ANNEX 1 ENVIRONMENTAL IMPACT ASSESSMENT AND CASE LAW

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This is an edited version of a document that was originally on the Department for Communities and Local Government's website (now the Ministry of Housing Communities and Local Government). It was updated again in 2020 with the assistance of Nina Pindham.

While a technical read, it gives a flavour of some of the legal challenges made around Environmental Impact Assessment ("EIA"). All legal challenges are underlined for readability.

This Annex is not a substitute for legal advice, nor is it intended to provide guidance on how to prepare an EIA. It is designed to provide an overview of some of the key judicial decisions relating to EIA.

Section 1: The purposive approach of the European Court

As the Directives are legal instruments of the EU, domestic courts in the UK must take account of the decisions of the Court of Justice of the European Union (CJEU). The CJEU has consistently held that the EIA Directive must be interpreted as having a **wide scope and broad purpose** (Kraaijveld Dutch Dykes Case C-72/95).

A useful example of the CJEU's purposive approach to environmental protection is C1-42/07 Ecologistas en Accion-CODA v Ayuntamineto de Madrid [2009] PTSR 458. The local highways authority had proposed to undertake a major refurbishment and improvement of the Madrid urban ring road. The works would cause an increase in traffic of nearly 25% on the ring road. The local authority subdivided the work into 15 independent sub-projects, only one of which triggered an EIA. The local authority sought to argue that the urban ring road was not a "motorway, express road or road," under Directive 85/337, and therefore did not fall under the scope of the EIA regime.

The Court flatly rejected that argument. The road in question was clearly an "express road." It would be contrary to the very wide purpose of the Directive to allow a road

construction project with likely significant effects on the environment to fall outside the Directive's scope, simply because the Annexes did not refer to that particular kind of road. The Ecologistas en Accion-CODA case demonstrates that the CJEU takes a robust approach: the entire purpose of the EIA Directive would be frustrated if local planning authorities could circumvent their obligations by simply artificially dividing up projects that have significant effects on the environment.

Section 2: Relationship between the EIA Directive and the Strategic Environmental Assessment (SEA) Directive

The SEA Directive applies to a wide range of public plans and programmes, eg, land use, transport, energy, waste, and agriculture. The SEA Directive is implemented in domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004. The relationship between the two Directives was discussed by the Supreme Court in Walton v Scottish Ministers [2012] UKSC 44. The SEA and EIA Directives required environmental assessments to be carried out in different but mutually complementary circumstances. The SEA Directive was concerned with the environmental effects of "plans" and "programmes" that set the framework for future development consent of "projects." The EIA Directive was concerned with the environmental impact of specific "projects."

Section 3: Case law on whether an Environmental Statement (ES) is required

As noted above, the EIA Directive is to be interpreted as having a "wide scope and broad purpose". This has implications for local planning authorities (LPAs) when they are screening for EIA.

An example of how the "wide scope and broad purpose" applies to England and Wales is found in the Court of Appeal judgment relating to a planning proposal by the Big Yellow Property Company Ltd to construct a storage and distribution facility (Goodman and another v Lewisham London Borough Council [2003] EWCA Civ 140). The planning authority took the view that as such development was not specifically described in either the Directive or Regulations, there was no need to consider EIA.

Following legal challenge, the Court of Appeal decided that: "in this instance 'infrastructure' goes wider, indeed far wider, than the normal understanding, as quoted from the Shorter English Dictionary, of 'the installations and services (power stations, sewers, roads, housing etc) regarded as the economic foundations of a country'".

It held that the decision that the proposed storage and distribution facility did not come under Schedule 2.10(b) of the EIA Regulations was outside the range of reasonable responses open to the planning authority ie, it was an unreasonable decision. The planning permission was quashed and the application remitted to the planning authority for reconsideration.

When evaluating whether a project would have a "significant effect on the environment" and require an EIA, public authorities have to look at the likelihood of that significant effect occurring: R. (on the application of An Taisce (National Trust for Ireland)) v Secretary of State for Energy and Climate Change [2014] EWCA Civ 1111. When doing so, they should consider that the greater the potential impact on the environment, the lower

will be the level of probability at which the competent authority will decide that it should be subjected to the EIA process. However, that does not mean that for certain projects – such as nuclear reactors – they have to adopt a "zero risk" approach.

However, where the issue is a question of judgement as to the significance of environmental effects, in the absence of an irrational exercise of that judgement, the court will not intervene: R. (on the application of Wye Valley Action Association Ltd) v Herefordshire Council [2011] EWCA Civ 2011.

Whether a development would have "indirect, secondary or cumulative effects" (the language used in Schedule 4, paragraph 5 of the 2017 Regulations) is a question of fact: Brown v Carlisle City Council [2010] EWCA Civ 523; Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321.

What are the lessons from these cases?

First, the Directive is **not** open to narrow interpretation. The UK Courts will interpret the Directive in the European sense – ie, as having wide scope and broad purpose. Second, **do not** assume a project is excluded simply because it is not expressly mentioned in either the Directive or the Regulations. For example, neither the Directive nor the EIA Regulations refer to specifically "housing development". But it would be a mistake to consider that housing development does not fall within the ambit of "urban development projects".

Section 4: Case law on the format for an ES

There is no prescribed format or recommended length. The key issue is that it contains the relevant environmental information specified in Schedule 4 of the EIA Regulations. It may comprise more than one document but in this case it will be helpful if the status of each document and its relationship to the others is clearly explained.

In the case of Berkeley v SSETR [2000] 3 WLR 420, the House of Lords commented that an ES must not be a "paper chase". Lord Hoffman said: "the point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language."

Is it necessary to have full knowledge of the environmental effects before making a screening decision on whether EIA is needed?

This question relates to projects for which an EIA is not automatic (ie Schedule 2, as opposed to Schedule 1, projects for which EIA is mandatory). The EIA Directive requires that decisions on whether to grant development consent for specific projects are taken in the full knowledge of the project's likely significant impact on the environment. It also requires a determination to be made of which projects should be made subject to assessment. There is a two-stage process – first, deciding whether EIA is required; and second, where it is required, of providing the environmental information.

At the first stage, the responsibility is to consider whether the project is likely to have a significant effect on the environment. This calls for the exercise of professional judgment taking into account factors such as nature, scale and location of the project (see Schedule

3 of the EIA Regulations), knowledge of the local area and its environment and evaluation of such information as it is reasonable to expect the applicant to provide at this stage. But the amount of information necessary at this stage does not mean you need to have "full knowledge" of every environmental effect. Only if it is decided that EIA is required, will full and detailed knowledge of the project's likely significant effects be required.

A helpful judgment in this respect is that of Regina oao Jones v Mansfield DC [2003] EWHC 7 (Admin) where Richards J held that, in general, a lesser degree of information is needed at the first stage of deciding whether EIA is required at all than at the second stage where it is necessary to provide the information.

He commented that: "it is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available and to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant effects. The gaps and uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effects. Everything depends upon the circumstances of the individual case."

The judgment also noted that: "Whether sufficient information is available to enable a judgment to be made as to the likelihood of significant environmental effects is a matter for the authority, subject to review by the court on Wednesbury principles."

There was subsequently an appeal to the Court of Appeal against Richards J's decision, but the appeal was dismissed ([2003] EWCA Civ 1408). The Court of Appeal confirmed that the question of whether there were likely significant effects or not is a matter of judgment for the decision maker subject to review by the courts on the basis of Wednesbury unreasonableness/ irrationality only.

Similarly, the Courts have ruled that what is "significant" is likewise a matter of judgment for the decision maker, and therefore, again subject to review by the courts on the same basis: R (Evans) v Basingstoke and Deane BC [2013] EWHC 899 (Admin).

The case of R (Bateman) v South Cambridgeshire DC [2011] EWCA Civ 157 addressed the question of what "likely" means, in the context of "likely significant effects". The Court established that "something more than a bare possibility is probably required, though any serious possibility would suffice".

Section 5: Case law on what should be in the ES

Once a scoping opinion is issued, can the council request further information?

It is important to stress that the authority must obtain all the information it needs to assess and evaluate the likely significant environmental effects of the proposal before it reaches its decision. It cannot adopt a "wait-and-see" approach or impose a condition requesting further work to identify the likely environmental effects after permission has been granted. It must be sure that all of these have been identified and taken into account before granting planning permission.

R v Cornwall County Council ex parte Jill Hardy [2001] JPL 786 refers to a case in which the applicant carried out an EIA and provided an ES. Although it was known that the conditions at the site were those favoured by a protected species (bats), the applicant did

not investigate their presence as part of the EIA. The planning authority, advised by Natural England, imposed a condition requiring the applicant to carry out a survey to establish whether bats were present prior to commencing the development.

The Court held that this information should have been included in the ES, otherwise the authority could not comply with the EIA Regulations because the decision maker did not have all of the information they needed before they made their decision. The planning permission was quashed.

Does this now mean that conditions cannot be used in cases where the proposed development falls within the scope of the EIA Regulations?

No. They can still be used in the case of EIA development. But planning authorities need to exercise care and judgment to ensure that conditions designed to mitigate the likely effects of a proposed development are not used as a substitute for EIA or to circumvent the requirements of the EIA Directive. It may be useful to refer to relevant recent case law.

Regina oao Lebus v South Cambridgeshire DC [2002] EWHC 2009 (Admin) involved development for an egg production unit to house 12,000 free range chickens. A local resident had written to the planning authority in 2000, suggesting that EIA was required for this development. After a meeting and discussion with the applicant, the planning officers dealing with the case took the view that this was not EIA development and the applicant was told informally that EIA was not required. The planning officer dealing with the case made no written record of his conclusions. At the meeting the officers concluded that the potential adverse impacts of the development would be insignificant with proper conditions and section 106 planning obligations.

Planning permission was granted subject to conditions in 2002. The resident challenged the decision by judicial review.

The Court allowed the appeal and quashed the planning permission. So far, as planning conditions and EIA are concerned, it held that: "it is not appropriate for a person charged with making a screening decision to start from the premise that although there may be significant impacts, these can be reduced to insignificance by the application of conditions of various kinds. The appropriate course in such a case is to require an Environmental Statement and the measures which it is said will reduce their significance".

The message from Lebus is that where proposed development is EIA development, the use of conditions cannot substitute for the proper assessment procedure. To do so would simply negate the purposes of the Directive. It is also clear from this case that planning authority staff need to make formal screening opinions on Schedule 2 applications.

The question of planning conditions was also considered in Gillespie v First Secretary of State and Bellway Urban Renewal [2003] EWCA Civ 400. In this case, the First Secretary of State granted planning permission for a housing development on the site of a former gas works. One of the former gasholders was still in situ. Soil surveys on the site had been carried out and revealed contamination, but the type and extent were not fully known, particularly below the gasholder. The First Secretary of State, however, considered that there was no need for an EIA. He approved the development subject to conditions to carry out a detailed site examination to establish the nature, extent and degree of the site contamination and to remediate it prior to commencement of the development. The

remediation strategy would rely upon tried and tested methods so there was no reason to assume they would be unsuccessful in removing the contamination.

The Court of Appeal held that on considering whether an EIA was required before planning permission could be granted, the Secretary of State did not have to ignore proposed remediation measures but could not assume that in a case of any complexity they would be successfully implemented.

Lessons from Gillespie

Remediation measures need not be ignored when making decisions about the likely significant effects of proposed development. But care and judgment must be exercised. Remedial measures that are well-established and uncontroversial, eg, cleaning wheels of trucks and covering load in lorries to minimise dust may well be taken into account. In more complex development, it may be less appropriate to take the proposed measures into account.

It is important that the offer of remediation measures is not used to frustrate the purpose of the EIA directive or serve as a surrogate for it.

Conditions need to be effective in order to be enforceable. In R (on the application of Sienkiewicz) v South Somerset DC [2013] EWHC 4090 (Admin) the High Court quashed the relevant planning permission because a planning condition did not in reality enable the local authority to control the use of the land.

Failure to take account of environmental impacts

A newly developing area of environmental law concerns how decision makers should take account of off-site impacts subject to other regulatory controls.

In R (Squire) v Shropshire Council [2019] EWCA Civ 888, the Court of Appeal ruled that the council had acted unlawfully in granting consent for an intensive poultry-rearing facility. The key facts were that over the course of a year some 2,322 tonnes of chicken manure would be produced by the development. The plan was to dispose of the manure by spreading it on farmland, not all of which was owned by the developer. The Court of Appeal held that the council's failure to consider the likely effects of odour and dust arising from the disposal of manure on land not owned by the developer was unlawful.

The Council ought to have taken those impacts into account, notwithstanding that they would be subject to a host of controls for the spreading of manure, and that the spreading of manure as fertiliser was a common agricultural practice which would occur irrespective of whether or not the proposed development went ahead. The implication is that a proper assessment of all of the environmental effects of a development must be carried out, including, for example, odour and dust from the storage and spreading of manure wherever that takes place.

R (Preston) v Cumbria County Council and United Utilities Water Ltd [2019] EWHC 1362 (Admin) concerned the installation of a new temporary outfall into a river following Storm Desmond. A new pipe had been installed following damage to the previous pipe, but the Claimant argued that this involved a discharge into a prime salmon beat and at a point where the river flow was slower than at the previous outfall, leading to greater adverse environmental impacts than the original outfall point. HHJ Eyre QC ruled that: "the wording

of the EIA Regulations… makes it clear beyond peradventure that the assessments undertaken pursuant to those Regulations are to have regard to the effects of the use of a permitted structure and not just its construction."

When considering whether the temporary outfall may have significant adverse effects on the environment, regard had to be paid not just to the consequences of the physical installation of the outfall but also to the consequences of the discharge through it at that point. Importantly, the failure of the council to consider the effects of the discharge from the outfall was not rescued by the fact that the discharge was regulated by an environmental permit granted by the Environment Agency.

Lessons to be learnt from Squire and Preston

The lessons to be learned from these decisions is that the courts will be ready to quash a decision when there are "known environmental unknowns" that are not taken into account by the local planning authority, even when, as in Preston, those environmental effects are already regulated by an environmental permit expressly designed to ensure there are no unacceptable impacts on the environment.

Section 6: Case law on evaluating the ES for full and outline applications

The planning authority is responsible for evaluating the ES to ensure it addresses all of the relevant environmental issues and that the information is presented accurately, clearly and systematically. The authority has to ensure that it has in its possession **all** relevant environmental information about the likely significant environmental effects of the project **before it** makes its decision whether to grant planning permission. It is too late to address the issues after planning permission has been granted.

Does this also apply to applications for outline planning permission where some matters may be reserved for later determination?

Yes. Where it applies, the Directive requires EIA to be carried out prior to the grant of "development consent". Development consent is defined as: "the decision of the competent authority or authorities which entitled the developer to proceed with the development".

Under the UK planning system, it is the planning permission that enables the applicant to proceed with the development. Therefore, in the case of outline applications, an EIA application must be properly assessed for possible environmental effects prior to the grant of outline permission.

However, the planning authority may, in some circumstances, be obliged to carry out an EIA even after outline planning permission had been granted. It is not possible to eliminate entirely the possibility that it may not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event, account would have to be taken of all the aspects of the project that had not yet been assessed or that had been identified for the first time as requiring an assessment. This was the decision of the House of Lords in R oao Barker v Bromley LBC [2006] UKHL 52.

For outline planning applications, how should an EIA be carried out so as to comply with the Directive and Regulations?

The related cases of R v Rochdale MBC ex parte Milne (No. 1) [2000] Env LR 1 and R v Rochdale MBC ex parte Milne (No. 2) [2001] Env LR 22 set out the approach that planning authorities need to take when considering EIA in the context of an application for outline planning permission if they are to comply with the Directive and the Regulations.

Both cases dealt with a legal challenge to a decision of the authority to grant outline planning permission for a business park. In both cases an ES was provided. In Milne No. 1 the Court upheld a challenge to the decision and quashed the planning permission. In Milne No. 2, the Court rejected the challenge and upheld the authority's decision to grant planning permission.

In Milne No. 1, the authority authorised a scheme based on an illustrative masterplan showing how the development might be developed, but with all details left to reserved matters. The ES assessed the likely environmental effects of the scheme by reference to the illustrative masterplan. However, there was no requirement for the scheme to be developed in accordance with the masterplan and a very different scheme could have been built, the environmental effects of which would not have been properly assessed. The Court held that description of the scheme was not sufficient to enable the main effects of the scheme to be properly assessed, in breach of Schedule 4 of the then EIA Regulations.

In Milne No. 2, the ES was more detailed. A Schedule of Development set out the details of the buildings and likely environmental effects, and the masterplan was no longer merely illustrative. Conditions were attached to the permission "to tie the outline permission for the business park to the documents which comprise the application". The outline permission was restricted so that the development that could take place would have to be within the parameters of the matters assessed in the ES. Reserved matters would be restricted to matters that had previously been assessed in the ES. Any application for approval of reserved matters that went beyond the parameters of the ES would be unlawful, as the possible environmental effects would not have been assessed prior to approval.

The judge emphasised that the Directive and Regulations required the permission to be granted in the full knowledge of the likely significant effects on the environment. This did not mean that developers would have no flexibility in developing a scheme. But such flexibility would have resulted in a scheme which was within the parameters of what had been properly assessed and taken into account prior to granting outline planning permission.

What are the lessons of the Milne and Barker cases?

i) When granting outline consent, the permission must be "tied" to the environmental information provided in the ES and considered and assessed by the authority prior to approval. This can be usually done by conditions, although it would also be possible to achieve this by a section 106 agreement. An example of a condition was referred to in ex parte Milne (No. 2). "The development on this site shall be carried out in substantial accordance with the layout included within the Development Framework document submitted as part of the application and shown on (a) drawing entitled 'Master Plan with Building Layouts'." The reason for this condition was given as: "The layout of the proposed

Business Park is the subject of an Environmental Impact Assessment and any material alteration to the layout may have an impact which has not been assessed by that process" (see paragraphs 28 and 131 of the judgment).

ii) Developers are not precluded from having a degree of flexibility in how a scheme may be developed. But each option will need to have been properly assessed within the remit of the outline permission.

iii) Development carried out pursuant to a reserved matters consent granted for a matter that does not fall within the remit of what had been assessed at the outline consent stage will be unlawful.

iv) In some circumstances the planning authority may be obliged to carry out an EIA after outline consent has been granted. For example, when considering a reserved matters application or an application for the discharge of conditions.

Section 7: Domestic challenges

If the project is one to which the EIA Regulations apply, it is essential to comply fully with them. It is not sufficient to argue that EIA was not necessary because all of the information that could have been in the ES was available elsewhere and was taken into account before the decision was taken; or that had an ES been available the decision would have been the same.

In Berkeley v SSETR [2000] 3 WLR 420, the House of Lords unanimously emphasised the need to comply with the Regulations. It took the view that when considering compliance with the Regulations it was necessary to consider the EIA Directive. The Lords stressed that the importance of the EIA process extended beyond the decision on the application. Its purpose is to provide individual citizens with sufficient information about the possible effects and give them the opportunity to make representations.

The Court was not entitled to decide after the decision had been made that the requirement of an EIA could be dispensed with on the ground that the outcome would have been the same even if these procedures had been followed. In the leading judgment, Lord Hoffman noted that the Directive did not allow Member States to treat "a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the information which should have been provided by the developer".

Applicants applying for permission for EIA development must comply with the publicity requirements set out in Article 15 and Schedule 3 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595). Breach of the publicity requirements can lead to judicial review: Jenkins v Gloucestershire CC [2012] EWHC 292 (Admin).

The Berkeley case must now be considered in light of the Supreme Court decision in *Walton v* Scottish *Ministers* [2012] UKSC 44, which involved a challenge of a decision to build a new bypass for Aberdeen, known as Fastlink. It was argued that Fastlink was a modification to a plan or programme and that the decision maker had failed to comply with the requirements of the SEA Directive.

In paragraph 139, Lord Carnwath held: "Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

The upshot is that it is now difficult to argue **any marginal non-compliance** with an EU requirement should lead to a decision being quashed. However, **a substantial failure to comply** with the EIA Regulations is likely to result in the quashing of a planning permission grant.

A similar approach was adopted in Kendall *v* Rochford *DC* [2014] EWHC 3866 (Admin) in relation to breaches of the SEA Directive. The High Court held that not every breach of the SEA Directive would lead to a planning decision being quashed, but will look at the harm done by the failure to comply with its requirements and whether it was repaired by subsequent developments. The plan-making process should be looked at as a whole and evaluated to see, as in this case, whether it "gave the public a sufficient opportunity to reflect upon and respond to the policies and allocations proposed in the draft plan in the light of the sustainability appraisal."

Changes or extensions to existing and approved development

In Baker v Bath and North East Somerset Council, Hinton Organics (Wessex) Ltd [2009] EWHC 595 (Admin) the High Court dealt with a case concerning the procedure for screening planning applications for changes or extensions to existing or approved development.

In his ruling, Mr Justice Collins considered that the then wording of the Regulations limited screening to the modification alone, and did not take account of possible likely significant environmental effects of the modification when considered cumulatively with the originally approved development. Mr Justice Collins considered this to be contrary to the purpose and language of the EIA Directive.

The effect of the ruling is that when determining whether EIA is required, planning authorities must look at the effect of the development, as modified, and not just the modification alone.

The wider implications of Baker

Mr Justice Collins also held that regard should be had to obligations about public participation under Article 10a (of the then-in-force EIA Directive 85/327) when an application for a modification or a new development did not satisfy the criteria or thresholds in Schedule 2 which determine whether planning authorities issue a screening opinion.

Mr Justice Collins considered that in such circumstances LPAs are required to notify members of the "public concerned" who feel that the proposed development would be likely to have adverse effects on the environment, that they have a right to ask the Secretary of State to consider issuing a screening direction under what was then regulation 4(8)) for EIA.

Similar provisions to those considered by Collins J now appear in Article 11 of Directive 2011/92/EU and Regulation 5(6) and (7) of the 2017 Regulations. It is arguable based on the decision in Baker that local planning authorities are under a positive obligation to alert the public to their right to seek a screening direction from the Secretary of State in relation to development that could have significant environmental effects (regardless of the Schedule 2 thresholds and criteria).

Section 8: CJEU Decisions on the article 11: "Right of Review"

In Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten (C-570/13) [2015] Env LR D6, a local resident sought to annul the grant of planning permission to a retail park where no EIA was carried out. Although the national law granted neighbours the right to raise objections during the consent procedure for the construction and operation of a commercial facility, they did not have the right to bring an action directly against the prior decision not to carry out an EIA. The only parties able to challenge that decision were the project applicant, the participating authorities, the ombudsman for the environment and the municipality concerned. The Court found this was too restrictive an approach, which effectively deprived a large number of affected persons from bringing a challenge.

In Liechtensteinische Gesellschaft fur Umweltschutz v Gemeinde Vaduz (Case E-3/15) [2016] 3 CMRL 15**,** the structure of the planning decision process meant that NGOs had no access to a review procedure before a judicial body. This could not be reconciled with Article 11, which clearly was aimed at ensuring that the public, including environmental NGOs, had access to justice. Member States have a broad discretion to determine at what stage an EIA decision can be challenged, but that cannot shut out public participation in the decision-making process.

Similarly, in Djurgarden-Lilla Vartans Miljoskyddsforening v Stockholms Kommun genom dess Marknamnd (C-263/08) ECR I-9967, a condition imposed by a Member State that prevented an environmental organization with fewer than 2,000 members from challenging decisions having significant environmental implications was incompatible with the previous EIA Directive, 85/337/EEC. The principle is that Member States must ensure wide access to justice when implementing the Directive.

The review procedure must be **fair, equitable, timely and not prohibitively expensive**. An example of how domestic law can ensure access to judicial review is discussed in R. (on the application of Simmons) v Bolton MBC [2011] EWHC 2729 (Admin). The High Court noted that a protective costs order was necessary to ensure judicial review proceedings would not be prohibitively expensive.

A protective costs order is made at the outset of the proceedings. It provides that the party applying for that order shall, regardless of the outcome of the proceedings, either not be liable at all for any of the costs of the other side, or only a fixed proportion, but if successful can recover all of their own costs. This is one mechanism by which the domestic law can ensure that individuals, activists and NGOs can participate in litigation, while minimising their exposure to the risk of exorbitant costs. The right to challenge decisions with environmental impacts without facing a prohibitive financial costs risk is set out in the Aarhus Convention (see our Judicial Review briefings).

Not every procedural defect will necessarily affect the legality of a decision: Gemeinde Altrip and others v Land Rheinland-Pfalz (Vertreter des Bundesinteresses beim Bundesverwaltungsgericht intervening) (Case C-72/12) [2014] PTSR 311. The reviewing court would have to consider the seriousness of the defect and ascertain, in particular, whether that defect had deprived the public of information and participation in the decision-making process.

Section 9: Secretary of State's power to give a screening direction (Reg 5(6))

The nature of the power to give a direction has been considered by the courts, under the previous 1999 Regulations. In Threadneedle Property Investments Ltd v Southwark LBC [2012] EWHC 855 (Admin), four features of the power were noted:

i. The provision was unlike others in the EIA Regulations, in that there was no prescribed procedure
ii. The power could only be used by the Secretary of State for Communities and Local Government
iii. A decision not to exercise the power would not amount to either a breach of the EIA Directive or of the EIA Regulations
iv. There was no general obligation on the Secretary of State to consider making a direction; such an obligation would be inimical to the purpose of the Regulations, in providing thresholds and criteria.

Thus, it is clear that Regulation 5(6) confers on the Secretary of State a power to give a screening direction, not a duty to do so.

Section 10: Reasons for screening opinions and directions

Regulation 5(5) of the 2017 Regulations requires a planning authority or the Secretary of State, when they give a screening opinion, to "state the main reasons for their conclusion with reference to the relevant criteria listed in Schedule 3".

In Mellor v Secretary of State for Communities and Local Government (C-75/08) [2010] PTSR 880, the CJEU considered whether the duty to provide reasons extended to a negative screening opinion. The Court ruled that the negative screening opinion itself did not need to contain reasons but the reasons underlying the determination must be at least available on request.

If the LPA or Secretary of State decide to give reasons on the face of a negative opinion or direction, the reasons must **enable interested parties to decide whether to appeal against the determination in question,** taking into account any factors which might subsequently be brought to their attention. That approach has been reiterated by the domestic courts in R. (on the application of Bateman) v South Cambridgeshire Council [2011] EWCA Civ 157, at paragraph 21.

As to the detail of the reasoning, it is worth noting the case of R. (on the application of Loader) v Secretary of State for Communities and Local Government [2011] EWHC 2010 (Admin), in which Lloyd Jones J held at paragraph 71 that "the reasons for a screening decision need not be elaborate. They must demonstrate that the issues have been understood and considered."

When a request for reasons is made under the Mellor principle, an authority has a reasonable timeframe in which to supply those reasons. Even if the reasonable timeframe has elapsed, the authority may cure the defect by making a statement of reasons prior to an application to the court: R. (on the application of Jedwell) v Denbighshire County Council [2015] EWCA Civ 1232.

Section 11: Case law on the SEA procedure

Regulation 8 of the Environmental Assessment of Plans and Programmes Regulations (SI 2004/1633) prevents the adoption of a plan or programme for which an SEA is required before the completion of the environmental assessment. Here, it is worth considering the challenges to HS2, a planned high-speed railway linking London to the Midlands and Northwest England. Given the scale of the project, it is not surprising that it has generated significant litigation, particularly the Buckingham cases.

The initial challenge was considered in R (on the application of Buckingham CC v Secretary of State for Transport [2013] EWHC 481 (Admin), where the issue was whether the government's decision to proceed with HS2, as contained in its Command Paper[1], constituted a plan or programme under the Directive, and so required environmental assessment. The government's position was that HS2 would be taken forward by way of a hybrid bill[2] in Parliament, which would contain development consent in the form of deemed planning permission.

The High Court ruled that the Command Paper was not a plan or programme within the scope of the SEA Directive. The government was entirely free to change its mind on such a decision or to change the nature of the decisions consulted on; it could change the topics and scope of the consultation process.

The case was appealed to the Court of Appeal: [2013] EWCA Civ 920. The majority of the Court of Appeal were persuaded by the sovereignty argument: parliament was not obliged to comply with or even have regard to the Command Paper in making its decision. The Command Paper therefore was not regarded as setting a framework, which required future development consent.

The Supreme Court endorsed the view taken by the lower courts: [2014] UKSC 3. While the Command Paper would influence the parliamentary debate, it did not set a framework because it was ultimately for parliament to decide whether to enact the bill or not. Lord Reed also rejected the argument that the hybrid bill procedure was not compliant with the EIA Directive: it was not appropriate for the domestic or European courts to attempt to exercise supervisory jurisdiction over proceedings in parliament.

[1] A Command Paper is a document laid before parliament by order of the Crown.

[2] A hybrid bill is a government-sponsored bill that affects the general public but also has a significant impact for specific individuals or groups