (which include reserved matters applications). There is no such explicit provision under the Habitats Regulations. However, our view is that they are broad enough to cater for such issues.

110. So far as multi-stage decision making is concerned (i.e. where there is a principal decision and one or more later implementing decisions) the habitats commentary in the Planning Encyclopedia raises an issue on this (without resolving it) at paragraph 3B-949B.1635.20. However, this does not appear to have been updated since *R (Wingfield) v Canterbury CC* [2019] EWHC 1974 (Admin) and *R (Swire) v Canterbury CC* [2022] EWHC 390 (Admin) (at [94]-[95]), both of which support the view (with which we agree) that both Article 6(3) of the Habitats Directive and the Habitats Regulations are broad enough to embrace HRA at all stages of multi-stage decision taking (in appropriate circumstances).

111. It has also been argued in certain quarters that HRA at reserved matters and discharge of conditions stages is no longer possible post-Brexit, but that argument seems to us to be founded on a misunderstanding of the effect of the European Union (Withdrawal)

[101] *Environmental law and planning: the road ahead* by David Elvin KC J.P.L. 2019, 13 Supp (Shining a Light), OP33-OP70.

Act 2018. The then Secretary of State for Environment, Food and Rural Affairs issued a Written Ministerial Statement on 20th July 2022 confirming the Government view that the HRA regime does apply to "post-permission approvals; reserved matters or discharges of conditions" and an Inspector has come to the same view in a recent appeal decision dated 24th November 2022 (Appeal Reference APP/W3330/W/22/3296248).

112. So far as renewals of permissions are concerned, we note that *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) [2005] 2 C.M.L.R. 31 ("Waddenzee"), the seminal habitats case, itself involved the renewal of annual permits. More recently, the decision of *Friends of the Irish Environment Ltd v An Bord Pleanala* (C-254/19) [2021] Env. L.R. 16 reminds authorities that once initial permission for a project has been granted, any subsequent decision to renew, alter or extend it may again trigger the requirement for careful consideration, and possibly a full assessment, of likely impacts under the Habitats Directive, and we consider the position is the same under the Habitats Regulations post-Brexit.

113. For those reasons, we consider that the HRA regime is capable of handling multi-stage decisions and renewals acceptably. However, given that issues have been raised, we wonder whether express legislative provision for such matters would be beneficial.

Scope of the HRA regime

114. Although the protection offered by the HRA regime is high, and its ostensible scope broad, its scope is limited to protection of the national site network.[102] We have not found a figure for the percentage of the UK covered by the national site network, but we note that the Natura 2000 network only covers about 18 per cent of Europe's surface. An idea to improve the current biodiversity status in Europe has recently been to link economy and ecology by integrating private landowners better into biodiversity conservation schemes. In doing so, the traditional approach to protect biodiversity only on designated sites is to some extent replaced by the more modern consideration of ecosystems as a whole and the demands of effective conservation undertakings.[103]

[102] This position differs from that pre-Brexit where the concept was of the EU wide Natura 2000 system. This means in practice that potential effects on non-UK sites will no longer be relevant (for example effects on protected species of fish using European estuaries).

[103] *Biodiversity protection under the habitats directive: Is habitats banking our new hope?* by Bettina Kleining Env. L. Rev. 2017, 19(2), 113-125.

Impact the LURB might have on HRA

115. Clause 129(3) of the LURB[104] provides a power by EOR Regulations to "*amend, repeal or revoke*" existing environmental assessment legislation, but as noted at paragraph 2 above, this does not apply to the Habitats Regulations. However, clause 129(2)(e) provides a power for EOR Regulations to include provision "*disapplying or otherwise modifying any provision of this Part or EOR regulations where something is done, or required to be done, under existing environmental assessment legislation or the Habitats Regulations*". We note that there has been academic commentary to the effect that the proposed changes to environmental assessment in the LURB are likely to weaken existing environmental protections.[105]

116. Unlike the HRA regime, Part 5 of the LURB does not set out a 'pass/fail' test for development. It does not state that a permission or consent cannot be granted or a plan cannot be adopted unless any particular environmental objective is met.

117. As stated at footnote 9 above, the purpose of the LURB is unclear. It appears quite possible that an environmental objective set by the EOR could include protection or ecological enhancement of certain sites, which might or might not correspond to European Sites under the HRA regime. In such circumstances it may be possible to draw parallels with the HRA Regime, albeit the LURB would appear to lack the requirement to refuse projects and plans which do not secure the relevant environmental objective.

118. As noted above, the HRA process may direct that permission cannot be granted for a development proposal or that a particular plan cannot be adopted. As already stated, it appears that EORs are designed to inform decision-making. However, there is a lack of clarity over what it means to give effect to an EOR (clause 119(2)(b) and 119(3)(b)).

119. Given the potential for EOR Regulations to disapply or modify HRA requirements we consider that there is a risk that EOR Regulations could lead to weaker protection for

[104] As amended in Public Bill Committee (20th October 2022), available here: https://bills.parliament.uk/bills/3155.

[105] *50 years of changes in planning law: 1972 to 2022: plus ca change, plus c'est la meme chose?* by Christopher Lockhart-Mummery KC and Matthew Henderson J.P.L. 2022, 13, OP4-OP19.

European Sites in the UK, though evidently this will depend upon the final terms of the Regulations.

120. Although we are unclear on what is meant by the potential to 'give effect' to EORs, it is possible that the EOR Regime could lead to better outcomes for European Sites. For example, if one of the environmental outcomes was to take measures designed to enhance the conservation status of certain species within a European Protected Site, then this could have the effect of requiring plans and proposals to go further than is currently required under the HRA regime. This would either be through the provision of enforceable measures set out in EORs themselves or through EORs shaping the content of plans or proposals for projects.

121. However, in the event that the current HRA regime did not provide a 'backstop' minimum level of protection and the EOR Regulations made provision for amendments to the Habitats Regulations which disapplied or heavily modified them (in the expectation that they would be replaced by an EOR), there is clearly a risk that the EOR would not provide sufficient protection to European Sites. First, this is because the legislation does not provide that proposals which adversely affect the integrity of European Sites should not (absent IROPI) be consented. Further, if the focus is on achieving a limited number of positive outcomes, the multitude of possible negative impacts (for example traffic, noise, local amenity) may be not be captured, adequately or at all. A potential area of interest for the OEP would be to consider the way in which the EOR Regulations could frame the environmental outcomes such that they can capture not only positive benefits but prevent environmental harms or negative impacts.

F COMMON THEMES ACROSS THE EIA, SEA AND HRA REGIMES

122. There are some common themes that emerge across the three regimes. We have tried here to distil those which seem to us the most important.

Protection offered by the three regimes

123. The general consensus across the majority of the grey literature has been that the three regimes have offered important environmental protection. The significance of the current Regulations (and their predecessors) has been both procedural and

substantive.[106] In general terms, the substantive effect has been to enhance the level of protection for the environment, including by delaying or preventing development altogether or otherwise ensuring that its environmental effects are avoided through better design, or are mitigated.

Role of the courts

124. Many academic commentators have prepared case comments on decisions and emphasised that they serve as reminders that the hurdle of establishing that discretionary judgements are unreasonable is a high one. In EIA, SEA and HRA cases, the courts have resolutely held to a *Wednesbury* standard. In the past, cases might have been referred to the CJEU (directly or through complaints about the outcome made to the European Commission), where a more interventionist approach, based on securing the environmental objectives of those processes, might have been adopted. Those routes are, however, now closed.[107]

125. We observe as a general theme, both from the research carried out in the literature review and in general practice, that in terms of the court's supervisory jurisdiction, when it comes to substantive matters courts are generally slow to intervene, but are generally much more forthright when matters concerning procedural defects come before them (though procedural deficiencies will not always result in a decision being quashed).

126. The *Wednesbury* irrationality threshold is a formidable hurdle in all areas, but it is raised yet further in many EIA, SEA and HRA cases by the substantial margin of appreciation accorded to judgements based on scientific, technical or predictive assessments by those with appropriate expertise (see *R (GOESA Ltd) v Eastleigh BC* [2022] P.T.S.R. 1473 at [101]-[102], *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at [68] and [177] and *R (oao Friends of the Earth Limited and Ors) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841). The overall pattern that emerges is one of

[106] *50 years of changes in planning law: 1972 to 2022: plus ca change, plus c'est la meme chose?* by Christopher Lockhart-Mummery KC and Matthew Henderson J.P.L. 2022, 13, OP4-OP19. See also the commentary in *Environmental Principles: will they have a legal role after Brexit* by Professor Macrory and Justine Thornton KC (as she then was) [2017] J.P.L. 907–913.

[107] See, for example, *Environmental impact and habitats assessments (Case Comment)* by Colin T. Reid S.P.E.L. 2021, 206, 91-92. The case comment uses the example of *Abbotskerswell Parish Council v Secretary of State for Housing, Communities and Local Government and others* [2021] EWHC 555 (Admin).

courts being reluctant to scrutinise technical assessments (although with some notable exceptions such as *Wealden DC v SSCLG* [2017] Env L.R. 31).

127. The limitations of the courts' supervisory jurisdiction underscore the importance of ensuring: (i) that the quality of the information that decision makers act upon is high and that those involved in EIA, SEA and HRA are competent; and (ii) that the purpose and requirements of the legislation are clear.

128. On the latter point in respect of all three regimes – EIA, SEA and HRA – the purpose of each regime is made clear on the face of the Directive. In numerous cases this has guided the courts in reaching decisions and has proved important in terms of the level of environmental protection offered by each regime. There have been many instances where the purposive approach required under EU law and embodied in EU case law have been decisive in settling important points. Given that this approach will, under the post-Brexit legislative arrangements, no longer be embodied in UK law, and given that previous EU jurisprudence will no longer have a role in interpreting new domestic legislation, this speaks to the importance of any future legislation being crafted in such a way that the purpose and requirements of any legislation are clear.

Multiple sets of regulation

129. We also observe that in respect of some aspects of the regimes, the legislation can be voluminous. This is in part a necessary consequence of precision, which is a strength, as well as the need to tailor the relevant requirements to a number of divergent legislative provisions, but there is scope for consolidation, particularly in the EIA regime, as set out in paragraph 35 above.

Terminological confusion

130. We have addressed various issues of unclarity in the existing legislation above. As a common theme to all three regimes, we draw attention again to the concept of "likelihood", in terms of the likelihood of significant effects, which we address at paragraph 29 above. In common parlance, "likely" tends to mean more likely than not, but its meaning in all three regimes is at odds with that ordinary meaning, with a much lower threshold of likelihood, and particularly so in the HRA context.

Quality of information – data and expertise

131. Across the three regimes concerns have been raised regarding the quality of information – this is compounded by two concerns, principally around data and expertise.

132. The concern regarding data was highlighted in the context of the REFIT evaluation of SEA by the European Commission (22nd November 2019) but is of wider application. In that report it was observed that potential synergies between SEA and HRA could be undermined by implementation challenges. For example, in some cases, data from one assessment is not made available for another. Similar concerns have been raised in the context of HRA (see paragraph 108 above). In some cases this appears to be a problem of coordination among authorities, whereby data is not transferred among authorities.[108]

133. Further, as explained above, concerns have been raised on multiple occasions regarding adequacy of expertise. Similar concerns as in the context of EIA have been raised in the context of SEA – that relevant expertise would not always be present amongst planners[109] – and the same is equally applicable to HRA. In addition, as outlined above, concerns have been expressed about independence of consultants and planning officers under pressure from clients or political masters.

134. The relevance of these concerns is that given the deference which the courts allow decision makers, it is vitally important that the information that decision makers are basing their decisions on is high quality information. This is an area where the consultants that the OEP has instructed may be able to assist.

Northern Ireland

135. We observe that there is less academic commentary focusing solely on Northern Ireland, and less caselaw. Given the similarities between the Regulations in England and Northern Ireland this has not been a particular issue in carrying out the literature review but it is notable.

[108] REFIT evaluation of SEA by the European Commission (22 November 2019), at pg 49.
[109] *Strategic environmental assessment guidance* by Frances McChlery S.P.E.L. 2013, 160, 130-132.

136. We also observe that the criticism has been made *"that historically, there is a well-known and problematic practice of directly replicating Westminster's environmental legislation into Northern Irish environmental law with minimal local input."* The example has been given that because Northern Ireland does not have a regulator independent of a central government department, changes that seem relatively innocuous may create potentially "*serious conflicts of interest*" and imbue more discretion in relation to environmental decision-making than regulators in England, Scotland or Wales.[110]

G CONCLUSION

137. We hope that we have dealt with our instructions adequately for present purposes. As outlined in previous meetings with the OEP, in the time available the literature review which has been carried out does not consider every resource exhaustively. However, it does provide an in-depth and we hope comprehensive overview of the relevant authorities, legislation and grey literature. Should those instructing have any further questions or wish to discuss any aspect of this advice, they should not hesitate to contact us.

Stephen Tromans KC

Ned Helme

Ruth Keating

Eleanor Leydon

16 December 2022

[110] *Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland* by Ciara Brennan, Mary Dobbs and Viviane Gravey Env. L. Rev. 2019, 21(2), 84-110.

Re: Legislation, Case Law and Implementation of the Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) and Habitats Regulations Assessment (HRA) Regimes in England and Northern Ireland

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ADVICE – GAP ANALYSIS

A INTRODUCTION

1. We are asked to advise the Office for Environmental Protection ("**OEP**") with regards to legislation, case law and implementation of the Environmental Impact Assessment ("**EIA**"), Strategic Environmental Assessment ("**SEA**") and Habitats Regulations Assessment ("**HRA**") regimes in England and Northern Ireland. We provided an overview advice of our literature review in respect of the three regimes in an advice dated 16 December 2022.

2. In that advice we had observed at paragraph 125 that in respect of some aspects of the regimes, the legislation can be voluminous. This is in part a necessary consequence of precision, which is a strength, as well as the need to tailor the relevant requirements to a number of divergent legislative provisions, but there is scope for consolidation. In the context of EIA it has been said that the highly detailed nature of the existing EIA regime is in part a strength, but the complexity is also partly a weakness, and particularly the "multiple and fragmented legislation".[1]

3. This supplementary advice considers whether there are significant 'gaps' that might exist between or across the three regimes in terms of environmental protection, whether as a result of multiple legislation or of the nature of the regimes themselves. All of the legislation cited in this supplementary advice has been uploaded to an accompanying shared access folder.

4. The remainder of this Advice is structured as follows:

[1] See *25 years of the UK EIA System: Strengths, weaknesses, opportunities and threats* by Urmila Jha-Thakur, Published in 2016 – online resource at page 12.

a. Section B provides an overview of the various statutory instruments relevant to EIA.

b. Section C provides an overview of the various statutory instruments relevant to SEA.

c. Section D provides an overview of the various statutory instruments relevant to HRA.

d. Section E provides an analysis of any 'gaps' across the regimes.

B EIA

5. As summarised in our advice of 16 December 2022, the first EIA Directive (85/337/EEC) ("the 1985 EIA Directive") came into force in 1985. It and various amendments to it were subsequently codified into the currently in force Directive 2011/92/EU ("the 2011 EIA Directive"), which has itself been amended by Directive 2014/52/EU ("the 2014 EIA Directive"). Projects listed in Annex I of the 2011 EIA Directive must be subject to EIA, while projects listed in Annex II fall to be determined through a case-by-case examination or domestic thresholds and criteria.

6. Annex I projects include certain power stations; certain metal or chemical installations; certain motorways, roads and waterways; certain groundwater abstraction schemes; and certain schemes to transfer water between river basins. Annex II projects include certain agriculture, silviculture and aquaculture products (paragraph 1), as well as various extractive industry, mineral, chemical and other projects.

7. In both England and Northern Ireland, the approach to transposition involves multiple legislative instruments covering different types of project and different regimes for development consenting (for example forestry activities, port and harbour works, water abstraction and reservoirs).

8. Since the majority of projects within the scope of the Directive require planning permission or development consent, the principal transposing regulations are: (a) in England, the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572); and (b) in Northern Ireland, the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 (SI 2017/83).

9. Other relevant legislation relating to EIA is as follows:

Title of legislation	Purpose
Harbours, highways, railways and other transport projects	
Transport and Works Act 1992 ("TWA 1992")	Sections 13A to 13D implement the EIA regime for transport projects in England and Wales, along with procedural rules made under that Act.
The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (SI 2006/1466)	
Harbours Act 1964 (As amended by the Harbour Works (Environmental Impact Assessment) Regulations 1999/3445 Sch.3 and further amendment regulations (2017/1070; 2020/460))	Procedure for making harbour revision and empowerment orders so far as relating to environmental impact assessments (Schedule 3).
Highways Act 1980	Part 5A relates to EIAs.
The Highways (Environmental Impact Assessment) Regulations 2007 (SI 2007/1062) ("Highways Regulations 2007")	Apply to certain projects for constructing or improving a highway that forms part of the Strategic Road Network in England or Wales.
The Environmental Impact Assessment (Miscellaneous Amendments Relating to Harbours, Highways and Transport) Regulations 2017 (SI 2017/1070)	Implement the EIA Directive 2014 in relation to development of harbours, highways, railways and other transport projects in England and Wales – amendments were made to the main implementing Acts.
The Roads (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 (2017 No 87)	Apply to roads in Northern Ireland.

Waterways (Environmental Impact Assessment) Regulations (Northern Ireland) 2019/209	Cover marina works and canal schemes in Northern Ireland.
Electricity Works	
The Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2017 (SI 2017/580) ("Electricity Works EIA Regulations 2017")	The Electricity Works EIA Regulations 2017 apply in England. Schedule 1 sets out the categories of development for which an EIA must always be carried out, reflecting the categories in Annex 1 to the EIA Directive 2014 that are relevant to the Electricity Act 1989.
Pipe-lines and offshore oil and gas developments	
Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 (SI 2020/1497) Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (S.I. 1999/360) The Pipe-line Works (Environmental Impact Assessment) Regulations 5 2000 (S.I. 2000/1928) Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999 (S.I. 1999/1672)	These Regulations apply to pipe-lines and offshore oil and gas developments. SIs 2020/1497, SI 1999/360 and SI 2000/1928 apply across the UK, while SI 1999/1672 does not extend to Northern Ireland (reg 1(2)).
Marine Works	
The Marine Works (Environmental Impact Assessment) Regulations 2007 (SI 2007/1518) ("Marine Works EIA Regulations 2007") (as amended by the Marine Works (Environmental Impact Assessment)	The Marine Works EIA Regulations 2007 apply the EIA regime to marine works for England, Wales, Northern Ireland and Scotland offshore (beyond 12 nautical miles). They revoke earlier specific Harbour Works EIA Regulations.

(Amendment) Regulations 2017 (SI 2017/588))	
Forestry	
The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999/2228) ("Forestry EIA Regulations 1999"). (As amended by: (a) the Environmental Impact Assessment (Forestry) (England and Wales) (Amendment) Regulations 2017 (SI 2017/592); (b) the Environment, Food and Rural Affairs (Miscellaneous Amendments and Revocations) Regulations 2018 (SI 2018/942))	The Forestry EIA Regulations 1999 implement the EIA regime for forestry projects in England and Wales.
The Environmental Impact Assessment (Forestry) (Amendment) Regulations (Northern Ireland) 2017 (2017 No 86)	As per the above – applying to Northern Ireland.
Land Drainage	
The Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 (SI 1999/1783) ("Land Drainage EIA Regulations 1999") (As amended by the Environmental Impact Assessment (Land Drainage Improvement Works) (Amendment) Regulations 2017 (SI 2017/585) ("Land Drainage EIA Regulations 2017"))	Implement the EIA regime for land drainage works in England and Wales.
Drainage (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 no 18	
Agriculture	

The Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations 2006 (SI 2006/2522) ("Agriculture EIA Regulations 2006"). (As amended by the Environmental Impact Assessment (Agriculture) (England) (No. 2) (Amendment) Regulations 2017 (SI 2017/593))	Implement the EIA regime for agricultural land in England.
Environmental Impact Assessment (Agriculture) Regulations (Northern Ireland) 2007/421	
Water Resources	
The Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003 (SI 2003/164) ("Water Resources EIA Regulations 2003") (as amended by the Water Resources (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2017 (SI 2017/583))	Implement the EIA regime in respect of water management projects for agriculture in England and Wales.
The Water Resources (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 (2017/85)	The above equivalent for Northern Ireland.
Decommissioning of Nuclear Reactors	
The Nuclear Reactors (Environmental Impact Assessment for Decommissioning) Regulations 1999 (SI 1999/2892) ("Nuclear EIA Regulations 1999"). (As amended by the Nuclear Reactors (Environmental Impact Assessment for Decommissioning)	Implement the EIA regime for consent for dismantling or decommissioning of nuclear power stations and reactors in Great Britain.

(Amendment) Regulations 2018 (SI 2018/834))	

10. The above demonstrates that specific consideration has been given to the following areas in the EIA context:

    a. NSIPs.

    b. Harbours, highways, railways and other transport projects.

    c. Electricity works.

    d. Pipe-lines and offshore oil and gas developments.

    e. Marine works.

    f. Water Resources.

    g. Forestry.

    h. Land Drainage.

    i. Agriculture.

    j. Decommissioning of Nuclear Reactors.

11. The EIA regime therefore covers a wide variety of different activities.

C SEA

12. As summarised in our previous advice, the SEA Directive (2001/42/EC) is transposed in England by the Environmental Assessment of Plans and Programmes Regulations 2004 and in Northern Ireland by the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004. The Northern Irish Regulations apply as regards a plan or programme relating solely to the whole or any part of Northern Ireland (see Regulation 3(1)). The English Regulations apply to a plan or programme relating: (a) solely to the whole or any part of England; or (b) to England (whether as to the whole or part) and any other part of the United Kingdom.

13. There are no additional statutory instruments to consider for specific activities, as there are for EIA and HRA.

D HRA

14. As explained in our previous advice, at European level, the provisions for what in England and Northern Ireland are referred to as HRA are contained in Article 6(3) and (4) of the Habitats Directive (92/43/EEC). They sit within a broader system of habitats protection under the Habitats Directive and the Birds Directive (2009/147/EC), which have established an EU-wide Natura 2000 ecological network of protected areas. Articles 6(3) and (4) have been transposed: (a) in England by the Conservation of Habitats and Species Regulations 2017; (b) in Northern Ireland by the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995; and (c) offshore by the Conservation of Offshore Marine Habitats and Species Regulations 2017 and the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001.

15. Other relevant legislation relating to HRA is as follows:

Title of legislation	**Purpose**
Water Abstraction and Impoundment (Licensing) Regulations (Northern Ireland) 2006/482	Regs 11 and 12 provide for consideration of the impact of proposed 'controlled activities' (the abstraction of water from underground strata or waterways and the construction, alteration or operation of impounding works) on any site protected under the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995.

E GAP ANALYSIS

16. First, at a high level, we note that there are differences in approach between the three regimes. In particular:

    a. As noted at paragraph 68 of our overview advice, the SEA regime applies to public plans and programmes, while the EIA regime applies to both public and private projects.

    b. In our view, the HRA regime takes a relatively broad approach to the definition of 'plans and projects'. As noted at footnote 13 of our overview advice, one jurisprudential interpretation of a 'project' within the EIA regime – that it refers to 'works or physical interventions' (*Brussels Hoofdstedelijk Gewest v Vlaams Gewest (C-275/09)* [2011] Env LR 26) - is narrower than the definition of a 'project' in the HRA regime (*Cooperatie Mobilisation for the Environment UA v College van Gedeputeerde* (C-293/17) [2019] Env LR 27 at [61]-[66]). On the other hand, the HRA regime will only apply to plans or projects which are likely to significantly affect a European site or a European offshore marine site, whereas EIA and SEA (which are not so constrained) will affect a geographically broader range of sites.

    c. The EIA regime is sector-specific: the 2011 EIA Directive specifies certain types of projects which are to be subject to EIA, and this is reflected in the various sector-specific regulations set out above. In contrast, in the SEA and HRA regimes, the legislation is enacted on more of a 'catch all' basis, with the overarching legislations covering all types of plans and programmes or projects (albeit that the HRA legislative regime divides onshore and offshore sites).

17. We have reviewed the EIA legislative framework set out above against the types of projects captured by both Annexes of the 2011 EIA Directive (as amended by the 2014 Directive), and have not identified any significant omissions in the domestic transposition of the 2011 EIA Directive. Nor are we aware of substantial case law (either at the domestic or EU level) seeking to challenge government for failing to effectively implement the 2011 EIA Directive. There were two settled challenges to the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 which led to their replacement with the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 (SI 2020/1497): however, these focused on failures to properly

transpose procedural requirements, in particular on publicity and consultation, rather than on substantive gaps in environmental protection. [2]

18. Albeit that the 2011 EIA Directive appears to have been adequately implemented, the fact that the types of projects in scope in the EIA regime as a whole are much more specifically defined makes it more conceivable that there could be 'gaps' in terms of environmental protection. For example, we note that Annex II of the Directive (as transposed in Schedule II of the Town and Country Planning (EIA) Regulations 2017) only requires EIA of certain "intensive fish farming" (paragraph 1(f)), rather than fishing more broadly.

19. Similarly, in *R. (on the application of Tree and Wildlife Action Committee Ltd) v Forestry Commissioners* [2007] EWHC 1623 (Admin), the first and apparently only challenge under the Forestry Regulations, the claimant successfully challenged a negative screening decision by the Forestry Commissioners, who had not thought it necessary to undertake EIA of a plan to 'develop' 12 acres of a 46-acre forest into 20 football pitches. The court discussed the meaning of paragraph 1(d) of Annex II of the EIA Directive (as implemented by the Forestry Regulations). Paragraph 1(d) requires screening of projects for "*initial afforestation and deforestation for the purposes of conversion to another type of land use.*" Since on the facts the development would plainly involve conversion to another type of land use (which would not be caught by the Town and Country Planning (EIA) Regulations), the Forestry Commissioners ought to have screened the proposed development under the Forestry Regulations.[3] However, the decision makes clear that (as a result of wording originating in the EIA Directive) a deforestation project <u>not</u> involving a clear subsequent change of use would not in itself require screening under the EIA regime, albeit that there may be situations where, "*if only it were possible,*

[2] *R (Garrick-Maidment) v Secretary of State for Business, Energy and Industrial Strategy and others* CO/1571/2019, concerning seahorses, was settled by consent in October 2019 when BEIS conceded that the Offshore Pipe-lines EIA Regulations did not fully transpose the EIA Directive, particularly in failing to provide a timely process for challenge. Soon after, a similar challenge brought by Greenpeace on the grounds that there was no clear way to challenge decisions - *R (Greenpeace Limited) v Secretary of State for Business, Energy and Industrial Strategy and others* CO/4392/2019 – led to the government's decision to replace the regulations (see paras 6.1-6.2 of the Explanatory Memorandum for SI 2020/1497. See further *Greenpeace Limited v Advocate General* [2021] CSIH 53 at [28]-[29].

[3] By virtue of Regulation 3(1) of the Forestry Regulations (similarly to other subsidiary EIA regulations), development which would be subject to EIA under the Town and Country Planning (EIA) Regulations falls outwith the sector-specific regulations: see [23]-[24].

deforestation itself might have such an adverse effect upon the environment as to make an impact assessment desirable" [29]-[30].[4]

20. In the broader habitats regime (albeit not a habitats assessment challenge), in the case of *R. (on the application of Lymington River Association) v Secretary of State for Communities and Local Government* [2010] EWHC 232 (Admin) the claimant successfully argued that the Conservation (Natural Habitats &c) Regulations 1994 did not effectively transpose Article 6(2)-(3) of the Habitats Directive into domestic law. The case concerned the Wightlink ferry operator's decision to introduce larger ferries operating across the Lymington Estuary. Wightlink itself was the competent authority [5], [94], and while regulation 22 empowered the Secretary of State to make special nature conservation orders specifying prohibited operations *"in respect of any land within a European site"*, this wording did not cover the operations at issue on the facts of the case. This lacuna constituted a failure to fully transpose the Habitats Directive [126]-[129].[5]

21. By the time of the judgment, DEFRA had already consulted on amending the regulations *"to make clear that these provisions can be used to restrict operations taking place on water [but outside the protected site itself] as well as on land, in order to protect European sites"*. The court held:

> *"128. There can be no doubt that it was this case that exposed the lacuna in the regulations, and resulted in the amendment that followed the consultation exercise. Furthermore in the letter dated 14 September, DEFRA expressly acknowledged the difficulty that it would have in arguing that the obligations under the Habitats Directive had been fully and properly transposed in the Habitats Regulations in their original form. I have no hesitation in finding that the Habitats Directive was not fully and properly transposed. Whilst I recognise, as was urged upon me by Mr Tromans, that all eventualities may not be foreseen when regulations are drafted, the fact remains that had consideration been given to the possible adverse effects of marine operations on protected sites, many of which are coastal, there would not have been the deficiency in the*

[4] We say *"in itself"* because any separate, later project to develop deforested land could evidently be subject to EIA under the main planning EIA Regulations 2017. Note also the discussion of whether paragraph 1(d) ought to be interpreted to mean that an *"initial afforestation"* project would also only need to be screened if it was for the purposes of conversion to another type of land use (paras [8]-[15]).

[5] While the declaration does not expressly specify which aspects of the Directive had not been properly transposed, plainly the referents are Articles 6(2)-(3): see the DEFRA consultation cited at [127].

regulations that this case brought to light.

129. Thus if the directive had originally been fully and properly transposed, DEFRA would have had the power to make a special nature conservation order to protect the sites from the risk of significant adverse effects, if satisfied that there was such a risk […]"

22. The Conservation (Natural Habitats &c) Regulations 1994 were replaced by the Conservation of Habitats and Species Regulations 2010 just two months after the judgment, and the power to make special nature conservation orders amended to apply *"in respect of any land within a European site…specifying operations (whether on land specified in that order or elsewhere and whether or not within the European site)"* which would be of a kind likely to damage the relevant conservation features of the site.

23. While there is therefore a limited body of case law which has importantly identified lacunae in the assessment regimes, during our literature review we notably did not encounter a substantial body of literature which criticises clear gaps across the regimes. In our view, substantive gaps in terms of environmental projection (which have not been identified through a particular legal challenge) are more likely to emerge from those dealing with the regimes on the ground, when implementing specific kinds of projects. We therefore suspect that any further such 'gaps' in protection are more likely to emerge from the implementation workstream of this review.

24. We are aware from our own experience, and from initial indications of the results of other branches of the OEP's review, of the general criticism that the assessment regimes have not prevented environmental deterioration at relevant sites. In particular, we note that given all three regimes bite at the point at which a proposed new plan, project or programme will independently (or in combination with other plans or projects) affect a particular site, they are less able to address and remediate pre-existing poor environmental conditions, or poor environmental conditions caused by unrelated activities, such as (in particular) substantial amounts of agricultural activity. Thus, both the English and Northern Irish Agriculture Regulations apply to "restructuring projects" and "uncultivated land projects", where a "project" means (a) the execution of construction works or other installations or schemes; or (b) other interventions in the natural surroundings and landscape. A "restructuring project" is a project for the "restructuring of rural land holdings", while an "uncultivated land project" is a project

to "increase the productivity for agriculture of uncultivated land or a semi-natural area, and includes projects to increase the productivity for agriculture of such land to below the norm". Finally, "uncultivated land" means land which has not been cultivated in the previous 15 years.

25. While these Regulations capture impacts from new agricultural activity (both through ploughing or breaking the soil and through chemical means of altering the soil), they will not capture the ongoing environmental impacts from the bulk of farmland which is already in agricultural use, including soil pollution and consequent water pollution. Similarly, nor do the Water Resources (EIA) Regulations in England or Northern Ireland (which apply to water management projects for agriculture, including irrigation projects and some abstraction projects) capture all agricultural impacts.

26. In a similar vein, under the HRA regime, one of last year's most significant cases was *R (Wyatt) v Fareham BC* [2022] EWCA Civ 983, which considered whether the Defendant's approach to an appropriate assessment of proposed residential development near a protected wetland site, which relied on Natural England's nutrient neutrality guidance, was lawful. This Court of Appeal litigation concerned a proposed development for just eight detached houses (albeit that all the houses would have four or more bedrooms). We have heard the criticism that the HRA regime is inapt to adequately address the problem of nutrient pollution, which is caused by a combination of factors including development, but also inadequacies in wastewater treatment and uncontrolled agricultural activity.

27. However, the HRA regime is only one aspect of the broader regime for habitats protection, with further duties deriving from Article 6(2) of the Habitats Directive (as discussed above). Further, while in our view it would be fair to say that the HRA regime cannot solve the nutrient pollution problem alone, it is undoubtedly a necessary (if not necessarily sufficient) tool to prevent the problem getting worse.

28. Finally, we reiterate that the above criticism is one which has arisen in conversation with various stakeholders, rather than from the legal and academic commentary which was the subject of our review. We therefore suspect that the stakeholders interviewed as part of the implementation review are better positioned to identify any further perceived gaps in the regimes from an environmental protection perspective.

F CONCLUSION

29. Should those instructing have any further questions or wish to discuss any aspect of this advice, they should not hesitate to contact us.

Ruth Keating

Eleanor Leydon

6 February 2023

Re: Legislation, Case Law and Implementation of the Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) and Habitats Regulations Assessment (HRA) Regimes in England and Northern Ireland

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ADVICE – LEGISLATIVE PURPOSE

A INTRODUCTION

1. We have provided advice to the Office for Environmental Protection ("**OEP**") on the legislation, case law and implementation of the Environmental Impact Assessment ("**EIA**"), Strategic Environmental Assessment ("**SEA**") and Habitats Regulations Assessment ("**HRA**") regimes in England and Northern Ireland. We provided an overview advice of our literature review in respect of the three regimes in an advice dated 16 December 2022.

2. On 9 January 2023 a conference took place between the OEP and members of the 39 Essex Chambers team. At this meeting a further brief advice was requested on examples of broad statutory purposes expressed in legislation and the way in which those statutory purposes have been interpreted by the courts and shaped relevant decisions.

3. This advice considers examples beyond solely environmental law. All of the sources referred to in this Advice can be found in the shared folder, to which a link has been provided separately.

4. The remainder of this Advice is structured as follows:

   a. Section B – Overview.

   b. Section C – Long titles or Preambles.

   c. Section D – Specific statutory provisions.

   d. Section E – Conclusions.

B OVERVIEW

5. In *O (a minor), R (on the application of v Secretary of State for the Home Department* [2022] UKSC 3, the Supreme Court considered the issue of statutory interpretation and the use of external material, in particular official material. The following points are worth emphasising by way of background in considering the issues in this advice:

   a. As per Lord Hodge at para 29: *"[t]he courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid."*

   b. Importantly Lord Hodge states at para 29: *"A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."* This statement reflects the decisions below – it need not be the case that the purpose or objective of the statute is found in the preamble. Often times a specific statutory provision relating to the exercise of powers or duties can effectively perform this function.

   c. In terms of secondary materials such as explanatory notes, as per paragraph 30: *"External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty… But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."* Therefore explanatory notes and Government reports can provide real assistance to the court in interpreting the purpose or objective of legislation – however, those materials are "secondary". Therefore, it is preferable for such meaning to come from the text of the legislation itself where possible as this will be the primary source for the courts to consider.

6. The starting point is that the courts will attempt to give effect to the objective intention of the statute and the plain meaning of the words.[1] However, if the plain meaning of the statute is in doubt, the court may resort to a purposive enquiry to determine the purpose and intent behind a statutory provision.[2]

7. Having reviewed relevant legislation there are effectively two ways of emphasising 'purpose' in legislation. The first is to provide a purpose in long title to the Act or the preamble to an Act of Parliament (in older statutes). The second is to outline how powers are to be exercised in a specific statutory provisions.

C LONG TITLES OR PREAMBLES

8. As restated by many authorities, the long title is part of an Act and may be used as an aid to construction.[3] As an aid to statutory interpretation it is therefore likely to be of particular use in determining an enactment's purpose or aim. The long title's drafting may be influenced by political and handling considerations to do with the Bill's legislative passage. It in our view, therefore, can be an appropriate place to make legislative aspiration or purpose clearer. As Lord Simon said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg* [1975] AC 591 at 647:

> *"In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case of an ambiguity – it is the plainest of all guides to the general objectives of a statute. But it will not always help as to particular provisions."*

9. Commentators have observed that there is clear support in Parliament and outside for long titles to be sufficiently concise to convey a *"helpful sense"* of the subject matter of the Act.[4] As *Craies* observes, it was once the norm for an Act of Parliament to be

[1] See for example *Jennings v Crown Prosecution Service* [2008] UKHL 29 at [13].

[2] Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 18.1.14.

[3] See for example, *R. (on the application of Miller) v Secretary of State for Exiting the European Union Divisional Court* [2016] EWHC 2768 (Admin) as per para 93: *"The long title indicates that Parliament intended that the ECA 1972 was to give effect to the enlargement of the European Communities by the addition of the United Kingdom as a Member State. It is inconsistent with that major constitutional purpose of the Act that the Crown should have power to undo that enlargement by exercise of its prerogative powers"*.
The same is true of Preambles which are now less prevalent. See, for example, s 10(1) of the Interpretation Act (Northern Ireland) 1954 provides: *"The preamble to an enactment shall be construed as a part thereof intended to assist in explaining the purport and object of the enactment."*

[4] Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 2.5.9.

preceded by a preamble setting out the social or legal background to the Act.[5] However, this is now a rarity. Although the decline of Preambles has been judicially deprecated,[6] *Craies* states that the Government's stated policy is firmly against the reintroduction of the preamble as a general measure.

10. In *Craies*, the author observes that preambles were useful. The example is given of the Territorial Waters Jurisdiction Act 1878 which was an Act of Parliament designed to reverse the decision in *The Queen v Keyn (The Franconia)* 1876-77 L.R. Ex. D II 63 C.C.R. *Craies* observes that a similar role may be served today, depending on the context, by the introduction of material in the Explanatory Notes.[7] However, we note that as per Lord Hodge's recent judgment in *O (a minor), R (on the application of v Secretary of State for the Home Department* cited at paragraph 5.c above, sources such as Explanatory Notes play *"a secondary role"*.

11. Therefore, in our view, although Explanatory Notes – and any statements regarding levels of environmental protection therein for example – are of assistance, it is preferable for statutory purpose to be made clear either in the long title to the Act or in a specific statutory provision. This is supported by statements from judges to the effect that *"[i]t is important to recall that the exercise of statutory interpretation involves ascertaining the intention of Parliament in enacting the statute concerned, not the understanding of the executive"* (as per *R (on the application of Black) v Secretary of State for Justice* [2015] EWHC 528 (Admin)). Therefore the courts are very live to the distinction between the Government's intention in promoting legislation and Parliament's intention in passing it.

12. Examples are provided below where the long title or preamble has assisted the court in expressing the statutory purpose of an Act:

The Human Fertilisation and Embryology Act 1990

"Preamble

An Act to make provision in connection with human embryos and any subsequent development of such embryos; to prohibit certain practices in connection with embryos and gametes; to establish a Human Fertilisation and Embryology Authority; to make provision about the persons who in certain

[5] Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 2.5.10.
[6] *LCC v Bermondsey Bioscope Co* [1911] 1 KB 445, 451 per Lord Alverstone CJ.
[7] Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 2.5.10.

circumstances are to be treated in law as the parents of a child; and to amend the Surrogacy Arrangements Act 1985."	
Authority	***Points of note***
R (on the application of Quintavalle) v Secretary of State for Health [2003] 2 AC	At para 26 of the judgment Bingham LJ (as he was was) stated as follows: *"I would summarise my reasons as follows. <u>The long title of the 1990 Act makes clear, and it is in any event self-evident, that Parliament intended the protective regulatory system in connection with human embryos to be comprehensive</u>. This protective purpose was plainly not intended to be tied to the particular way in which an embryo might be created. The overriding ethical case for protection was general."* (emphasis added) The long title and the stated purpose therein was evidently of important to the court.
Criminal Law Act 1967 *"Preamble* *An Act to amend the law of England and Wales by abolishing the division of crimes into felonies and misdemeanours and to amend and simplify the law in respect of matters arising from or related to that division or the abolition of it; to do away (within or without England and Wales) with certain obsolete crimes together with the torts of maintenance and champerty; and for purposes connected therewith."*	
Authority	***Points of note***
R v Jones (Margaret) [2006] UKHL 16	In *R v Jones* a number of defendants were charged with criminal damage and aggravated trespass arising out of their actions in protesting against the war in Iraq. Part of their defence was that they were seeking to prevent a 'crime' and so entitled to a defence under s 3 of the Criminal Law Act 1967. Their argument depended on whether the reference to 'crime' covered crimes established in customary international law, such as the crime of aggression. Having regard to the long title to the Act, provided above, the House of Lords held that 'crimes' in the long title self-evidently referred to domestic crimes and that 'crime' in s 3 must have the same meaning (paras 55 and 56 of the judgment).
Armed Forces Act 2006 *"Preamble* *An Act to make provision with respect to the armed forces; and for connected purposes."*	
Authority	***Points of note***
Director of the Serious Fraud Office v B [2012] 1 W.L.R. 3188	As per paragraph 25 of the judgment, the Court of Appeal relied on the long title of the Armed Forces Act 2006 to support a rectifying construction in circumstances where a drafting mistake would otherwise have resulted in a defendant's right to appeal from the Criminal Division of the Court of Appeal being removed in cases of contempt of court. The court pointed to the fact that the long title made no mention of the removal of the rights in question. It is therefore also relevant that which is not referred to in the long title.
Life Assurance Act 1774	

"Preamble

An Act for regulating Insurances upon Lives, and for prohibiting all such Insurances except in cases where the Persons insuring shall have an Interest in the Life or Death of the Persons insured.

Whereas it hath been found by experience that the making 1 insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming"

Authority	***Points of note***
Siu Yin Kwan v Eastern Insurance Co Ltd [1994] 2 AC 199	The Judicial Committee of the Privy Council used the preamble to the Life Assurance Act 1774 as a guide to the interpretation of s 2 of that Act. It was held that indemnity insurance, with which the case was concerned, was not within s 2 because by no stretch of the imagination could it be described as "*a mischievous kind of gaming*".

13. In terms of the importance of long titles or preambles, as per *Matthew v State of Trinidad and Tobago* [2004] UKPC 33 Lord Bingham stated:

> *"[T]he preamble to a statute cannot override the clear provisions of the statute. But it is legitimate to have regard to it when seeking to interpret those provisions … and any interpretation which conflicts with the preamble must be suspect."*

14. We therefore also consider in this advice the way in which specific statutory provisions might act as an aid to interpretation and provide an appropriate opportunity to enhance a statutory purpose.

D SPECIFIC STATUTORY PROVISIONS

15. Examples include the following:

Proceeds of Crime Act 2002 ("POCA")

Section 69 'Powers of court and receiver'

S.69 provides guidance on how the powers conferred on a court (listed in s.69(1)) are to be exercised.

The relevant part of note of s. 69 for our purposes provides:

"(2) The powers –

(a) must be exercised with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant;

(b) must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property;

(c) must be exercised without taking account of any obligation of the defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the defendant;

(d) may be exercised in respect of a debt owed by the Crown.

(3) Subsection (2) has effect subject to the following rules –

(a) the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him;

(b) in the case of realisable property held by a recipient of a tainted gift, the powers must be exercised with a view to realising no more than the value for the time being of the gift…" (emphasis added)

In the case law on s 69 POCA the principles or purpose in s 69 have come to be referred to by the courts as the "*legislative steer*".

Authority	***Points of note***
Serious Fraud Office v Lexi Holdings PLC (In Administration) [2009] 2 WLR 905	The "*legislative steer*" in s 69 is drafted more restrictively than under the previous legislation and its construction fell to be determined by the Court of Appeal in *Serious Fraud Office v Lexi Holdings PLC (In Administration)*. The Court of Appeal held that the "*legislative steer*" (para 64) in s 69 of POCA precluded the release of funds restrained by POCA restraint orders for the purpose of paying third-party creditors of the defendant. The effect of the decision is that unless the creditor can assert a proprietary claim over restrained assets, he will be unable to secure their release for the purpose of satisfying his claim. The Court noted that there were significant differences between the wording of the legislative steer in s 69 of POCA and under the previous legislation. Keene LJ said: *"80. …It is true that some of the provisions in that section contain the phrase 'with a view to' which as has been said in several of the authorities indicates a degree of flexibility in the court's approach and simply gives a 'legislative steer'. Section 69(2)(c), however, is different. It does not contain that phrase and does appear to be in mandatory terms: the powers 'must be exercised without taking account of any obligation . . .'. Moreover, the feature of its equivalent provision in the earlier legislation which so influenced Davis J. in Re X has changed: it is now clear that this provision does apply in the situation where there is a restraint order but no confiscation order in existence, because the words 'or may be made' have been added. This must be taken to represent a deliberate tightening up of the legislation by Parliament."* (emphasis added) He went on:

	"81. On the face of it, section 69(2)(c) does require the courts to ignore any debt owed by the restrained person to an unsecured third party creditor, so that the existence of such a debt would not empower the court to vary a restraint order unless there was no conflict 'with the object of satisfying any confiscation order'. On that last aspect we are wholly unpersuaded by Counsel for Lexi's argument about the meaning to be attached to those words. His contention that the 'object' is that of depriving the offender of the proceeds of crime is unsustainable. That is the object of the confiscation order itself, whereas this provision is referring to the object of 'satisfying' any confiscation order, i.e. providing a sufficient quantum of assets to meet the sum identified, already or in due course, in a confiscation order. Counsel's interpretation would render the presence of that word 'satisfying' unnecessary and would, in our judgment, distort the natural meaning of section 69(2)(c). If he were right, the provision would enable any third party creditor to obtain a variation of the restraint order and so to be paid and indeed Counsel submits that this is what should happen. The provision would in fact have virtually no effect in practice. In our view, the latter part of paragraph (c) is, as Counsel for the SFO argues, indicating merely that if the court can see that a confiscation order, existing or prospective, relates to an amount which the defendant has ample assets to meet, then it may be that a debt to a third party creditor can properly be allowed to be paid from the restrained assets." The specific wording at s 69 therefore provides "the legislative steer" for interpreting how the power is to be interpreted. S 69 provides a helpful example of the way in which specific clauses or sections can be used as an aid of interpretation for certain statutes and can provide an appropriate place for the guiding legislative principles to be made clear.
R v S [2020] 1 WLR 109	The "legislative steer" in s 69 of POCA is again referred to by the Court of Appeal at paragraphs 28. At paragraph 37 the court summarises the purpose of s 69 as follows: *"…Moreover, in cases such as the present where confiscation is prospectively in issue the underlying rationale, as reflected in the legislative steer set out in section 69 of the 2002 Act and as confirmed in the Supreme Court decision in R v Waya [2013] 1 AC 294 , is that criminals should not profit from their crimes: and a restraint order is thus a means of furthering that particular public interest."*
Alexander Windsor and others v Crown Prosecution Service [2011] 1 WLR 1519	Paragraph 60 of the judgment provides that: *"We add this. It has often been said when interpreting the confiscation legislation in a manner adverse to those affected by Part 2 orders that it is 'draconian'. Judges asked to exercise their discretion to make restraint (and receivership) orders of the kind with which this appeal is concerned should bear in mind the draconian consequences of such orders, albeit of course applying the legislation and, in particular, section 69."* (emphasis added) The purpose of the principles in s 69 is therefore that they are considered by judges when exercising their discretion. They therefore act as an express way in which the purpose behind the regime can be given proper and structured account.

R v Luckhurst [2021] 1 W.L.R. 1807	In providing guidance in *Luckhurst*, the Court explicitly relied upon the "*legislative steer*" under s 69 of POCA (paras 24 and 26). At paragraph 32(3) the Court of Appeal: "*[t]he legislative steer in section 69(2) requires the court to promote the preservation of assets so as to render them available to meet a confiscation order. That statutory objective is defeated rather than served by permitting a continuation of a previous lifestyle which reduces the amount available below that which would obtain by the imposition of some objective standard of reasonableness, merely because it was that to which the defendant was previously accustomed.*" (emphasis added) Therefore, the Court of Appeal referred to s 69 both as providing the legislative steer that the court was to "*promote*" and speaking of that legislative steer as reflecting a "*statutory objective*". Although *Luckhurst* was appealed to the Supreme Court, these issues were not part of the appeal, which was dismissed in any event.

Immigration Act 2014

Section 19 'Article 8 of the ECHR: public interest considerations' inserts after Part 5 of the Nationality, Immigration and Asylum Act 2002 the following:

"PART 5A ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where –

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part –

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who-

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who –

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person –

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who –

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under –

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time –

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it." (emphasis added)

Many courts have referred to s.19 Immigration Act 2014. Below we have referred to judgments that themselves have received positive or neutral judicial treatment. S.19 is oft

Authority	***Points of note***
Sajid Zulfiqar (Anonymity Direction Not Made) v The Secretary of State for the Home Department [2020] UKUT 312 (IAC)	S.19's purpose and scope is described as follows: *"From 28 July 2014 section 19 of the Immigration Act 2014 ('the 2014 Act') was brought into force, amending the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') by introducing a new Part 5A which applies where the Tribunal considers article 8(2)… Section 117B is concerned with the application of the public interest consideration in all article 8 cases… Section 117D provides the interpretation to Part 5A . Relevant to our considerations"* (emphasis added) *Those headings then flow through the structure of the judgment and therefore the considerations for the court.* *Further, paras 74-77 state as follows:* *"74. Sections 117A to 117D in Part 5A of the 2002 Act set out the correct approach to considering article 8 claims. Section 117A(1) of the 2002 Act sets out how the article 8 provisions are to be applied and is clear in terms. In respect of this appeal the Tribunal is to determine whether the respondent's decision made under the Immigration Acts breaches a person's right to respect for private and family life under article 8, and as a result would be unlawful under section 6 of the 1998 Act.* *75. Section 117A(2) is equally clear in terms: in considering the public interest question, the Tribunal must (in particular) have regard in all cases to the considerations listed in section 117B, and in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C .*

	76. Section 117D sets out the interpretation of sections 117A to 117C . The focus of the parties' submissions upon us were directed to section 117D(2) where the definition of a 'foreign criminal' is set out. *77. Part 5A prescribes a domestically refined approach to the public interest considerations which the Tribunal is required to take into account when considering article 8 in a deportation appeal. Unlike the 2007 Act it is not a statutory change as to the exercise of power to deport, rather it is a domestic refinement as to the consideration of the public interest…"* (emphasis added)
HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176	The Court of Appeal described s. 19 and the amendments it made as "a complete code". At paras 12-13 the court outlined as follows: *"12. Part 5A of the 2002 Act was introduced by section 19 of the Immigration Act 2014 with effect from 28 July 2014. It is headed " Article 8 of the ECHR: public interest considerations". It comprises four sections – 117A–117D.* *13. Section 117A provides, so far as material for our purposes, that in considering whether an interference with a person's right to respect for their private and family life is justified under article 8(2) (defined as "the public interest question") "the court or tribunal must (in particular) have regard – (a) in all cases, to the considerations listed in section 117B, and (b) in cases concerning the deportation of foreign criminals to the considerations listed in section 117C ". It is convenient to note here that in NE-A (Nigeria) v Secretary of State for the Home Department 4 5 6 [2017] Imm AR 1077 this court confirmed that the obligation to "have regard to" sections 117B and (where applicable) section 117C meant that the statutory scheme constitutes a "complete code" for the consideration of article 8 in the context of immigration removal and deportation: a similar point is made in NA (Pakistan) v Secretary of State for the Home Department [2017] 1 WLR 207…"* (emphasis added) At para 17 the court continued: *"At the risk of spelling out the obvious, the effect of section 117C is to prescribe different approaches to "the public interest question" – that is, the justification issue under article 8 – by reference to the length of the sentence imposed."* (emphasis added) At paras 26-27 the court explained the purpose of the statutory scheme imposed by s. 19 as follows: *"It will be useful to make some general observations about the purpose and effect of the scheme which now applies under Part 5A of the 2002 Act and Part 13 of the Rules… The starting point is that the purpose of the statutory scheme is to require decision-makers to adopt a structured approach to the article 8 issues raised by the removal of a foreign national – that is, whether it will constitute a disproportionate interference with, and thus a breach of, their article 8 rights – and one which ensures that due weight is given to the public interest. It is no part of its purpose to prevent the proper application of article 8."* (emphasis added)

	The purpose of s. 19 is therefore to impose a "*structured approach*" to Article 8 issues. At para 32 the court emphasises the "fundamental point principle" which underpinned by the statutory scheme (s. 19): "*First, the discussion is underpinned by the fundamental point of principle…as follows:* " *Section 117C (1) of the 2002 Act , as inserted by the 2014 Act , re-states that the deportation of foreign criminals is in the public interest.*" (emphasis added) At para 36 the court summarises that: "*The purpose of the new provisions [s. 19] was to give statutory force, accompanied by some re-wording, to principles which had already been established in the case law relating to the Immigration Rules.*"
KO (Nigeria) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening) [2018] 1 WLR 5273	At para 14 of the UKSC's judgment, Lord Carnwath emphasised s.19's effect as follows: "*Part 5A of the 2002 Act takes that process a stage further by expressing the intended balance of relevant factors in direct statutory form.*" (emphasis added) At para 15 Lord Carnwath added: "*I start with the expectation that the purpose is to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute.*" (emphasis added)
NE-A (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239	The purpose of s.19 is again referred to as being to provide a "structured approach" for the court's assessment. At para 14 the Court of Appeal explained: "*that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with Article 8…*"
Borders, Citizenship and Immigration Act 2009	
Section 55 'Duty regarding the welfare of children' provides: "*(1) The Secretary of State must make arrangements for ensuring that –* *(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and* *(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.* *(2) The functions referred to in subsection (1) are –*	

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

(4) The Director of Border Revenue must make arrangements for ensuring that –

(a) the Director's functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements made by the Director in the discharge of such a function are provided having regard to that need…" (emphasis added)

Authority	***Points of note***
ST (A Child) v Secretary of State for the Home Department [2021] EWHC 1085 (Admin)	At para 35 the court observed that: *"It might be thought, as a matter of language, that this is a high level organisational duty. The Secretary of State appears, nevertheless, to have conceded, in ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 AC 166 , that this duty binds every decision-maker when making a decision in an individual case (see para 24 of the judgment of Baroness Hale of Richmond). The Secretary of State took a similar position in R (MM (Lebanon)) v Secretary of State for the Home Department (Children's Comr intervening) [2017] 1 WLR 771 (see para 46 of the judgment) . We do not consider that it is open to us to depart from that approach."* (emphasis added)
ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4	In respect of s.55, as per para 12 of the judgment obligations such as the welfare of all children affected by decisions and their right to respect for their family and private lives *"are now (at least partially) reflected in the duty of the Secretary of State under section 55 of the Borders, Citizenship and Immigration Act 2009"*. As to the scope of s. 55 the court emphasised that: *"…this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions."* (emphasis added)

Human Rights Act 1998

Section 3 of Human Rights Act 1998 provides that:

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." (emphasis added)

Although not strictly a statutory purpose section 3 does demonstrate the way in which provisions can be *required* to be interpreted in such a way that is compatible with either other rights or indeed objectives if a provision is so drafted.

16. The above examples demonstrate the way in which – with appropriate drafting – a statutory purpose can be emphasised in specific statutory provisions or the court's exercise in discretion can be guided by a specific statutory structure.

E CONCLUSION

17. The starting point, and very often the end point, for courts in construing legislation is the natural meaning of the clear language used by the legislature. Some statutory schemes have a tendency to make the statutory purpose clearer in secondary sources, such as Explanatory Notes, rather than making that purpose plain on the face of the Act – either in the long title or in a specific statutory provision. Therefore, if the intention of legislation is to provide greater levels of environmental protection, it is preferable for that to be made clear in the Act itself rather than left to a "*secondary source*".

18. In terms of the application of the above for the OEP, where the statute expressly make clear a statutory purpose or guidance for interpreting the powers therein, the courts generally feel are more at ease in interpreting those provisions. As such, a purpose or principle behind a statutory provision can be expressed as a duty or a power and is therefore more likely to be enforceable.

19. In respect of the current position, we note that one area where the courts have taken a strongly purposive approach in EIA is in guarding against salami-slicing at the screening stage (see, domestically, *Swale*, and *Ecologistas* in the CJEU). We note that the feedback given to WSP has been that salami-slicing is no longer a significant problem posed by developers, which may reflect the success of this vigilant and clearly purposive approach. However, the guiding purpose behind certain aspects of environmental protection is not always clear. For example, in respect of the *Finch* appeal being heard by the UKSC in June and scope 3 emissions. The judges of the Court of Appeal in *Finch* reflected this lack of clearly expressed purpose. Moylan LJ relied on a purposive approach to conclude that the local planning authority would need very weighty reasons to exclude Scope 3 emissions from assessment, while Lindblom LJ in the majority relied primarily on the concept of 'the project' and on orthodoxies of domestic planning and administrative law.

20. The OEP have previously received advice from 39 Essex Chambers on the proposed changes to environmental law in the LURB. If these changes were to be implemented one potential way to safeguard against a lowering of environmental protection could be for specific provision to be made in the Act – either in the long title or in specific statutory provisions – that the purpose of the Act is to enhance the level of environmental protection and to re-iterate the non-regression principle.

21. We hope that we have dealt with our instructions adequately for present purposes. Should those instructing have any further questions or wish to discuss any aspect of this advice, they should not hesitate to contact us.

Ruth Keating

Eleanor Leydon

6 February 2023