East Midlands Gateway
Phase 2 (EMG2)

Document DCO 7.14 / MCO 7.14

Applicants' Post Hearing Submissions (OFH1, CAH2 and ISH3)

JUNE 2026

The East Midlands Gateway Phase 2
and Highway Order 202X and The East Midlands Gateway
Rail Freight and Highway (Amendment) Order 202X

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(DOCUMENT DCO 7.14 / MCO 7.14)

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1 Introduction

1.1 This document relates to the applications for a second phase at East Midlands Gateway Logistics Park (EMG1), being an application for a Development Consent Order (DCO) made by SEGRO Properties Limited (DCO Applicant) and an application for a Material Change Order (MC) made by SEGRO (EMG) Limited (MCO Applicant). The DCO Applicant and the MCO Applicant are together the "Applicants".

1.2 This document has been prepared by the Applicants to set out their post hearing submissions in respect of the hearings that took place on 12, 13 and 14 May 2026.

1.3 The Applicants' submissions in respect of the Open Floor Hearing 1 (OFH1) on 12 May 2026 are set out in section 2 of this document.

1.4 The Applicants' submissions in respect of the Compulsory Acquisition Hearing 2 (CAH2) on 12 May 2026 are set out in section 3 of this document.

1.5 The Applicants' submissions in respect of the Issue Specific Hearing 3 (ISH3) on 13 and 14 May 2026 are set out in section 4 of this document.

1.6 Any terms used but not defined in this document shall have the same meaning as in the Glossary accompanying the DCO Application and the MCO Application (**Document DCO 6.1A / MCO 6.1A**) [**APP-067**].

2 OFH1 - Applicants' Post Hearing Submissions

2.1 A summary of the Applicants' submissions to the points arising from the OFH1 are set out in the table below.

2.2 Table of submissions:

Agenda for the PM		**Applicants' Submissions (AM hearing notes in red)**
Item 1	**Welcome, introductions, arrangements for this open floor hearing** Hearing starts at **10.00am** Registration and seating available at venue from **9.30am** and virtual registration process from **9.30am**	N/A
Item 2	**Purpose of the open floor hearing**	N/A
Item 3	**Confirmation of those who have notified the Examining Panel (ExP) of a wish to be heard at this open floor hearing.**	N/A
Item 4	**Oral representations from interested parties (IP), other persons (OP) and any other non-IPs** Each IP and OP who has indicated a wish to speak will be invited forward in turn to speak at a table set up in front of the ExP, or via Microsoft Teams if attending online. Each non-IP who has indicated a wish to speak will then, at the ExP's discretion and if time permitting, be invited forward in turn to speak at a table set up in front of the ExP, or via Microsoft Teams if attending online. Oral representations should be up to 5 minutes long.	Oral Representations were made by the following Interested Parties: • Protect Diseworth; • Ray Sutton and Chris Cain; • Nathon Alton; • Jonty Thornton.

	If many people wish to speak, the ExP may further restrict the time available to each speaker. The ExP will issue a list of speakers and the times allocated on **Friday 9 May 2026**. Oral representations should provide further detail, explanation and corroborative evidence on the matters raised in the speaker's relevant representation. The ExP may ask questions to the speaker.	
Item 5	**Responses by the applicants** The applicants will be invited to respond to matters raised and to questions arising from the ExP either orally after all IPs/ non-IPs have spoken, or in writing by deadline 4 – 16 June 2026.	The Applicant's have responded to the matters raised during the hearing by each Interested Party below: <u>Protect Diseworth</u> The Applicants noted the oral representations made by representatives of Protect Diseworth on behalf of Diseworth residents. The residents of Diseworth are also understood to be represented by Long Whatton and Diseworth Parish Council (LWDPC). Notwithstanding the potential for duplication and the absence of any information regarding the distinction between the residents represented by Protect Diseworth and LWDPC, the Applicants have provided responses to the points directed to the EMG2 Project. • Location – The Applicants' position in relation to conformity with the existing North West Leicestershire District Council Local Plan and the emerging new Local Plan is set out in the Planning Statement [**AS-081**] at paragraphs 4.67 to 4.111. • Freeport designation – The Applicants respectfully refer to the Freeport's response to the ExQ1 15.0.5 [**REP1-227**] and the response to the ExP's Rule 17 letter from HM Treasury and Ministry for Housing Communities and Local Government

		at Annex B [**REP1-214D**] which both addressed matters regarding designation of the Freeport. • Construction programme – The Construction Environmental Management Plan (CEMP) [**REP2-026D**] includes the indicative master construction programme over a 4.25 year period at Appendix 1. A construction phasing plan is also provided at Appendix 2. The phased construction programme prioritises work to construct the community park and bunding closest to Diseworth in phases A and B of the earthworks which are to be delivered within the first year of construction. • Traffic and M1 Junction 24 – The EMG2 Project includes proposals for the delivery of a package of Highway Works which includes significant works to improve the existing constraints at M1 Junction 24 and the A453 between the site access and M1 Junction 24. The proposals also include other active travel improvements and public rights of way improvements. These improvements are expected to have a number of permanent, beneficial impacts to environmental factors on a number of roads in the vicinity of the site, including both the Strategic Road Network and local road network. A summary of the effects, mitigation and residual effects is provided in table 6.15 of Chapter 6 of the ES [**AS-032**]. Ray Sutton and Chris Cain The Applicants noted the oral representations made jointly by Mr Sutton and Mr Cain. The Applicants note that Mr Cain was invited to make additional representations in writing at Deadline 4 and will respond to those matters at Deadline 5, in accordance with the Examination timetable.

		In the interim and in response to the query raised regarding the need for viability information, the Applicants confirm that a viability appraisal was submitted at Deadline 1 [**REP1-027D]** and a summary is included at [**REP1-028D**]. Nathon Alton The Applicants noted the oral submission made by Mr Alton and that the ExP encouraged the submission of such further information as he may wish to provide at Deadline 4. The Applicants were not aware of any issues related to the Kegworth Bypass drainage until the relevant representations were received. Those representations referred to flooding on the field immediately to the north of the bypass, and to properties on Langley Drive, Foxhills, and Broadhill Road. The Applicants' provided a response to Mr Alton's original relevant representation at page 281 of the Applicants' response document bearing examination reference [**REP1-051D**]. The Applicants have also met with Mr Alton on 2 June 2026 to discuss his concerns. The North West Leicestershire Strategic Flood Risk Assessment (SFRA) (March 2024) does not identify any records of reported fluvial or surface water flooding incidents in this location, and Leicestershire Lead Local Flood Authority (LLFA), Leicestershire County Council, have not published any Flood Investigation Report's on flooding incidents relating to the area, nor does it appear on their list of pending investigations. The Applicants submitted an enquiry to the LLFA who identified that they are aware of a series of flooding events in Kegworth, but that none of these events met the trigger for a formal Flood Investigation Report. They were investigated by the LLFA as a series of routine

		enquiries, which did not identify evidence that the bypass has exacerbated the existing flood risk at this location. The available flood water datasets evidence a flood risk in this location before the bypass was constructed. The drainage system for the bypass discharges water at a controlled rate equivalent to the former greenfield runoff rate (QBAR). The excess water is stored within an attenuation basin and drains down at the restricted rate. The flood risk data available to the Applicants confirms the bypass has not added to or exacerbated existing flood risk issues. After the bypass design was signed off and the completed scheme passed inspection, ownership and maintenance responsibilities of the highway drainage were passed to Leicestershire County Council as highway authority. The Local Highway Authority conducted a survey in November 2025 which concluded that the drainage network was operating in accordance with the approved plans <u>Jonty Thornton</u> The Applicants noted the oral submission made by Mr Thornton and have provided responses to the points raised in respect of the MCO Application below. • Footpaths – the changes to EMG1 to be introduced by the MCO Application will not reduce the existing network of footpaths originally created. One footpath, L112, will be diverted around the warehouse to be constructed on Plot 16 and this shown on MCO 2.4 Access and Rights of Way Plan [**APP-062M**]. • Planning Policy – the impacts of the MCO Application are summarised and considered in section 5.2 of MCO 5.4 Planning Statement [**APP-222**] commencing on internal page 108 of that document.

		• Consultation – The Villages of Lockington and Hemlington were included in the 'core area' for consultation from the outset in the Statement of Community Consultation, provided at Appendix 8 to the Consultation Report [**APP-209**]. Residents in the core area received leaflets and newsletters notifying them of the application and the clerks to local parish councils, including Lockington and Hemington Parish Council, were kept informed and consulted on all stages of the emerging applications (see the Consultation Report [**APP-208**] and adequacy of consultation milestone document at Appendix 31 [**APP-218**]). • Flooding – The Flood Risk Assessment at Appendix 13G [**AS-058**] of Chapter 13 of the Environmental Statement (ES) specifically considers the EMG1 Works within the MCO Application at page 85 of that document. Chapter 13 of the ES [**REP3-021**] assesses the MCO Application individually in section 13.6 (page 57) and together with the EMG2 Works in section 13.7 (page 71). The Planning Report [**APP-222**] provides a summary at internal page 115. The drainage for Plot 16 will utilise underground storage tanks and an additional drainage basin to store excess water. Water will drain and be discharged through the existing infrastructure to the east of the EMG1 Site and away from Lockington. The rate of discharge will remain unchanged, equivalent to the undeveloped (greenfield) rate. Consequently, the residual effects are shown in the ES to be negligible both during construction and operation phases. Post hearing, the Applicants have also exchanged correspondence with Mr Thornton to provide additional clarity in relation to the above points.
Item 6	**Closing**	N/A

3 CAH2 - Applicants' Post Hearing Submissions

3.1 The Applicants' submissions to the points arising from the CAH2 are set out in the table below.

3.2 Table of submissions:

Agenda for the CAH2		**Applicants' Submissions (AM hearing notes in red – action points highlighted yellow)**
Item 1	**Welcome, introductions, arrangements for the hearing** Hearing starts at **11.40am** Registration and seating available at venue from **11.30am** and virtual registration process from **11.30am**.	N/A
Item 2	**General case**	N/A
Item 2.1	The Examining Panel (ExP) will ask the applicant to update it on the general case for the compulsory acquisition hearing focussing on matters which have changed since CAH1 (10 March 2026).	The Applicants confirmed that the current position is as set out in the Land and Rights Negotiation Tracker [REP2-021D].
Item 2.2	The applicant will be asked to provide an update on progress in identifying those who have been identified as “unknown” in the Book of Reference.	The Applicants have not been able to make significant further progress in identifying unknown interests as limited new information has come to light, save that – • National Highways has provided details of its land interests which the Applicants are reviewing. • There have been discussions with East Midlands Airport regarding their land interests in and around the Active Travel Link. Both prior to and after the CAH2 hearing, the Applicants have continued to discuss the proposed Active Travel Link with representatives of East Midlands Airport (EMA). As a result of

		those discussions changes have been made which do not require any additional land. Those changes have been agreed with EMA, National Highways and Leicestershire County Council (where relevant) and updated documentation has been submitted at Deadline 4. • The Applicants' land referencing agents, TerrraQuest, have completed data refreshes and checked updates on titles and parties but these have not revealed any changes to the submitted BoR. Notices have been erected on site to coincide with the hearing notices and a further site visit is programmed to be completed this week.
Item 2.3	The applicant will be asked further questions about the extinguishment of private rights on land owned by it (see item 5 of the Applicants' Post Hearing Submissions (PM, CAH1, ISH1 and ISH2) [REP1-052] relating to CAH1).	The Applicants have reflected on the matter post hearing and are content to remove the wording from Article 24 (private rights) which was included as part of the updates to the dDCO submitted at Procedural Deadline A.
Item 3	**Specific cases**	
Item 3.1	As indicated in the ExP's letter of notification for CAH2 Prologis UK Limited, Prologis UK 121 Limited, East Midlands International Airport Limited and East Midlands Airport Property Investments (Industrial) Limited will be given an opportunity to provide a single presentation on the joint application and the benefits they consider it would deliver when compared with EMG2. This presentation should only use information already submitted into this examination and will be limited to 10 minutes.	The Applicants have responded to the written submissions made on behalf of Prologis UK Limited, Prologis 121 Limited, East Midlands International Airport and East Midlands Property Investments (Industrial) Limited at Deadlines 2 and 3 in **DCO 7.13** The Applicants' Responses to Deadline 2 and 3 Submissions.

	Following the presentation, the ExP will ask any questions of the applicants and affected persons (APs) as it considers necessary.	
Item 3.2	Any APs attending CAH2 will be asked in turn by the ExP to summarise their cases with respect to the compulsory acquisition (CA) and temporary possession (TP) powers sought by the applicant. APs in explaining their cases should set out whether they consider the powers sought by the applicant do or do not accord with conditions stated in section 122 (Purpose for which compulsory acquisition may be authorised) of the Planning Act 2008 and the 'Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land' (Department for Communities and Local Government, 2013). For Prologis UK Limited, Prologis UK 121 Limited, East Midlands International Airport Limited and East Midlands Airport Property Investments (Industrial) Limited this will be in addition to the time allocated for item 3.1. While each of these APs will be provided with a set time to make their representations, they are asked to co-operate as the ExP does not need to hear points repeated. Each will need to refer to their individual plots.	The representations made on behalf of Prologis UK Limited, Prologis 121 Limited, East Midlands International Airport and East Midlands Property Investments (Industrial) Limited raised no new points and the Applicants have responded to the written material provided at Deadlines 2 and 3 in **DCO 7.13** The Applicants' Responses to Deadline 2 and 3 Submissions.

	The applicant will then be given the opportunity to respond to any summary cases made by APs.	
	The ExP will ask any questions of APs and the applicant as it considers necessary. Including but not limited to: • whether the contended socio-economic benefits of the joint application could be displaced by the DCO scheme upon its delivery (the delivery scenario), and therefore whether the environmental statement must treat such a displacement as a likely significant effect of the project? The focus being on the definition of likely in the context of the EIA Regulations and whether this merely means could rather than more probable than not.	Post Hearing the ExP issued a Rule 17 letter dated 2 June 2026 [**PD-021**] which supersedes this agenda item and CAH2 Action Point 31 [**EV7-008**]. The Applicants' response to these matters is provided at **Appendix 1** below.
	• whether the definition of a project for the purposes of the EIA Regulations is contingent upon there being physical works or other physical interventions that would alter the environment? If so, in a scenario where the DCO is granted but the development is not implemented (the non-delivery scenario), would that still fall within the definition of a project and therefore fall within the scope of the EIA Regulations? On that basis, should the sterilisation of socio-economic benefits said to arise from the non-delivery	Post Hearing the ExP issued a Rule 17 letter dated 2 June 2026 [**PD-021**] which supersedes this agenda item and CAH2 Action Point 31 [**EV7-008**]. The Applicants' response to these matters is provided at **Appendix 1** below.

	scenario be treated as a likely significant effect of the project and assessed in the environmental statement?	
	• whether the non-delivery scenario should be assessed at all, as part of the environmental statement or otherwise, on the basis of the applicants' contention it is not a likely outcome. To inform this, the ExP would like to understand how many DCOs have been consented but never delivered. If there has been an appreciable number of DCOs where non-delivery has occurred, then would this mean that such a scenario could happen, and is therefore likely and should be assessed accordingly?	Post Hearing, CAH2 Action Point 32 requested a short note and a table identifying the DCOs that have been granted but not subsequently delivered. The Applicants have provided a table at annex 2 to **Appendix 1** below. The table has been prepared using the decided DCOs as shown on the Planning Inspectorate's National Infrastructure Consenting website (as at May 2026). As can be seen from the key and colouring applied to the table, all four SRFI DCOs that have been consented have either been built or are progressing. None have been abandoned. 1. Daventry International Rail Freight Terminal (Prologis) 2. East Midlands Gateway Rail Freight Interchange (SEGRO) 3. Northampton Gateway Rail Freight Interchange (SEGRO) 4. West Midlands Interchange (Four Ashes Limited)
	• whether in light of the above, and if it is determined that further socio-economic assessment is required for the delivery and non-delivery scenarios, the applicants must then suitably re-visit and update their approach to the compelling case test in their Statement of Reasons in the context of justifying compulsory acquisition powers?	CAH2 Action Point 33 requested a response to these agenda items in writing. Post Hearing, the ExP issued a Rule 17 letter dated 2 June 2026 [**PD-021**] which supersedes these agenda items and CAH2 Action Point 33 [**EV7-008**]. The Applicants' response to these matters is provided at **Appendix 1** below.
	• whether the counterfactual position advanced by Prologis that development on the southern land would come forward	

	under a planning application, and therefore provides the correct baseline with which to assess the DCO scheme's socio-economic effects, is too speculative and contingent to be given any more than limited weight? For example, whilst the land is part of a draft allocation in the emerging local plan, the ExP notes Planning Inspectorate's guidance on cumulative effects, which categorises development identified in emerging development plans as tier 3 development and the least certain to come forward.	
	• the ExP are also likely to include questions on alternatives to compulsory acquisition and viability, including a discussion on necessary mitigation works and apportionment of costs, the rate of return, comparators, underlying costs, how the calculations have been approached and other assumptions.	Post Hearing, CAH2 Action Point 35 requested a joint excel spreadsheet with commentary to explain any differences in approach to the valuation evidence submitted by the Applicants and the Prologis. The Applicants and Prologis have prepared a joint note which is included at Appendix 2 to DCO 7.15 / MCO 7.15 Applicants' Response to Hearing Action Points Deadline 4.
	The order of those speaking will be: • those who have pre-registered a desire to speak as set out in the notice of the hearing • any other APs who have not pre-registered to speak. Please note that the ExP may limit the amount of time that APs and the applicant will be permitted to speak in order to ensure	N/A

	that all those who have pre-registered will be able to address the ExP. The ExP will issue a list of speakers and the time allocated to them on **Friday 9 May 2026**.	
Item 4	**Statutory undertakers** Statutory undertakers (SU) whose operational land is affected by the proposed development will be invited in turn by the ExP to summarise their cases with respect to the compulsory acquisition (CA) and temporary possession (TP) powers sought by the applicant. SUs in explaining their cases should explain whether they consider the powers sought by the applicant do or do not accord with conditions stated in section 127 (Statutory undertakers' land) of the Planning Act 2008 and the 'Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land' (Department for Communities and Local Government, 2013). Where appropriate, SUs should also comment on whether they consider any protective provisions promoted by the applicant would be suitable, and if not, explain why they hold that view, including what changes they would seek.	The Applicants are in continuing dialogue regarding protective provisions with National Grid Electricity Distribution, National Highways, Leicestershire County Council and East Midlands Airport (as a statutory undertaker of the airport). The Applicants have provided updated wording to each statutory undertaker and expects to include updated protective provisions at Deadline 5 in accordance with the Examination timetable. In addition, the Applicants are seeking confirmation from Network Rail (NR) that its interests referenced in its earlier representation [**PD-017**] are not affected by EMG2 and no protective provisions in favour of NR are required. The Applicants have provided full details to NR to enable them to confirm that position by Deadline 5. In relation to the Active Travel link, there have been discussions with East Midlands Airport regarding their land interests in and around the Active Travel Link. Both prior to and after the CAH2 hearing, the Applicants have continued to discuss the proposed Active Travel Link with representatives of East Midlands Airport (EMA). As a result of those discussions changes have been made which do not require any additional land. Those changes have been agreed with EMA, National Highways and Leicestershire County Council (where relevant) and updated documentation has been submitted at Deadline 4.

	The applicant will then be given the opportunity to respond to any summary cases made by APs. The order of those speaking will be: • those who have pre-registered a desire to speak as set out in the notice of the hearing • any other SUs who have not pre-registered to speak. Please note that the ExP may limit the amount of time that SUs and the applicant will be permitted to speak in order to ensure that all those who have pre-registered will be able to address the ExP. The ExP will ask any questions of the applicant and APs as it considers necessary, including to potential alterations to the application site for the proposed Active Travel Link.	
Item 5	**Any other business** The ExP may extend an opportunity for the applicant and APs to raise matters relevant to topics raised in CAH2 that they consider should be examined.	N/A
Item 6	**Review of matters and actions arising** The ExP will discuss how any actions arising from the discussion are to be addressed by	Unless otherwise stated in the responses above, the Applicants responses to Action Points arising from the Hearing [**EV7-008**] are provided in DCO 7.15 / MCO 7.15 Applicants Reponses to Hearing Action Points Deadline 4.

	the applicant, APs or SUs following CAH2. A written action list will be published if required.	
Item 7	**Close of hearing**	N/A

4 ISH3 - Applicants' Post Hearing Submissions

4.1 The Applicants' submissions to the points arising from the ISH3 are set out in the table below.

4.2 Table of submissions:

Agenda for the ISH1		Applicants' Submissions
Item 1	**Welcome, introductions, arrangements for the hearing** **Wednesday 13 May 2026** **Hearing starts at 10.00am** Registration and seating available at venue from 9.30am and virtual registration process from: 9.30am **Hearing adjourns by 5.00pm** **Thursday 14 May 2026** **Hearing resumes at 10.00am** Registration and seating available at venue from 9.30am and virtual registration process from 9.30am	N/A
Item 2	Purpose of the issue specific hearing	N/A

Item 3	**Legal basis of determination of the DCO application and the relationship to the environmental statement**	N/A
Item 3.1	The ExP will lead discussion and ask questions about the legal basis of determination of the DCO application and the relationship to the environmental statement. Below, the ExP has provided detailed context to help the applicants and other IPs prepare. Notwithstanding some caveats, there seems to be broad agreement between relevant IPs that the split approach regarding s104 and s105 should be applied to the DCO application. However, it is not clear that the split approach can be lawfully undertaken given the environmental statement is not disaggregated to assess the highways NSIP (plus associated development) and the business and commercial NSIP (plus associated development) separately. For example, if assessing the highways NSIP under s104 the SoS would need to understand the benefits and adverse impacts. However, given the environmental statement conflates the assessment of the highways NSIP with the non-NSIP highways works (that is the associated development to the business and commercial NSIP) is it currently impossible to determine what benefits and adverse	The Applicants' representations to date on the legal basis for determination are set out in its written summary of ISH1 [**REP1-052**] and in response to Action Point 8 arising from ISH1 [**REP1-053**]. The Applicants' position is that there are two separate issues to consider: a. The first relates to the obligations arising under the Infrastructure Planning (EIA) Regulations 2017; and b. The second is the consenting mechanism for the various parts of the DCO application. <u>EIA</u> Environmental Impact Assessment is a process which comprises of a number of stages, as described in section 5 of the EIA Regs. The first step is the obligation on an applicant to prepare an Environmental Statement. The ES must identify, describe and assess the likely significant effects of the project / proposed development on the environment. The EIA Regulations refer to the "development" whereas the EIA Directive refers to the "Project" but there is no material difference between those terms (***R (Wingfield) v Canterbury City Council*** **[2019] EWHC 1975 (Admin);** ***Raeshaw Farms Ltd v Scottish Ministers*** **[2026] CSIH 10).** The courts have been astute to detect the device of 'salami slicing' – where a project is split into applications for smaller component parts that fall below EIA thresholds and thereby avoid the requirement to carry out an EIA. As a result, caselaw emphasises the importance of identifying and assessing the EIA project as a whole (see, for example ***Raeshaw Farms Ltd v Scottish Ministers*** **[2026] CSIH 10**). Some parts of the EIA project might be subject to a

	impacts should be attributed to the highways NSIP and tested under s104? Indeed, is there a risk that by relying on the aggregated assessment of highways works within the environmental statement, the non-NSIP highways works could be uprating or downrating the effects of the highways NSIP and therefore could this subvert the lawful s104 balance? It is also not clear whether the approach in Net Zero Teesside is applicable to the proposed development in this case and that assessing the proposed development in the alternative would provide a remedy given there are two distinct NSIPs (a de facto highways NSIP under s14 and a deemed business and commercial NSIP under s35). For example, if the SoS assessed everything under s105 would the highways NSIP be erroneously stripped of the presumption that should apply to it under s104, and would this subvert the lawful balance? Alternatively, if the SoS assessed everything under s104, would the business and commercial NSIP be erroneously afforded the presumption when it should not and would this also subvert the lawful balance? The ExP would like to understand more about the underlying DCO application	separate application or a different consenting regime but if they are properly part of the Project, they must all be assessed in the ES. In light of the inter-relationship between the various parts of the DCO Scheme, all elements have been assessed as a single project in its ES. There has been no suggestion from any party that it was wrong to adopt that approach to environmental assessment. Similarly, the MCO Scheme has been assessed as a single project. The DCO Scheme and the MCO Scheme have also been assessed together as the EMG2 Project. Finally, the EMG2 Project has been assessed in combination with other development, to provide an assessment of the cumulative effects. The Applicants have been clear throughout the examination that the NSIP works (and their associated development) are necessary to mitigate the effects of the commercial and business development such that one will not come forward without the other. In those circumstances, it would be wholly artificial to seek to separate out the impacts of one from the other. The effects of the NSIP works will not arise without the commercial and business development and *vice versa.* To give an example, it would be illogical to assess the environmental impacts of the highway NSIP works alone without taking account of the traffic flows generated by the commercial and business development. The second stage of the EIA process is the carrying out of consultation and publicity in respect of the EIA application. The third stage is governed by Regulation 21 of the EIA Regs and requires the SoS to: a. Examine the environmental information; b. Reach a reasoned conclusion on the significant effects of the development on the environment; and c. Integrate that conclusion into the decision as to whether to grant consent. Again, the obligation on the SoS is to consider the effects of the project as a whole. Those obligations apply irrespective of whether the application is determined under s.104 or s.105. They require the SoS to take account of all significant environmental effects of the Project as a whole.

	associated with *EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 2697 (Admin), and how the split approach worked in that case and whether the environmental statement was aggregated or disaggregated, and whether this had any bearing in the court's judgement.	It is important to remember, as the courts have emphasised, that EIA is not supposed to be an obstacle course for decision-makers to trip over. It is meant to *facilitate* decision-making, not to hamper or impede it (***Boswell v Secretary of State for Energy and Net Zero* [2025] EWCA Civ 669**). Its purpose is to ensure that any decision to grant consent is taken with full knowledge of the environmental consequences. <u>Consenting mechanism under the PA2008</u> The second and separate consideration is the consenting mechanism under the PA2008. Under s.104 PA2008, were a national policy statement has effect, the SoS must have regard to: a. That NPS; b. Any Local Impact Report; c. Any prescribed matters; and d. Any other matters which the SoS considers is important and relevant The SoS must decide an application in accordance with the relevant NPS except to the extent provided for in sub-sections (4) – (8). That means that under s.104, when it comes to the overall planning balance, need is taken to be established by national policy and there is a presumption in favour of granting consent for development that complies with the relevant NPS (see eg. NNNPS para 4.2) (***EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 2697 (Admin)** at [38]). The highway works described in Part 2 of Schedule 1 to the dDCO and its associated development (namely, Work 16) and the MCO application benefit from that presumption. Where no NPS has effect, the application must be determined pursuant to s.105 and the SoS must have regard to: a. Any Local Impact Report; b. Any prescribed matters; and

		c. Any other matters that the SoS thinks are important and relevant. The business and commercial development and its associated development fall to be determined under s.105. That means that it will be for the ExP to make its recommendation without the benefit of a policy presumption. However, the NNNPS will be an important and relevant consideration under s.105 (***R (Gate) v SST*** **[2013] EWHC 2937 (Admin);** ***EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy*** **[2021] EWHC 2697 (Admin**). The different consenting routes for the discrete aspects of the development do not affect the EIA process. That requires all significant effects of the Project as a whole to be taken into account. In practice, what that means for the ExP's recommendation report is that it will need to consider all benefits and adverse impacts of the Project as a whole. When it comes to the overall balance: for the highways works and Work 16 and the MCO, the ExP's report will acknowledge that need is established by policy and take account of the presumption in favour of development that complies with the NNNPS; for the business and commercial development and its associated development, it will not add in that presumption. The agenda asked specifically about the Net Zero Teesside DCO and the Wheelabrator Kemsley DCO (as considered in ***EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy*** **[2021] EWHC 2697 (Admin)).** There is a further example which is also instructive – the Gatwick Airport Northern Runway Project decided by the SoS in September 2025. <u>Net Zero Teesside DCO (2024)</u> This example is directly comparable to the present case. This application included: a. A generating station which was a de facto NSIP as it fell within the descriptions and thresholds in s.14 and 15 PA2008 (Work No 1) b. Certain other “Specified Elements” which did not fall within the PA2008 descriptions but were subject to a s.35 Direction (Works 6, 7 and 8) and

		c. Associated development (AD) for both the generating station and the Specified Elements without distinguishing between what was AD to the *de facto* NSIP and what was AD to the Specified Elements (Works 2, 3, 4, 5, 9 and 10). It was agreed and accepted that the generating station should be determined under s.104 and in accordance with the relevant NPS. The High Court judgment in EWF Group was handed down during the examination which gave rise to some uncertainty as to whether the Specified Elements should be determined under s.104 or s.105. In that particular case, the s.35 direction specifically provided that the Specified Elements should be determined in accordance with the NPS which was ultimately found to put it into a different category to the EWF case. However, because of the uncertainty, the generating station was determined in accordance with s.104 whereas the Specified Elements were considered against both s.104 and s.105 by both the ExA and SoS. So, as in the present case, part of the development was considered against s.104 (Work No.1) and part under s.105 (Works 6, 7 and 8). The ExA and SoS were able to consider the generating station under s.104 and the Specified Elements under s105 notwithstanding the fact that the ES assessed the environmental impacts of the whole of the Project together without distinguishing between the environmental effects of the generating station and those arising from the Specified Elements or the AD. It is clear from the ES (see, for example, the **NTS paras. 1.1.3 and 4.1.3**; **Chapter 4** which described the Proposed Development; **all topic chapters** and **Chapter 25** which provides a summary of the significant effects), that no distinction was drawn between the environmental effects arising from the de facto NSIP, the Specified Elements or the Associated Development. Neither the ExAR nor the SoS's DL contain discrete assessments of benefits and impacts for the s.104 development and the s.105 development.

		The ExAR: a. describes the statutory provisions and consenting route in a section dedicated to the Planning Act 2008 at the outset (**section 3.2 NZT ExAR**); b. records that climate change legislation and policy is relevant and important under both s.104 and s.105 (**section 3.6 NZT ExAR**) and that the SoS must have regard to LIRs under both sections (**section 4.3 NZT ExAR**); and c. in the planning balance (**section 7.3 NZT ExAR**), finds that the benefits outweigh any adverse impacts and even if the Specified Elements were determined under s.105, that would not change the position. Similarly, the SoS considered the generating station under s.104 and the specified elements under both sections 104 and 105 (**NZT DL para 4.4**) and found that the benefits of the scheme outweighed the harms, whether under s.104 or s.105 (**NZT DL section 7**).] <u>Wheelabrator Kemsley DCO (2021)</u> The Wheelabrator Kemsley DCO included: a. An onshore generating station exceeding the thresholds in s.14 and s.15 PA2008 known as the K3 project; and b. Works to construct and operate a waste-to-energy facility, known as the WNK project, which was below the NSIP threshold and so subject to a s.35 direction. The ExA recommended that the generating station be determined in accordance with s.104 and the waste-to energy facility pursuant to s.105. That meant it identified local planning policy as the primary policy consideration for the waste facility, albeit national policy was still important and relevant, and in the overall planning balance it expressly acknowledged that the waste facility didn't benefit from the presumption in favour of determining the application in accordance with the NPS and that need was established through the NPS for the K3 project but not for the WMK project (**Wheelabrator ExAR section 3.2; para 3.3.4; section 4.7; para 6.2.2, 6.2.11 and 6.2.13**).

		Ultimately, the ExA recommended the grant of development consent for the K3 project but did not consider the applicant had established the need for the WKN project and so recommended refusal of that aspect. The SoS concluded that the K3 and WMN projects should both be considered pursuant to s.104 PA2008 but agreed overall that K3 should be allowed and WKN refused. The SoS's decision was challenged on the basis that the SoS had been right to determine all aspects of development under s.104 but had failed to properly apply the presumption in favour of the WKN project arising under s.104.The High Court found that the SoS had been wrong to determine the whole of the application under s.105. The K3 project should have been determined pursuant to s.104 and the WKN project under s.105. However, the court refused to quash the SoS's decision on the basis that the overall outcome would have been the same, whether the WKN project was determined under s.104 or s.105 (***EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy*** **[2021] EWHC 2697 (Admin)** at [77]: "*It follows that on the basis of the defendant's assessment, the overall outcome of the application would have been the same even if he had adopted the decision-making framework contained within section 105 of the 2008 Act"*.) While the ES for that project did split out the impacts of the generating station and waste-to-energy facility, they were not considered separately in the ExAR and the fact the environmental effects had been described separately in the ES played no part in the High Court's determination that the discrete parts should have been considered under sections 104 and 105, respectively. The words Environmental Statement or EIA are not mentioned at all in the court's decision. It seems that the ES separated out the effects of the K3 and WKD projects, that may have been because the applicant had emphasised that the WKD project was an "entirely stand-along facility" and that the projects were "separate and distinct" and only included in a single application for the sake of efficiency (***EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy*** **[2021] EWHC 2697 (Admin)** at [4] and [6]). That is not true in the present case, there the

		NSIP works and commercial and business development are entirely dependent on one another and neither will come forward independently of the other. Gatwick Airport DCO (2025) The DCO application comprised alterations to the runway which fell within the PA2008 thresholds but were not covered by the airports NPS; and highway works which were required solely to facilitate the airport expansion, which were covered by the NNNPS [**ExAR 3.5.5; 3.5.8**]. As such, the airport works were determined under s.105 and the highway works under s.104 [**ExAR 3.5.4**] The Environmental Statement did not separate out the environmental effects of the airport works and the highway works (see the various topic chapters and **ES Chapter 21: summary of effects**) Summary In summary, it is not necessary to separately identify and assess the environmental effects of those parts of the development to be determined under s.104 from those to be determined under s.105 to comply with the EIA regulations or to enable reporting and decision-making under the relevant provisions of the 2008 Act. Provided that all environmental effects of the project as a whole are assessed and the recommendation report makes it clear that only for the works for which the NPSNN has effect should it be assumed that need is established and that there is a presumption in their favour if they comply with the NPS, that will ensure the decision is appropriately taken under s.104 and s.105. Further, whether the DCO Application is determined under s.104 or s.105, the outcome in this case will inevitably be the same. Under s.104, the NPS has effect for the purposes of the highways NSIP. Under s.105, is an important and relevant consideration for the commercial and business development (***R (Gate) v SST [2013] EWHC 2937*** **(Admin);** ***EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy*** **[2021] EWHC 2697 (Admin)**). Need for the highways NSIP is established through the NPS. Need for the business and commercial development is established through the Industrial and Logistics Need Assessment [APP-223] submitted with the DCO Application. The benefits of the highways NSIP and the commercial and business development substantially

		outweigh their adverse impacts, and the planning balance falls decisively in favour of granting development consent for the project as a whole.
Item 3.2	The ExP wishes to explore with the parties the status of the Draft East Midlands Freeport Strategic Infrastructure and Contributions Supplementary Planning Document in light of forthcoming changes to the plans system through the Levelling Up and Regeneration Act 2023 and the English Devolution and Community Empowerment Act 2026, along with consideration of other supplementary planning documents.	The intention of the Levelling Up and Regeneration Act 2023 (LURA) is to phase out Supplementary Planning Documents and replace them with supplementary plans under s.15CC of the Planning and Compulsory Purchase Act 2004 (see Schedule 7 LURA). Paragraph 6 of Schedule 1 to the Levelling Up and Regeneration Act 2023 (Commencement No. 11 and Saving and Transitional Provisions) Regulations 2026 contains saving and transitional provisions for SPDs which provides that a. Authorities may continue to prepare and make arrangements for the adoption of proposed SPDs provided the document is adopted by 30 June 2026 b. Thereafter, supplementary plans will need to be prepared in accordance with the requirements of s.15CC PCPA 2004 c. s.15CC(3): *A supplementary plan prepared by a local planning authority may include—* *(a) policies (however expressed) in relation to the amount, type and location of, or timetable for, development at a specific site in their area or at two or more specific sites in their area which the authority consider to be nearby to each other;* *(b) other policies (however expressed) in relation to the use or development of land in the local planning authority's area which are designed to achieve objectives that relate to the particular characteristics or circumstances of a specific site in their area or two or more specific sites in their area which the authority consider to be nearby to each other;* *(c) details of any infrastructure requirements, or requirements for affordable housing, to which development in accordance with any policies, included in the plan under paragraph (a) or (b), would give rise;*

		(d) requirements with respect to design that relate to development, or development of a particular description, throughout the local planning authority's area, in any part of their area or at one or more specific sites in their area, which the local planning authority consider should be met for planning permission for the development to be granted. In the Applicants' view, the draft East Midlands Freeport Strategic Infrastructure and Contributions SPD was hurriedly produced so that it could be adopted prior to the 30th June deadline. It was published for consultation on 23 March 2026 and the consultation closed on 27 April 2026. The Applicants' have responded to the consultation, objecting to the adoption of the SPD. We understand that other members of the Consortium that the Applicants have been working with have also objected. In summary, the Applicants' objections are that: a. The draft SPD does not include much of the information that would normally be required in a pooled contribution SPD. For example, it does not identify: b. The infrastructure works to which it relates; i. The estimated cost of the works; ii. The basis on which contributions are to be calculated; iii. When contributions are to be paid; and iv. Importantly, who is actually going to deliver the required infrastructure. Given that the works to J24 themselves constitute an NSIP, it remains wholly unclear who would secure consent for the relevant works, or when. There is no money allocated for securing consent or delivering the works in the Government's Road Investment Strategy 3, which is intended to run to 2031. As such, the draft SPD recognises that it will be dependent on an Infrastructure Delivery Plan, which does not yet exist, even in draft. The Applicants understand that a draft IDP is not expected until late this year or possibly next year and even that draft is not expected to have the works fully identified or costed.

		Given the deficiencies of the draft SPD, even if it is adopted by 30 June, it includes no content that would enable any monetary contribution to be calculated or secured. As such, it is clear that it will be some considerable time before there is a policy framework in place that would enable infrastructure improvements to Junction 24 to be funded through that route. The English Devolution and Community Empowerment Act 2026 received Royal Assent on 29 April 2026. It introduces 'Strategic Authorities' into law, to make it quicker to devolve powers out from Whitehall. Strategic Authorities with elected Mayors will receive more devolved powers over transport, planning, housing, and economic regeneration. The Applicants' are not aware that the enactment of the Act will have any implications for the consenting of this project. In addition to the above points, the Applicants noted that the ExP requested an update from NWLDC on progress with the adoption of the SPD at Deadline 5 (30 June 2026). The Applicants will comment further, if necessary, at Deadline 6.
Item 4	**Traffic and transport**	N/A
Item 4.1	The ExP will lead a discussion as to the latest position on traffic modelling for the proposed development, and the position of the highway authorities, and where areas of disagreement remain.	**National Highways** The Applicants welcomed confirmation from National Highways that all modelling is now complete and adequate to assess the impacts of the proposed development on the SRN. The SoCG with NH [**REP2-037**] confirms that all 11 departures from geometric standards are now approved [**item 4.7**] The SoCG with NH [**REP2-037**] also confirms that the NH intends to review the signage and signalling departures shortly. The Applicants will keep the ExP updated as to the approval of the signage and signalling departures, in response to ExQ2s or SoCG as appropriate.

		Leicestershire County Council Following the PRTM 2023 assessment on the local road network, the Applicants understand that LCC has two concerns: i. The first concerns potential impacts on Derby Road in Kegworth, where the modelling predicts an increase of around 160 vehicles in the morning peak hour [**REP3-058**]. ii. The other relates to potential through-traffic in Castle Donington. LCC has requested additional signage to encourage use of Castle Donington Relief Road [**REP3-058**]. The Applicants are considering both of these matters and are in ongoing discussions with LCC. LCC requested that further information be provided to the previously issued report (Document MCO 7.10 [**REP1-283M**] in respect of the traffic impact of the MCO at the EMG1 access junction. Discussions are ongoing. Works No. 15 (the A453 EMA junction) was discussed and the Applicant confirmed they would continue to work with LCC to see if a solution could be found. The Applicant has agreed with LCC that a controlled crossing can be provided and further details of this are set out in the Applicant's response to the Deadline 2 and 3 responses (Document **DCO 7.13**).
Item 4.2	The ExP will seek to explore what assessment has been undertaken of the effects of the construction of the proposed development on surrounding network, with particular emphasis on overnight and weekend users of the network.	At the Hearing the ExP led a discussion between the highway authorities and East Midlands Airport (EMA) which considered matters which can affect traffic flows including peak travel times at EMA and the annual Download festival at Donington Park. The Applicants have submitted an updated Construction Traffic Management Plan (CTMP) at Deadline 4, to clarify how such events have been considered. The CTMP is included at Appendix 3 to **DCO 6.3A** Construction Environmental Management Plan.

Item 4.3	The ExP will lead a discussion about the various 'works packages' relating to the highway network around junctions 23A to 24A of the M1 and their deliverability in light of the proposed development.	The drawing of the J24 works packages at Annex 19A of the Applicants' response to ExQ1s [**REP1-054**] was out of date (November 2024). At the time when the J24 works packages were being developed the initial concept was to take this link under the A453 (as shown on revision P17 of the plan dated November 2024). However, when this was investigated in detail by the EMG2 team there are clear and sound reasons for taking the link over the A453 and this justification is found within TA Appendix 27 [**REP1-035**] & [**REP1-037**]. Following this work the J24 works packages drawing was updated and as such there is no incompatibility between this and the EMG2 proposals. The Applicants have submitted an updated plan at Deadline 4 in response to Action Point 42 (Document **DCO 7.15**) to clarify that the proposed Highway Works do not prejudice the deliverability of other strategic highways improvements which may be promoted by other parties. The latest version shows the crossing of the new M1 NB to A50 WB link to cross over the A453 rather than under and this aligns with the A453 Bridge Plan [**APP-053D**].
Item 4.4	The ExP will seek the responses of the applicants, National Highways and Leicestershire County Council (LCC) to the critique of the Transport Assessment submitted by East Midlands Airport in relation to traffic effects around the airport.	During the Hearing the ExP asked questions of National Highways and Leicestershire County Council in response to the comments from East Midlands Airport on the proposed highways mitigation proposed by the Applicants. The Applicants have provided a detailed response to EMA's comments in '**DCO 7.13** The Applicants Response to Deadline 2 and 3 Submissions' which has been provided at Deadline 4.
Item 4.5	The ExP will lead a discussion on the response to the Road Safety Audit and look to ensure that delivery of the recommendations would be achievable.	The Applicants confirm that all actions which required a change to the preliminary design, such as geometric layout issues, have already been completed and implemented into the scheme in the revised drawings submitted at Deadline 1. See the Applicants' response to Action Point 43 (Document **DCO 7.15**) for the response to the specific question related to the swept paths at the EMG2 access junction.

Item 4.6	The ExP will lead a discussion on sustainable transport options, given the disagreements between the parties as to delivery and whether, given the success at EMG1, the modal share targets should be made 'stretch' targets.	The Applicants' response to each of the issues raised during the hearings are set out below: 1) Funding for attendance of officers at 6 monthly Sustainable Transport Working Group meetings – The Applicants have agreed with Leicestershire County Council and National Highways that the existing EMG1 Travel Plan fund will be used to pay for officer attendance. The Applicants have agreed to provide pay an uplift to that existing fund to allow officers to attend for a 1 hour meeting every 6 months for 10 years. 2) Duration of complementary bus tickets for employees – The Applicants have agreed proposals with LCC to provide employees with a mechanism to apply for a 6 month bus pass. The Applicants' detailed response is provided at Action Point 45 in **DCO 7.15** Applicants Response to Hearing Action Points Deadline 4. 3) Stretched mode share targets – The Applicants confirm that the targets are already 'stretched' for the following reasons: i) SOV mode share targets for EMG2 have been extensively discussed and agreed with National Highways and Leicestershire County Council through the EMG2 Transport Working Group. ii) An end-year SOV target of 56% was agreed through this process and included in the Framework Travel Plan submitted to examination. iii) This target is significantly below typical benchmarks, including local travel-to-work patterns (c.80–81%), the 80% baseline modelled in the EMG2 Transport Assessment and comparable B8 warehouse developments (c.75%). iv) Evidence indicates that SOV mode share of 75–80% is typical for developments of this nature and location.

		v) By contrast, a 56% target represents a 24-percentage-point reduction from baseline conditions modelled in the Transport Assessment and a clear step change in travel behaviour. vi) The target is grounded in real-world evidence, specifically the 2024 EMG1 employee travel survey, which recorded an observed SOV mode share of 56%. vii) The target therefore goes well beyond local and regional benchmarks and has been accepted by highway stakeholders. viii) The Framework Travel Plan includes a monitoring and review mechanism, allowing targets to be refined over time if performance exceeds expectations.
Item 5	**Landscape and visual and lighting**	N/A
Item 5.1	The ExP will consider the distinction between surveyed and non-surveyed viewpoints and the positional accuracy of the submitted visualisations, with reference to Appendix 10A and 10B, and whether the clarification provided on methodology and survey control now provides a sufficiently clear evidential basis for examination.	In response to Action Point 50, the Applicants have identified the viewpoints not surveyed in Appendix 10B. A full list of viewpoints at Appendix 13 to **DCO 7.15 / MCO 7.15** Applicants Response to Hearing Action Points submitted at Deadline 4. For clarity, the Applicants confirm that Appendix 10A [**AS-043**] details the methodology adopted for the LVIA including the methodology for the Visualisations. Appendix 10B [**AS-044**] [**AS-045**] [**AS-046**] [**AS-047**] includes the Visualisations at Figures 12.1 – 12.27; 13.1 – 13.14; 14.1 – 14.18; and 15.1.15.3. The methodology employed for the Visualisations follows the technical guidance published by the Landscape Institute, *'Visual Representation of Development Proposals - Technical Guidance Note 06/19'* (September 2019), (subsequently referred to as TGN 06/19). A copy of this guidance can be provided if required. In respect of the approach adopted and any potential concerns in respect of positional accuracy and survey control; additional points to note within TGN 06/19:

		Para 1.2.9 '*Visualisations should provide the viewer with a fair representation of what would be likely to be seen if the proposed development is implemented and should portray the proposal in scale with its surroundings.*' *1.2.13 Two-dimensional visualisations, however detailed and sophisticated, can never fully substitute what people would see in reality. They should, therefore, be considered an approximation of the three-dimensional visual experiences that an observer might receive in the field.* The guidance proposes four types of Visualisations (1 -4), from least to most sophisticated. Appropriate Visualisation Types for different purposes are identified in Table 1 (pg 9). For *'Evidence submitted to Public Inquiry, most planning applications accompanied by LVIA (as part of formal EIA)…*', Table 1 advises that Types 2 – 4 are appropriate for Visualisations. Para 3.6.2 of TGN 06/19 also notes that some Visualisations straddle categories. This is the position for those Visualisations in Appendix 10B identified as Type 3s. These include much of the information/ detail sought for Type 4s (Appendix 10 of TGN 06/19) yet a cautionary categorisation for the Visualisation Type has been applied. As confirmed in the response to Q12.0.5 [**REP1-054**], *'It is considered that all of the Visualisations, comprising Type 4 and Type 3 versions have been appropriately prepared and presented and provide a suitably accurate and fair representation of how the proposed development would be seen from the agreed viewpoint locations, in both the daytime and night-time*.'
Item 5.2	The ExP will discuss whether the Landscape and Visual Impact Assessment (LVIA) adequately addresses the sequential experience of approaching the site, with reference to Hyams Lane and the A42/ Gelscoe Lane routes, including the adequacy of Appendix 10F and the current position of the relevant interested parties.	The Applicants refer to and do not repeat their response to ExQ1 Q12.0.6 [**REP1-054**] (DCO Doc 7.5 Applicants Response to Examining Panel's First Written Questions Deadline 1). The following additional references are provided for clarity: Visual Effects for users of Hyams Lane are provided at Appendix 10F [**REP3-049**]; Ref F1; Viewpoint Refs VPs B, C and D (App 10B; Figs 9.2 – 9.4).

		Visual Effects for users of lane north of Gelscoe Lane are provided at Appendix 10F [REP3-049]; Ref V7; Viewpoint Ref I. Fig 9.9. Summary of visual effects upon these and other receptors at ES Chapter 10 Table 10.3 (page 10-92) [AS-041].
Item 5.3	The ExP will consider the assessment of night-time visual effects and the control of external and façade lighting, having regard to the updated Appendix 10F and the amended draft DCO requirement 14, including whether the position on no full-height façade lighting on elevations facing Diseworth is now sufficiently secured.	Updated Appendix 10F, submitted at Deadline 3 [REP3-049], now includes narrative on the night time visual effects for all receptors. Draft DCO Requirement 14 [REP2-008D], addresses the lighting for western and southern elevations of buildings in Zones 1,2,4 and 5. NWLDC's landscape consultant (Gillespies), confirmed at the hearing that updated Requirement 14 includes the wording they requested.
Item 5.4	Discuss the latest version of Landscape and Ecological Management Plan (LEMP) submitted at deadline (D) 3 and any remaining matters under discussion regarding long-term management, monitoring and replacement planting.	An updated LEMP was submitted at Deadline 3 [REP3-043]. The update addressed a number of matters raised in the ExP's First Written Questions and comments received from NWLDC. The Applicants responses to ExQ1s are contained within [REP1-054]. Questions and responses relevant to the LEMP comprise Q5.0.1, Q5.0.13, Q5.0.28 and Q12.0.3. The Applicants are not aware of any remaining outstanding ecology matters on the LEMP and noted that NWLDC indicated during the Hearing that it will provide comments, if any, at Deadline 4. The Applicants will respond, if necessary, at Deadline 5.
Item 6	**Cultural heritage**	N/A
Item 6.1	The ExP will seek a brief update on progress of the Heritage and Archaeology Statements of Common Ground. The ExP will invite LCC and North West	**NWLDC SoCG** Post Hearing, an updated SoCG incorporating the changes requested by the ExP in their Rule 17 letter dated 19 May 2026 [PD-019], has been prepared. In

	Leicestershire District Council (NWLDC) to clarify their current positions, identify the principal matters that remain under discussion/ not agreed and why. Also signpost where those outstanding matters are submitted in the examination documents.	accordance with that request, a copy of the updated **DCO 8.3G** Heritage Draft SoCG with NWLDC [previous reference REP1-068] has been submitted at Deadline 4. The one outstanding area of dispute relates to Diseworth Conservation Area (CA), where the Applicants disagree with NWLDC in relation to (i) the contribution made by the EMG2 Main Site to the setting of the CA, and (ii) where on the spectrum of less than significant harm the impacts to the Diseworth CA lie. **LCC SoCG** Post Hearing, an updated SoCG incorporating the changes requested by the ExP in their Rule 17 letter dated 19 May 2026 [**PD-019**], has been prepared and all matters are now agreed. In accordance with that request, a copy of the updated **DCO 8.4C** Archaeology Draft SoCG with LCC [previous reference REP1-071] has been submitted at Deadline 4. **Historic England SoCG** Post Hearing, the ExP requested further information from Historic England in its letter dated 19 May 2026 [**PD-018**]. The Applicants have had regard to the responses provided by Historic England in its email dated 26 May 2026 when preparing its response to the archaeological and built heritage Action Points numbered 53 to 58 (**DCO 7.15/ MCO 7.15** Applicants Response to Hearing Action Points Deadline 4). The Applicants have prepared an updated SoCG to respond to the ExP's letter dated 19 May 2026 [**PD-019**]. Further to a meeting with HE on 3rd June the applicant has moved to finalise their position on the SoCG with HE. Outstanding points of disagreement comprise (i) contributing the site makes to the setting of the Diseworth CA, (ii) resultant impact to the significance of the Diseworth CA, (iii) impact to the significance of Church of St Michael and All Angels, and (iv) impact to the significance of Church of St Mary and St Hardulph. The updated SoCG has been issued to HE for further comment and a copy of the revised format **DCO 8.8**

		Draft SoCG with Historic England [previous reference REP1-079] has been submitted at Deadline 4.
Item 6.2	The ExP will consider setting effects on key heritage assets and the conservation area, including any remaining differences in position on the assessment approach and conclusions and what further clarification (if any) is required to resolve those differences.	The setting effects/impacts to the following designated heritage assets have been assessed in detail: **Diseworth Conservation Area** The principal point of difference relates to the assessment of effects upon Diseworth Conservation Area, specifically the extent to which the EMG2 Main Site contributes to its significance, and the consequential level of harm identified. The Applicants assessment is based on a proper consideration of the Conservation Area as a whole, including its wider setting, character, and the range of views and relationships that contribute to its special interest. Historic England has requested a kinetic assessment of the approach along Hyams Lane. This was already included within the existing assessment; however, additional images and explanatory text have now been added to Appendix 12A of the Built Heritage Statement to make this clearer. Verified views are being produced at various points along Hyams Lane, as requested by Historic England. The EMG2 Main Site occupies only a limited and peripheral part of that wider setting. It is not a defining component of the Conservation Area's significance, nor does it comprise a core area of townscape, enclosure, or historic association within the designated area. In particular, the southern approaches to the Conservation Area and the wider rural context, including views across the landscape and towards Diseworth Brook, remain important components of its setting and character. These relationships are also apparent from within the Conservation Area, including in views southwards from Clements Gate, as identified within the Conservation Area Appraisal: *"Good views out of the Area into the surrounding countryside are obtained from the rear of properties on the southern side of Clements Gate over Diseworth Brook and the B5401. Glimpses of these views can be obtained from the public highway through the gaps between the properties. There is a good view of the broach spire to St Michael's and All Angels Church from Town End, although the background to the view is now of the*

		recently completed control tower at East Midlands Airport". Those wider rural elements and outward views will remain available and materially unchanged. Importantly, views towards the EMG2 Main Site are already experienced in a context influenced by the substantial modern development associated with **East Midlands Airport** and related infrastructure. That existing pattern of development forms part of the present-day context in which the Conservation Area is understood and appreciated. The Site therefore does not introduce an entirely new or isolated urbanising influence into an otherwise undeveloped setting, and its effect on the Conservation Area's significance should be assessed in that light. Accordingly, the EMG2 Main Site does not result in the loss of the key setting attributes that contribute most significantly to the Conservation Area's character and appreciation. On that basis, the impact should not be overstated, and the level of harm identified supported by proper planning and heritage assessment of the designated asset as a whole. **Grade II* The Church of St Michael and All Angels** The EMG2 Main Site makes up a small part of the secondary setting of the church, and thus only makes a low level contribution to the asset's significance. The proposals will have an effect on the ability to appreciate the architectural and historic interest of the asset through the reduction in views of it within its rural setting; the change in land use and character within the EMG2 Main Site; and the alteration of some long-distance views. This will give rise to less than substantial harm to the asset's significance, which is likely to represent a medium level of less than substantial harm, and therefore not significant in Environmental Impact Assessment terms. This position has been agreed with NWLDC [**REP1-067**], Historic England currently disagree with this position, as they believe that a medium level of less than substantial harm to the asset would represent a significant effect in Environmental Impact Assessment terms. This position is recorded in **DCO 8.8** Draft SoCG with Historic England [previous reference [**REP1-079**] which has been submitted at Deadline 4. **Bulwarks Scheduled Monument**

		The EMG2 Main Sites makes a very limited contribution to the setting of the monument due to being at a distance of 5km from the assets prominent hill top position. Taking distance, screening and the extensive nature of the wider setting into account, any visual intrusion from the development would be minor and would cause only very limited degradation of the monument's aesthetic value. Overall, impacts to the monument's setting are assessed as low adverse harm before mitigation and embedded mitigation is expected to reduce effects to negligible adverse (residual) harm. This position has been agreed with NWLDC [**REP1-067**]. Historic England agree that there will be low adverse harm to the asset prior to mitigation, although they disagree that the embedded mitigation will reduce the level of impact to level of negligible adverse harm. Both the Applicants and Historic England agree that impacts to the Scheduled Monument will need to be considered by the ExP as part of the planning balance. This position is recorded in **DCO 8.8** Draft SoCG with Historic England [previous reference REP1-079] which has been submitted at Deadline 4. **Grade I Listed Church of St Mary and St Hardulph** The Grade I Listed Church has been scoped out of detailed assessment as the proposed development would not materially alter the asset's immediate setting attributes. This position has been agreed with NWLDC [**REP1-067**], Historic England have highlighted that the church should be assessed as all impacts upon designated heritage assets will need to be considered by the ExP, even if not considered significant in Environmental Impact Assessment terms. Historic England requested a statement of harm or inclusion in the ES. The assessment has concluded that the Church's principal significance derived from setting is associated with its immediate setting, namely the churchyard/cemetery, and its prominent hilltop location on the site of a former Iron Age hillfort. The church was not conceived as a building primarily experienced from within, but rather as a landmark intended to be seen and remain prominent in the wider landscape. Accordingly, the main contributory elements of its significance are the visual prominence of the church within the settlement and

		wider landscape, together with its elevated and highly visible location, rather than outward views from the church itself. On that basis, the proposed development would not materially diminish those key elements of significance. The church's prominence, landmark role and relationship to its immediate setting would remain legible, and the site was therefore assessed as less sensitive to change from the application site and scoped out of detailed assessment. The Applicants acknowledge the presence of modern infrastructure in the wider landscape, but the assessment considers that this does not of itself establish harm in this case. The proposal would not materially alter the aspects of setting that most strongly contribute to the church's significance, and any change to the wider skyline would be proportionate and limited in effect. The Applicants and Historic England agree this designated heritage asset will need to be considered by the ExP as part of the planning balance where there is an impact to its significance resulting in harm. However the Applicants' position is that the proposed development does not result in harm to the Church's significance. This position is recorded in **DCO 8.8** Draft SoCG with Historic England [previous reference REP1-079] which has been submitted at Deadline 4. **Grade II* Church of St Andrew** The Built Heritage Assessment concluded that the development proposals would not have a negative impact to this asset. On this basis, the assessment of the church has not been specifically included within any of the SoCG's. This approach is not contested by NWLDC. Historic England have asked for an assessment to St Andrew's Church, Kegworth including construction and operational effects, effects from vehicles on the motorway network and the proposed link between the M1 and A50, the increased height of the gantry cranes for the Material Change Order (MCO) and the in-combination and cumulative assessments. The Applicants will submit this additional material as part of its Deadline 4 submissions. **Langley Priory**

		The Applicants have provided a detailed response to Action Point 55 (**DCO 7.15/ MCO 7.15** Applicants Response to Hearing Action Points Deadline 4) and additional explanation has been included within Appendix 12A [**AS-053**] to explain how the assessment of the EMG2 Main Site Langley Priory concluded that it makes no contribution to the significance, historic appreciation or shared experience of Langley Priory. Historic England confirmed in their email dated 26 May 2026 [**AS-081**] "*having reviewed the position outlined by NWLDC, we are in agreement with this assessment on contribution to significance. This issue is evidently explored, and we have no reason to disagree*."
Item 7	**Ecology and biodiversity**	
Item 7.1	The ExP will seek an update from LCC and the applicants regarding the SoCG [REP1-072] and matters referenced 4.11 to 4.14 and 5.10. As part of this update LCC should make clear their current position and explain in appropriate detail why the matters are yet to be agreed.	The Applicants' position is that there are no substantive outstanding technical objections to any of the five matters identified. The Applicants' position on each matter, having regard to LCC's formal submissions, is set out below. • **4.11 (BNG assessment, DCO)** - LCC's Written Representations confirm that they are reviewing the additional BNG information provided by the Applicants and encourage its submission to the examination. The updated BNG assessment has been submitted [**REP3-041**], and condition assessment sheets have been provided to LCC. The Applicants' ecologist considers this matter to be agreed. • **4.12 (Skylark mitigation)** - LCC's Local Impacts Report and Written Representations state that suitable breeding habitat provision has not been provided or is limited in extent. The Applicants' position, as set out in their responses to ExQ1 at Deadline 1 [Q5.0.3 **REP1-054**], is that a minor adverse residual effect on skylark is acknowledged but that this does not amount to significant harm. The community park grassland will provide enhanced foraging resource and increased carrying capacity of the wider landscape. Direct off-site replacement of nesting habitat is not considered proportionate. The Applicants' ecologist considers this matter to be agreed.

		• **4.13 (Lighting scheme and bat boxes)** - LCC's LIR and Written Representations confirm that LCC is awaiting a response on the sensitive lighting scheme and bat box provision. The Applicants' position is that the principle of a sensitive lighting scheme and bat box provision has been agreed, and that detailed design will be secured through Requirements R10 and R14 of the draft DCO [**REP2-008D**]. The Applicants' ecologist considers this matter to be agreed. • **4.14 (Veteran tree mitigation)** - LCC's Written Representations state that the veteran tree strategy in the LEMP does not fully consider Natural England and Forestry Commission guidance on ancient and veteran trees. The Applicants' ecologist has provided a plan demonstrating that all retained veteran trees and their root protection areas are buffered from construction works in accordance with NE/FC Standing Advice. The approach and mitigation have been agreed with the Forestry Commission, as recorded in the agreed Forestry Commission SoCG [**REP1-080**]. The Applicants' ecologist considers this matter to be agreed. • **5.10 (BNG assessment, MCO)** -- LCC's position mirrors that at row 4.11. The updated BNG assessment and condition assessment materials apply equally to the MCO. The Applicants' ecologist considers this matter to be agreed.
Item 7.2	NWLDC, in paragraph 7.6 of their Local Impact Report [REP1-103], states that they have assessed air quality impacts on human receptors and defer air quality impacts on ecological receptors to LCC. LCC in paragraph 7.48 of their Local Impact Report [REP1-084] recognise negative air quality impacts on surrounding	The Applicants welcomed the confirmation from LCC during the hearing that it agrees with the Applicants assessment of air quality impacts on the SSSIs and that the necessary mitigation is secured. The Applicants' assessment follows Natural England's sequential approach as recommended through engagement with Natural England, with detailed dispersion modelling across all four pollutant pathways. The full methodology and

	habitats, including Lount Meadows Site of Special Scientific Interest (SSSI) and Oakley Wood SSSI. The ExP will seek a position from LCC about air quality impacts on ecological receptors because it is not clear from the SoCG [REP1-072], or other submissions to date, whether they agree with the applicants' assessment of these impacts or not.	conclusions are set out in ES Chapter 9 [**REP3-014**], Appendix 8H [**REP3-039**], and the Applicants' response to ExQ1 Question 1.5.1 [**REP1-054**]. Although Process Contribution values exceed the 1% critical load screening threshold at both SSSIs, this exceedance is not, in itself, decisive. The qualitative ecological assessment concludes that the spatial extent of effect is limited, both sites are buffered by existing woodland belts adjacent to the strategic road network, and the predicted reductions in air quality are not considered likely to result in a detectable change to the condition or features of either SSSI. The Applicants and LCC are updating the SoCG to record this agreement.
Item 7.3	The ExP notes LCC communications with the case team about their ecologist's unavailability on 14 May 2026. If this remains the case the ExP would request that the LCC ecologist reviews this detailed agenda and briefs someone else within LCC to attend ISH3 in their absence to provide an update on the above matters. The ExP appreciates that the person LCC sends instead of their ecologist may not have the technical knowledge to answer follow up questions during ISH3. However, an update on the above matters in and of itself will assist the ExP in understanding LCC's current position and we will be able to ask any follow up questions as part of ExQ2 on 2 June 2026.	N/A
Item 7.4	The ExP will ask questions of the applicants and NH about biodiversity net gain (BNG) on NH land and the extent to which NH's BNG key performance indicators (KPI) are important and relevant.	The Applicants' position on BNG in relation to National Highways (NH) land is set out at row 4.21 of the Statement of Common Ground with NH [**REP1-076**].

	In addition, the ExP will want the applicants and NH to consider any implications of the government's recent response to consultation on the implementation of BNG and whether there is now more flexibility in terms of delivering BNG outside NH land and whether being proximal to it is sufficient to deliver similar benefits.	
Item 7.5	The ExP will seek clarification whether there are net losses of habitats on NH land and whether the applicants have satisfied the mitigation hierarchy in terms of exploring opportunities to avoid, mitigate and compensate, given that BNG is conjunctive to that process and does not replace it.	The Applicants have updated the Statement of Common Ground with National Highways and all matters relating to BNG, including the Applicants' approach to the mitigation hierarchy are agreed. A copy of the updated SoCG has been provided at Deadline 4.
Item 8	**Design** The ExP will lead a discussion about how good design would be secured for the proposed development. This will relate to all elements of the proposed development.	The Applicants have provided a detailed response to Action Point 60 regarding external design review.
Item 9	**Population and human health** The ExP will seek an update on the Population and Human Health Statement of Common Ground with LCC and any outstanding matters. The ExP will also seek clarification on reliance on the transport evidence base for ES conclusions (including equality statement),	Post Hearing, an updated SoCG incorporating the changes requested by the ExP in their Rule 17 letter dated 19 May 2026 [**PD-019**], has been prepared. The Applicants have also provided responses to Action Points 61 and 63 confirming that ES Chapter 17 (Population and Human Health) has been updated to provide signposting to the key components of the Health Impact Assessment embedded in that chapter and to update table 6 at Appendix 17C to include in combination effects.

	the transparency/ signposting of the embedded health impact assessment (HIA) approach and the basis for the diet/nutrition conclusions within ES.	To clarify, the following health determinants are reliant on the transport evidence base and have been reviewed in light of the PRTM 2023 model in the "PRTM 2026 – Population and Health Technical Note" appended to the revised **DCO 8.4E** Population and Human Health Draft SoCG with Leicestershire County Council [previous reference **REP2-035**] submitted at deadline 4: • Health effects from changes in transport, access and connections; • Health effects from changes in air quality; • Health effects from changes in noise and vibration; • Health effects from changes in diet and nutrition.
Item 10	**Draft development consent order** The ExP will lead a discussion about the draft Development Consent Order in light of the changes since Issue Specific Hearing 2 in March 2026 and those flowing from discussions in the hearings this week.	The Applicants are preparing an updated dDCO to address the matters arising from the Hearing which will be submitted at Deadline 5.
Item 11	**Draft material change order** The ExP will lead a discussion about the draft Material Change Order in light of the changes since Issue Specific Hearing 2 in March 2026 and those flowing from discussions in the hearings this week.	The Applicants are preparing an updated dMCO to address the matters arising from the Hearing which will be submitted at Deadline 5.
Item 12	**Review of matters and actions arising** The ExP will discuss how any actions arising from the discussion are to be addressed by the applicant, APs or SUs	The Applicants responses to Action Points arising from the Hearing are provided in **DCO 7.15 / MCO 7.15** Applicants Reponses to Hearing Action Points Deadline 4.

	following ISH3. A written action list will be published if required.	
Item 13	**Close of hearing**	N/A

APPENDIX 1

Socio Economic Assessment – Post Hearing Submissions - Response to matters raised by ExP in Rule 17 letter

Introduction

1. This note provides a response to:

   - Action Points 31 – 33 of the CAH2 Action Points (EV7-008);
   - Post Hearing submissions in respect of the first three bullet points contained in Item 3.2 of the CAH2 Agenda which were discussed at the CAH2 hearing and
   - The Rule 17 letter issued by the ExP dated 2 June 2026 (PD-021)

2. Any case law referred to below is contained in **Annex 1** to this note.

3. The ExP, in their agenda for CAH2, set out, in five bullet points, issues for discussion in relation to the alleged need for an assessment in the DCO ES of the socio economic effects of the impacts on the Joint Application resulting from the delivery or, in the alternative, the non-delivery of the DCO scheme were it to be approved. Following the hearing the ExP issued a request under Rule 17 seeking further information. In that request the ExP advised that it had determined that both the delivery and non-delivery scenarios were "likely" and that there should be an assessment of the impact of delivery and non-delivery of the DCO Scheme on the likely environmental effects of the Joint Application development which the ExP wishes to be treated as a future baseline.

4. These points are considered in turn in this document, however first some preliminary points are made.

5. The DCO scheme was the subject of a scoping exercise which resulted in a Scoping Opinion issued by the Planning Inspectorate in October 2024 (**APP- 070**)[1]. The Scoping Opinion and the Report to which it responded included an assessment of socio-economic effects none of which were scoped out. As required by the Infrastructure Planning (EIA) Regulations 2017, the ES was based on that Scoping Opinion[2].

6. The alleged need for the assessment of likely significant effects resulting from "displacement" of the Joint Application to be included in the ES is something initially raised by Prologis (but only in respect of "socio-economic and land use" effects). It is therefore relevant to note that the ES produced on behalf of Prologis/EMA in respect of the Joint Application does not assess the displacement effect of the Joint Application on the DCO scheme, neither in respect of the differences between the development which would be carried out on the northern land under either consent nor in respect of the potential loss/delay in the development of the southern land. The DCO scheme on the northern land or southern land is not treated as part of a "future baseline" and the Joint Application ES also states:

[1] The Joint Application was submitted in June 2024.
[2] Reg 14 (3)(a) The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

"*It is considered that the SEGRO scheme is being presented as an alternative to the application proposals comprised in the proposed development. Therefore there is no cumulative or in combination scenario to assess. As such the SEGRO Scheme is not considered further in this ES Update" ES Update Section 7.27"*

7. Criticisms levelled at the DCO ES in respect of the failure to assess the effects of the "displacement" of the Joint Application could equally be levelled at the ES for the Joint Application in respect of failure to assess the effects of the "displacement" of the DCO scheme by the Joint Application. In particular, whilst Prologis may dispute that development would not come forward on the southern land (although the viability evidence of the Applicant is clear in this regard) it is beyond argument that if the DCO scheme were displaced by the Joint Application, that would result in the non-delivery of the Highway NSIP – which, if a proposed development is to be considered part of a future baseline, is an example of an impact which, presumably, should be assessed.

8. This inconsistency between the approach that Prologis/EMA have taken in their ES and the approach they assert should be taken in respect of the DCO betrays the weakness in the assertion that development which is in the alternative should be considered as part of a future baseline.

Item 3.2 CAH 2 Bullet Points

9. The bullet points set out in Item 3.2 of the CAH2 Agenda are responded to below:

    - *whether the contended socio-economic benefits of the joint application could be displaced by the DCO scheme upon its delivery (the delivery scenario), and therefore whether the environmental statement must treat such a displacement as a likely significant effect of the project? The focus being on the definition of likely in the context of the EIA Regulations and whether this merely means could rather than more probable than not.*

10. The requirement of the EIA Regulations is for the ES to include a description of the "*likely significant effects of the proposed development on the environment*"[3]. The bullet point therefore raises two questions. Firstly, whether it is *likely* that the delivery of the DCO would "displace" development (and its associated environmental impacts) pursuant to the Joint Application and secondly whether there would be any *likely significant* effects.

11. In terms of the interpretation of the word "likely" it is clear from judicial authority that it does not mean "more probable than not"[4]. Something is not likely in this context simply because it is possible. There must be a real risk[5] and serious possibility of the significant effect occurring[6]. This is recognised in the Rule 17 letter (PD-021).

12. The first point to note is that the Joint Application is not an approved project nor is it known when or whether it will be (see para 34. below) . In addition, for the reasons set

[3] Ibid footnote 2 Reg 14 (b).
[4] R. (on the application of An Taisce (National Trust for Ireland)) v Secretary of State for Energy and Climate Change para 161[2013] EWHC 4161 (Admin)
[5] R (Morge) v Hampshire County Council [2010] PTSR
[6] R(Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157 Para 17 "something more than a bare possibility is probably required though any serious possibility would suffice

out in the Applicant's Viability Appraisal (REP1-027D) and the response to the viability information submitted by Prologis at Deadline 2 being submitted by the Applicant at Deadline 4 (Doc 7.13) the Applicant's understanding is that the Joint Application is not viable. Accordingly, the scenario of the DCO scheme "displacing" the delivery of the Joint Application is not accepted by the Applicant as a likely scenario giving rise to likely significant effects requiring assessment.

13. In any event the term displacement is a misnomer. As agreed in CAH2 by Counsel for Prologis the developments proposed on the northern land under the Joint Application and as proposed in the DCO whilst not identical are "*similar*" and, as asserted by Counsel for EMA in CAH2, any assessment should be blind to the identity of the developer.

14. The substitution of one similar form of development with another on the same land is not displacement. The fact that one developer rather than another would be developing the land is not an effect which is required to be assessed under the EIA regulations.

15. Notwithstanding the comments above and in response to the Exp's Rule 17 letter (PD-021) the Applicant is assessing the impact of delivery on the likely significant effects of the development of the Joint Application and this exercise will be submitted at D5.

    - *whether the definition of a project for the purposes of the EIA Regulations is contingent upon there being physical works or other physical interventions that would alter the environment? If so, in a scenario where the DCO is granted but the development is not implemented (the non-delivery scenario), would that still fall within the definition of a project and therefore fall within the scope of the EIA Regulations? On that basis, should the sterilisation of socio-economic benefits said to arise from the non-delivery scenario be treated as a likely significant effect of the project and assessed in the environmental statement?*

16. This scenario is posited upon the Applicant obtaining the DCO and then failing to deliver it.

17. It is the DCO scheme which is "the Project" for the purpose of the application of the EIA Directive. It is therefore the likely significant effects of the DCO scheme which fall to be assessed in the ES. The courts have considered the definition of "project" and have declined to apply it where there are no works or physical interventions[7]. Accordingly, it is the works or physical interventions which bring the scheme within the scope of the EIA Regulations, and it is the likely significant effects arising from those works or physical interventions which are required to be included in an ES assessing the project. Non implementation does not give rise to works or physical interventions related to the project and accordingly do not fall to be assessed.

18. Counsel for Prologis in CAH2 referred to the need to assess non physical works in an ES, such as a stopping up order or discontinuance of an existing use, as evidence that it is not only the effect of physical works which are required to be assessed. However, the effects of stopping up in this context would be effects arising from the

[7] Case C-2/07 Paul Abraham v Region Wallone [2008] ECR 1-01197] where an agreement between the government and an airport operator to allow 24 hours a day operation was not a project because there were no works or physical interventions.

implementation of an EIA development and so would fall to be assessed as direct effects of those physical works and discontinuance of a use is a physical change and the cessation of a use may have effects on the environment which require assessment. Those situations are quite different and distinct to the situation where the status quo is being retained because the DCO has not been implemented. In those circumstances there are no changes to the environment to be assessed.

19. It should in any event be reiterated in this context that it is the Applicant's belief that the Joint Application is not viable and that would be the reason for any difficulties in delivery of the Joint Application rather than the non-delivery of the DCO scheme.

20. For the reasons given above the 'sterilisation' of socio-economic benefits (or other effects as per the Rule 17 letter) said to arise from the non-delivery scenario should not be treated as a likely significant effect of the project to be assessed in the environmental statement.

21. Notwithstanding the comments above in response to the Exp's Rule 17 letter, the Applicant is assessing the impact of non-delivery on the likely significant effects of the development of the Joint Application and this exercise will be submitted at D5.

    - *whether the non-delivery scenario should be assessed at all, as part of the environmental statement or otherwise, on the basis of the applicants' contention it is not a likely outcome. To inform this, the ExP would like to understand how many DCOs have been consented but never delivered. If there has been an appreciable number of DCOs where non-delivery has occurred, then would this mean that such a scenario could happen, and is therefore likely and should be assessed accordingly?*

22. There is no basis upon which to assess the non-delivery scenario for the reasons set out above.

23. The information that the Applicant has been able to glean with regard to un-implemented DCO is contained in **Annex 2** to this note. It is not put forward as a comprehensive position since the research is effectively limited to internet searches and knowledge within the Applicant's team. The information is undoubtedly incomplete given that the information on the status of approved DCO schemes is patchy.

24. What is known is that:

    a. There are 10 DCO schemes which are known to have been cancelled which comprise publicly funded highway schemes and energy schemes. The cancellation of these seem to be for reasons of withdrawal of public funding and/or changes in energy policy. There is no basis to suggest that the reasons for non-delivery of those schemes have any bearing on whether or not EMG2 will be delivered.

    b. No Business and Commercial DCO have been approved hence none could have been implemented.

    c. The closest proxy to the EMG2 DCO are the four SRFI DCO which have been approved. All of those SRFI have been implemented and are either complete or in the process of being built out.

25. Two of the four SRFI DCO are SEGRO schemes one of which is EMG1. The details of the anticipated implementation of EMG2, informed by the actual delivery of EMG1, are set out in the Applicant's response to the Prologis Relevant Representation (REP1-051D - Appendix 6 Issue 3 (Programme) Paras 3.24 – 3.33). Notably Prologis has not sought to comment on those details and hence has not gainsaid what is said by the Applicant to the effect that there is no basis to be anything other than confident in the delivery of the scheme and its anticipated programme.

26. The ExP in the Rule 17 letter (PD-021) refer to a point made by Prologis/EMA at CAH2 that the delivery of DCO's relating to business and commercial development was inherently unproven. In a circumstance where no business and commercial DCO have been approved then that is obviously going to be the case. There is, however, no basis to conclude that this DCO Application is particularly vulnerable to non-delivery. Quite the reverse is true. It cannot, and has not, been denied that the closest proxy to the DCO application is the SRFI DCOs that have gone before, all of which are effectively business and commercial developments and all of which have been implemented and are either complete or on their way to completion.

27. Reference was made by Prologis/EMA to the Immingham Green Energy Terminal as an example of a DCO being granted but not delivered. As pointed out in the Rule 17 letter this was because the promoter withdrew funding after the DCO was made. The reason for this was not related to a change in market conditions or investment decisions, it was because Government energy policy changed which directly affected the viability of the scheme. This is also the reason that some highway DCO also have not proceeded – because of changes in Government funding.

28. The suggestion in the rule 17 letter that "there is still potential for shifting market conditions and different investment decisions" is not accepted as giving rise to a requirement to assess the effects of a non-delivery scenario on the Joint Application particularly since the Joint Application would itself be subject to those same shifting market conditions and investment decisions.

29. The Applicant has an impressive track record in delivering DCO. It has already invested circa £10/11m in acquiring interests and promoting development. It is not accepted that the fate of other DCO which have not proceeded for reasons unrelated to this development should be at all relevant to the consideration of the likelihood of this development proceeding.

    - *whether in light of the above, and if it is determined that further socio-economic assessment is required for the delivery and non-delivery scenarios, the applicants must then suitably re-visit and update their approach to the compelling case test in their Statement of Reasons in the context of justifying compulsory acquisition powers?*

30. It is not the Applicant's view that socio economic assessment (or assessment of other environmental effects) is properly required for the delivery or non-delivery scenarios for the reasons explained above. The exercises have been carried out as requested by the ExP however it is not accepted that they have any legitimacy in the context of the EIA Regulations. It is the case however that the limited delivery assessment exercise highlights the benefits of the DCO scheme as compared to the Joint Application

development which are apparent from the comparison of the wider comparison of the schemes carried out in other submissions (e.g. Applicant's response to Prologis Relevant Representations Appendix 6 and Annex 5 REP1-051D.)

31. Irrespective of comparisons, the benefits of the DCO scheme identified in the application documentation as supplemented during the Examination establish a compelling case in the public interest. The fact that another developer may have its own untested and uncertain aspirations to develop part of the site does not detract from the benefits the DCO scheme will deliver and which justify compulsory acquisition.

- *whether the counterfactual position advanced by Prologis that development on the southern land would come forward under a planning application, and therefore provides the correct baseline with which to assess the DCO scheme's socio-economic effects, is too speculative and contingent to be given any more than limited weight? For example, whilst the land is part of a draft allocation in the emerging local plan, the ExP notes Planning Inspectorate's guidance on cumulative effects, which categorises development identified in emerging development plans as tier 3 development and the least certain to come forward.*

32. The prospect of the southern land coming forward under a planning application is highly speculative and contingent upon many matters including the lack of viability and known unknowns, such as the highway mitigation which might be required. It is also contingent upon the Joint Application proceeding and the Applicant is clear that the northern land is not viable for the reasons set out in the Applicant's response to the Relevant representations of Prologis (REP1-051D Appendix 6 paragraphs 3.9-3.14).

33. Leaving aside issues of viability the prospect of a Phase 2 on the southern land was examined in the Applicant's response to the EMA Relevant Representation (REP1-051D Appendix 5 para 1.44). Sub-paragraph c) of that paragraph is an extract from the objection letter submitted to the local planning authority in respect of the Joint Application on behalf of the Applicant. For convenience that paragraph is set out below:

c) The concept of the balance of the wider site to the south of Hyam's Lane representing a "Phase 2" (with the MAG application forming "Phase 1") is disingenuous and flawed for the following reasons:

- *The plans and consenting route for the balance of the site would have to change – a new planning application would have to be prepared for the land to the south of Hyam's Lane.*
- *The content and form of development would have to be re-considered dependent on the final form of the "Phase 1" development.*
- *There would be significant delay arising from the required re-plan arising from the ongoing uncertainty as to whether and when any Phase 1 might come forward and in what form. Both the content and timing of any development south of Hyam's Lane would be dependent upon the final content and timing of the MAG proposals which is not yet known.*

- *Mitigation required for the balance of the wider site (to the south of Hyam's Lane) would need to be re-considered. This would include:*

- *Revised highway mitigation which would need to be identified and re-modelled, the outcome of which is uncertain. This would need to follow the identification of the MAG application's highway mitigation which is, as yet, incomplete*
  The site layout and strategic landscaping proposals would need to be changed to reflect the inability to provide the Community Park as previously envisaged.

    - *The delivery of the "green package" as a key first element to the strategic solution required to address the constraints on growth at M1 J23A/J24/J24A would not happen. A DCO would be required to deliver that element and land to the south of Hyam's Lane could not promote such a DCO since that development could not viably deliver the "green package".*

    - *Due to all the uncertainties and attendant risks, the viability of the delivery of land to the south of Hyam's Lane would be compromised to the point that it may never be delivered.*

34. That letter was written in January 2026, however the comments within it remain valid. There is still no clear understanding of when the Joint Application might be considered by the local planning authority. Any dates mentioned seem to be dependent upon there being an outcome to the ongoing transport modelling and those dates have consistently slipped. As recently as 10 June 2026 National Highways issued a further holding objection to the determination of the Joint Application setting out extensive outstanding work required before the mitigation can be identified and, potentially, agreed. The full extent of any highway mitigation therefore remains unknown and, even were it to become known, the consequences for any highway mitigation for the southern land will remain unknown.

35. As explained in other submissions, in any event the southern land would not be likely to come forward as a separate entity due to viability issues (See Appendix 6 of Applicants response to Relevant Representations – Issue 1 page 10 (REP1-051D) and the Applicants Viability Appraisal (REP1-027D) and the Applicant's response, submitted at Deadline 4, to the viability information submitted by Prologis at Deadline 2 (Doc 7.13] .

36. Accordingly, to answer the question raised in the bullet point directly, the development of the southern land is highly speculative and contingent and should not therefore serve as a baseline for the assessment of any socio economic, or other, effects.

ANNEX 1

CASE LAW

1. Case C-2/07 Paul Abraham v Region Wallone [2008] ECR 1-01197]
2. ECJ in Brussels Hoofdstedelijk Gewest v Vlaams Gewest (C-275/09) at Para 20, which endorses the approach in Abraham
3. Supreme Court in R (Finch) v Surrey CC [2024] UKSC 20 at Para 274 (albeit this is part of Lord Sales' dissenting judgement).

   "Project" is defined in article 1(2)(a) to mean "execution of construction works…" or "other interventions in the natural surroundings …". This definition focuses on a specific set of physical works. As the CJEU observed in Abraham at para 23, "[i]t is apparent from the very wording of [what was then article 1(2) of the 1985 Directive] that the term 'project' refers to works or physical interventions"; see also Brussels Airport, paras 20-24.
4. High Court in R (Parkes) v Dorset CC [2024] EWHC 1253 (Admin), citing the Brussels decision at Para 218

JUDGMENT OF THE COURT (Second Chamber)

28 February 2008 *

In Case C-2/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (Belgium), made by decision of 14 December 2006, received at the Court on 4 January 2007, in the proceedings

Paul Abraham and Others

v

Région wallonne,

Société de développement et de promotion de l'aéroport de Liège-Bierset,

T.N.T. Express Worldwide (Euro Hub) SA,

* Language of the case: French.

Société nationale des voies aériennes-Belgocontrol,

État belge,

Cargo Airlines Ltd,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, P. Kūris and J.-C. Bonichot (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 18 October 2007,

after considering the observations submitted on behalf of:

— Mr Abraham and Others, by L. Misson, L. Wysen and X. Close, avocats, and A. Kettels, Rechtsanwältin,

— Mr Beaujean and Others, by L. Cambier and M. t'Serstevens, avocats,

— Mr Dehalleux and Others, by L. Cambier, avocat,

— Mr Descamps and Others, by A. Lebrun, avocat,

— Région wallonne, by F. Haumont, avocat,

— Société de développement et de promotion de l'aéroport de Liège-Bierset, by P. Ramquet, avocat,

— T.N.T. Express Worldwide (Euro Hub) SA, by P. Henfling and V. Bertrand, avocats,

— the Belgian Government, by A. Hubert and C. Pochet, acting as Agents, assisted by F. Haumont, avocat,

— the Czech Government, by T. Boček, acting as Agent,

— the Commission of the European Communities, by M. Konstantinidis and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 November 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40; 'Directive 85/337'), in the version existing prior to Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5; 'Directive 97/11'), and in particular point 7 of Annex I and point 12 of Annex II thereto.

2 The reference was made in proceedings between numerous individuals who live near Liège-Bierset Airport (Belgium) and the Région wallonne (Region of Wallonia), Société de développement et de promotion de l'aéroport de Liège-Bierset, T.N.T. Express Worldwide (Euro Hub) SA ('TNT Express Worldwide'), Société nationale des voies aériennes-Belgocontrol, the État belge (Belgian State) and Cargo Airlines Ltd regarding the noise pollution brought about by the establishment of an air freight centre at that airport.

Legal context

Community law

3 Pursuant to Article 1(1) thereof, Directive 85/337, applicable here in its original version, concerns the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

4 Article 1(2) of Directive 85/337 states:

'…

"project" means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

"developer" means:

the applicant for authorisation for a private project or the public authority which initiates a project;

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

5 Under Article 2(1) of the directive, 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4'.

6 Article 3 sets out the subject-matter of the environmental impact assessment:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the interaction between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

7 Article 4 distinguishes two types of project.

8 Article 4(1) requires that, subject to Article 2(3), projects of the classes listed in Annex I to the directive are to be made subject to an assessment in accordance with Articles 5 to 10. The projects which fall within Article 4(1) include the 'construction … of airports with a basic runway length of 2 100 m or more', referred to in point 7 of Annex I.

9 Footnote 2 to point 7 states that 'for the purposes of this Directive, "airport" means airports which comply with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organisation (Annex 14)'.

10 As regards other types of projects, Article 4(2) of Directive 85/337 provides:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

11 In respect of those projects which fall within Article 4(2) of the directive, point 10(d) of Annex II refers to the 'construction of … airfields (projects not listed in Annex I)' and point 12 of that annex refers to 'modifications to development projects included in Annex I'.

12 Articles 5 to 9 of Directive 85/337, to which Article 4 of that directive refers, essentially state the following: Article 5 specifies the minimum information to be provided by the developer, Article 6 imposes, inter alia, the developer's obligation to inform the authorities and the public, Article 8 refers to the obligation of the competent authorities to take into consideration the information gathered in the assessment procedure, and Article 9 imposes an obligation on the competent authorities to inform the public of the decision taken and any conditions attached to it.

National law

13 In the Region of Wallonia, the assessment of the effects of projects on the environment was governed, until 1 October 2002, by a decree of 11 September 1985 and by the decree implementing it of 31 October 1991.

14 Those decrees provided that the projects listed in Annex I to the Decree of 11 September 1985, which adopted the list in Annex I to Directive 85/337, and in

Annex II to the Decree of 31 October 1991 were automatically subject to an environmental impact assessment. Other projects, for which an impact assessment was not automatically required, only had to be the subject of a prior notice regarding assessment of their impact on the environment.

15 In accordance with Annex I to the Decree of 11 September 1985, the construction of airports with a runway length of at least 2 100 metres had to be subject to an environmental impact assessment. In addition, pursuant to Annex II to the Decree of 31 October 1991, the construction of airports with a runway length of 1 200 metres or more, including the extension of existing runways beyond that threshold and leisure airports, also had to be subject to an environmental impact assessment.

The dispute in the main proceedings and the questions referred

16 The individuals who live near Liège-Bierset Airport complain of noise pollution, often at night, resulting from the restructuring of the former military airport and its use since 1996 by air freight companies.

17 An agreement signed on 26 February 1996 between the Region of Wallonia, Société de développement et de promotion de l'aéroport de Liège-Bierset and TNT Express Worldwide provided for certain modifications to the infrastructure of that airport in order to enable it to be used 24 hours per day and 365 days per year. In particular, the runways were restructured and widened. A control tower, new runway exits and aprons were also constructed. The length of the runway of 3 297 metres was not altered however.

18 Planning consents and operational authorisations were also granted so that the works could be carried out.

19 The dispute pending before the Belgian national court concerns liability: the claimants in the main proceedings have sought compensation for the harm suffered, in their view, by them as a result of the nuisance — which they claim to be serious — linked to the restructuring of the airport.

20 It is in that context that an appeal on a point of law was brought before the Cour de cassation (Court of Cassation) against a judgment delivered on 29 June 2004 by the Cour d'appel de Liège (Court of Appeal of Liège).

21 Considering that the dispute before it raised questions of interpretation of Community law, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does an agreement between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2 100 metres in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year, and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport constitute a project within the meaning of … Directive 85/337 …, as applicable before its amendment by … Directive 97/11 …?

(2) Do works to modify the infrastructure of an existing airport with a view to adapting it to a projected increase in the number of night-time and daytime flights, without extension of the runway, correspond to the notion of a "project", for which an impact assessment is required within the terms of Articles 1, 2 and 4 of … Directive 85/337 …, as applicable before its amendment by … Directive 97/11 …?

(3) Since a projected increase in the activity of an airport is not directly referred to in the annexes to Directive 85/337 …, must the Member State in question nevertheless take account of that increase when examining the potential environmental effect of modifications made to the infrastructure of that airport with a view to accommodating that increase in activity?'

The questions

The first question

22 By its first question the national court asks whether an agreement such as the one at issue in the main proceedings is a 'project' within the meaning of Directive 85/337.

23 That question calls for a negative answer. It is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to works or physical interventions. An agreement cannot, therefore, be regarded as a project within the meaning of Directive 85/337, irrespective of whether that agreement contains a more or less exact description of the works to be carried out.

24 However, in order to provide a satisfactory answer to a national court which has referred a question to it, the Court of Justice may also deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question (see, inter alia, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9).

25 In the present case, it should be pointed out to the national court that it is for it to determine, on the basis of the applicable national legislation, whether an agreement such as the one at issue in the main proceedings constitutes a development consent within the meaning of Article 1(2) of Directive 85/337, that is to say a decision of the competent authority which entitles the developer to proceed with the project (see, to that effect, Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 20). Such would be the case if that decision could, under national law, be regarded as a decision of the competent authority or authorities granting the developer the right to proceed with construction works or other installations or schemes or to intervene in the natural surroundings and landscape.

26 In addition, where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 53). Thus, where one of those stages involves a principal decision and the other involves an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of the latter procedure (*Wells*, paragraph 52).

27 Finally, the national court should be reminded that the objective of the legislation cannot be circumvented by the splitting of projects and that failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of Directive 85/337 (see, to that effect, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 76).

28 Consequently, the answer to the first question must be that, while an agreement such as the one at issue in the main proceedings is not a project within the meaning of Directive 85/337, it is for the national court to determine, on the basis of the applicable national legislation, whether such an agreement constitutes a development consent within the meaning of Article 1(2) of Directive 85/337. It is necessary, in that context, to consider whether that consent forms part of a procedure carried out in several stages involving a principal decision and implementing decisions and whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally.

The second question

29 By its second question the national court asks, in essence, whether works relating to the infrastructure of an existing airport whose runway is already more than 2 100 metres in length fall with the scope of point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in its original version.

30 Pursuant to point 12 of Annex II in the version prior to Directive 97/11, 'modifications to development projects included in Annex I' constitute projects subject to Article 4(2). Point 7 of Annex I refers to the 'construction … of airports … with a basic runway length of 2 100 m or more'.

31 Société de développement et de promotion de l'aéroport de Liège-Bierset, TNT Express Worldwide and the Kingdom of Belgium submit that it necessarily follows from that wording that only modifications to the 'construction' of an airport with a runway length of 2 100 metres or more are covered and not modifications to an existing airport.

32 The Court has frequently pointed out, however, that the scope of Directive 85/337 is wide and its purpose very broad (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 31, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 40). It would be contrary to the very objective of Directive 85/337 to exclude works to improve or extend the infrastructure of an existing airport from the scope of Annex II on the ground that Annex I covers the 'construction of airports' and not 'airports' as such. Such an interpretation would indeed allow all works to modify a pre-existing airport, regardless of their extent, to fall outside the obligations resulting from Directive 85/337 and would, in that regard, thus deprive Annex II to Directive 85/337 of all effect.

33 Consequently, point 12 of Annex II, read in conjunction with point 7 of Annex I, must be regarded as also encompassing works to modify an existing airport.

34 That interpretation is in no way called into question by the fact that Directive 97/11 has replaced point 12 of Annex II to Directive 85/337 with a new point 13, which expressly designates 'any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed …' as a project subject to Article 4(2) of Directive 85/337, as amended by Directive 97/11, whereas point 12 of Annex II merely referred to 'modifications to development projects included in Annex I. The new wording adopted by Directive 97/11, the fourth recital in the preamble to which makes reference to experience acquired in environmental impact assessment and stresses the need to introduce provisions designed to clarify, supplement and improve the rules on the assessment procedure, merely sets out with greater clarity the meaning to be given here to the original wording of Directive 85/337. The Community legislature's amendment cannot, therefore, warrant an *a contrario* interpretation of the directive in its original version.

35 In addition, the fact that the works at issue in the main proceedings do not concern the length of the runway is not relevant to the question whether they fall within the scope of point 12 of Annex II to Directive 85/337. Point 7 of Annex I to Directive 85/337 makes a point of defining the term 'airport' by reference to the definition given in Annex 14 to the Chicago Convention of 7 December 1994 on International Civil Aviation. Under that annex, an aerodrome is 'a defined area on land or water (including any buildings, installations and equipment) intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft'.

36 It follows that all works relating to the buildings, installations or equipment of an airport must be considered to be works relating to the airport as such. For the application of point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, that means that works to modify an airport with a runway length

of 2 100 metres or more thus comprise not only works to extend the runway, but all works relating to the buildings, installations or equipment of that airport where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic.

37 Finally, it is appropriate to remind the national court that, although the second subparagraph of Article 4(2) of Directive 85/337 confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) of the directive that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (*Kraaijeveld and Others*, paragraph 50).

38 Thus, a Member State which establishes criteria and/or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2) of Directive 85/337.

39 It is for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

40 The answer to the second question must therefore be that point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in their original version,

also encompasses works to modify the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic. It is for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

The third question

41 By its third question the national court asks, in essence, whether the competent authorities have an obligation to take account of the projected increase in the activity of an airport in determining whether a project covered by point 12 of Annex II to Directive 85/337 must be made subject to an assessment of its impact on the environment.

42 As stated in paragraph 32 of this judgment, the Court has frequently pointed out that the scope of Directive 85/337 is wide and its purpose very broad. In addition, although the second subparagraph of Article 4(2) of Directive 85/337 confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment. In that regard, Directive 85/337 seeks an overall assessment of the environmental impact of projects or of their modification.

43 It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works.

44 Moreover, the list laid down in Article 3 of Directive 85/337 of the factors to be taken into account, such as the effect of the project on human beings, fauna and flora, soil, water, air or the cultural heritage, shows, in itself, that the environmental impact whose assessment Directive 85/337 is designed to enable is not only the impact of the works envisaged but also, and above all, the impact of the project to be carried out.

45 The Court has thus held, in relation to a project to double an existing railway track, that a project of that kind can have a significant effect on the environment within the meaning of Directive 85/337, since it is likely to produce, inter alia, significant noise effects (Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 49). In that case, the significant noise effects were brought about not by the works involved in doubling the railway track but by the foreseeable increase in rail traffic permitted precisely by the works involved in doubling the track. The same must apply to a project, such as the one in dispute in the main proceedings, which seeks to enable an increase in the activity of an airport and, consequently, in the intensity of air traffic.

46 Therefore, the answer to the third question must be that the competent authorities have to take account of the projected increase in the activity of an airport when examining the environmental effect of modifications made to its infrastructure with a view to accommodating that increase in activity.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **While an agreement such as the one at issue in the main proceedings is not a project within the meaning of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, it is for the national court to determine, on the basis of the applicable national legislation, whether such an agreement constitutes a development consent within the meaning of Article 1(2) of Directive 85/337. It is necessary, in that context, to consider whether that consent forms part of a procedure carried out in several stages involving a principal decision and implementing decisions and whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally.**

2. **Point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, in their original version, also encompasses works to modify the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and char-**

acteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic. It is for the national court to establish that the competent authorities correctly assessed whether the works at issue in the main proceedings were to be subject to an environmental impact assessment.

3. The competent authorities have to take account of the projected increase in the activity of an airport when examining the environmental effect of modifications made to its infrastructure with a view to accommodating that increase in activity.

[Signatures]

JUDGMENT OF THE COURT (First Chamber)

17 March 2011 *

In Case C-275/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Raad van State (Belgium), made by decision of 14 July 2009, received at the Court on 21 July 2009, in the proceedings

Brussels Hoofdstedelijk Gewest,

Pieter De Donder,

Fernande De Becker,

Katrien Colenbie,

Philippe Hutsenbaut,

Bea Kockaert,

* Language of the case: Dutch.

VZW Boreas,

Frédéric Petit,

Stéphane de Burbure de Wezembeek,

Lodewijk Van Dessel,

v

Vlaams Gewest,

intervening party:

The Brussels Airport Company NV,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, M. Ilešič and M. Berger (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2010,

after considering the observations submitted on behalf of:

— Brussels Hoofdstedelijk Gewest, by F. Tulkens and J. Mosselmans, advocaten,

— Mrs De Becker, Mrs Colenbie, Mr Hutsenbaut, Mrs Kockaert and VZW Boreas, by I. Larmuseau and H. Schoukens, advocaten,

— Mr. Petit, by J. Verstraeten and S. Vanthienen, advocaten,

— Mr de Burbure de Wezembeek, by M. Denys, advocaat,

— Mr Van Dessel, by P. Flamey and P.-J.Vervoort, advocaten,

— Vlaams Gewest, by J. Vanpraet and S. Ronse, avocats,

— The Brussels Airport Company NV, by D. Ryckbost and A. Lippens, advocaten,

— the Italian Government, by G. Palmieri, acting as Agent, and G. Fiengo, avvocato dello Stato,

— the Austrian Government, by E. Riedl, acting as Agent,

— the European Commission, by P. Oliver, J.-B. Laignelot and B. Burggraaf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of point 7(a) of Annex I to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337').

2 The reference was made in proceedings between the Brussels Hoofdstedelijk Gewest (Brussels Capital Region) together with a number of other applicants and the Vlaams Gewest (Flemish Region) concerning a decision relating to the operation of Bruxelles-National Airport.

Legal context

European Union law

3 Article 1(2) of Directive 85/337 provides as follows:

‘For the purposes of this Directive:

“project” means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

…

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

4 The first subparagraph of Article 2(1) of Directive 85/337 provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects'.

5 The projects concerned are defined in Article 4 of Directive 85/337. That provision distinguishes between the projects listed in Annex I, which must be made subject to an environmental impact assessment, and the projects listed in Annex II, for which the Member States must determine, on the basis of a case-by-case examination or thresholds or criteria set by the Member State, whether they are to be made subject to such an assessment.

6 Point 7(a) of Annex I to Directive 85/337 refers to the 'construction … of airports with a basic runway length of 2 100 m or more'.

7 The first indent of point 13 of Annex II to Directive 85/337 covers '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment'.

National law

8 The legislation applicable in the Flemish Region distinguishes between a 'planning permit', which authorises the execution of certain works, and an 'environmental permit', which authorises the operation of an establishment that is classified as causing environmental nuisance.

9 The grant of an environmental permit, which is valid for a limited period of time, is governed by the Decree of the Flemish Parliament of 28 June 1985 on Environmental Permits, which was supplemented by an implementing order of the Flemish Government of 6 February 1991.

10 Since the entry into force on 1 May 1999 of a new Classification List, as amended by an order of the Flemish Government of 12 January 1999, 'sites for airports with a runway length … of at least 1 900 metres' are classified in the category of establishments causing environmental nuisance, for which an environmental permit is required.

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Bruxelles-National Airport, situated in the Flemish Region, has three take-off and landing runways over 2 100 metres in length. It has existed for decades but its operation has been subject to the grant of an environmental permit only since 1999.

12 The first environmental permit was granted on 1 February 2000 for a period of five years. That permit, which laid down, inter alia, noise emission standards, was amended on three occasions with a view to a greater reduction in overall noise load. The Raad van State states that it does not appear from the documents submitted to it that an environmental impact assessment was carried out in connection with that permit or the subsequent amendments to it.

13 On 5 January 2004, The Brussels Airport Company NV submitted an environmental permit application for the continued operation of and alterations to the airport, involving the addition of parcels of land.

14 On 8 July 2004, the Permanent Delegation of the Provincial Council of Vlaams-Brabant granted the permit sought as regards the continued operation of the airport but rejected the application to extend it. The Permanent Delegation considered that an environmental impact assessment was unnecessary.

15 An administrative appeal was lodged against that decision. The applicants submitted inter alia that an environmental impact assessment report should have been annexed to the environmental permit application.

16 On 30 December 2004, the Flemish Minister for Public Works, Energy, the Environment and Nature confirmed the decision of the Permanent Delegation of the Provincial Council of Vlaams-Brabant. He considered that an environmental impact assessment was unnecessary under both Flemish legislation and Directive 85/337.

17 The Brussels Hoofdstedelijk Gewest and several other applicants brought an action before the Raad van State against that confirmatory decision. They submit that the decision is vitiated by an irregularity because the grant of the environmental permit was conditional upon an environmental impact assessment being carried out and that requirement was not met.

18 It was in those circumstances that the Raad van State decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) When separate development consents are required for, on the one hand, the infrastructure works for an airport with a basic runway length of 2 100 metres or more and, on the other hand, for the operation of that airport, and the latter development consent – the environmental permit – is granted only for a fixed period, should the term "construction", referred to in point 7(a) of Annex I to [Directive 85/337], be interpreted as meaning that an environmental impact report should be compiled not only for the execution of the infrastructure works but also for the operation of the airport?

(2) Is that mandatory environmental impact assessment also required for the renewal of the environmental permit for the airport, both in the case where that renewal is not accompanied by any change or extension to the operation, and in the case where such a change or extension is indeed intended?

(3) Does it make a difference to the obligation to produce an environmental impact report, in the context of the renewal of an environmental permit for an airport, whether an environmental impact report was compiled earlier, in relation to a previous operational consent, and whether the airport was already in operation at

the time when the requirement to produce an environmental impact report was introduced by the European or the national legislator?'

Consideration of the questions referred

19 In order to answer those questions, which it is appropriate to consider together, it is necessary to ascertain whether the operation of an airport may constitute a 'project' within the meaning of Article 1(2) of Directive 85/337 and, if so, whether such a project falls within those listed in Annexes I and II to the directive.

20 As the Court observed at paragraph 23 of its judgment in Case C-2/07 *Abraham and Others* [2008] ECR I-1197, it is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to works or physical interventions.

21 It is expressly stated in the order for reference that the measure at issue in the main proceedings is limited to the renewal of the existing consent to operate Bruxelles-National Airport and does not entail works or interventions which alter the physical aspect of the site.

22 However, some of the applicants in the main proceedings have argued that the concept of physical intervention must be broadly construed as encompassing any intervention in the natural surroundings. They rely on paragraphs 24 and 25 of the judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004]

ECR I-7405, in which the Court held that an activity such as mechanical cockle fishing is within the concept of 'project' as defined in the second indent of Article 1(2) of Directive 85/337.

23 That argument cannot be accepted. As the Advocate General points out at point 22 of his Opinion, the activity at issue in the case which gave rise to that judgment was comparable with the extraction of mineral resources, an activity which is specifically referred to in the second indent of Article 1(2) of Directive 85/337 and entails genuine physical changes to the sea bed.

24 It follows that the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337.

25 It should be added that Article 2(1) of Directive 85/337 does not, in any event, require that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that directive, but only those referred to in Annexes I and II to that directive (order in Case C-156/07 *Aiello and Others* [2008] ECR I-5215, paragraph 34).

26 It should be noted in that connection, as pointed out by the Advocate General at point 26 of his Opinion, that the term 'construction' used at point 7(a) of Annex I to Directive 85/337 is not in any way ambiguous and is to be understood as having its normal meaning, namely as referring to the carrying out of works not previously existing or of physical alterations to existing installations.

27 It is true that, in its case-law, the Court has given a broad interpretation of the concept of 'construction', accepting that works for the refurbishment of an existing road may be equivalent, due to their size and the manner in which they are carried out, to the construction of a new road (Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 36). Similarly, the Court has interpreted point 13 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337 as also encompassing works to alter the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (*Abraham and Others*, paragraph 40).

28 However, it is clear from reading those judgments that each of the cases which gave rise to them involved physical works, which is not the case in the main proceedings according to the information provided by the Raad van State.

29 As the Advocate General points out at point 28 of his Opinion, while it is established case-law that the scope of Directive 85/337 is wide and its purpose very broad (see, inter alia, *Abraham and Others*, paragraph 32, and *Ecologistas en Acción-CODA*, paragraph 28), a purposive interpretation of the directive cannot, in any event, disregard the clearly expressed intention of the legislature of the European Union.

30 It follows that, in any event, the renewal of an existing consent to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'construction' within the meaning of point 7(a) of Annex I to Directive 85/377.

31 It should nevertheless be pointed out that in the proceedings before the Court, in particular at the hearing, some of the applicants in the main proceedings submitted that, since the expiry of the period for transposition of Directive 85/337, the infrastructure of Bruxelles-National Airport has undergone alteration works without an environmental impact assessment being carried out.

32 In that context, it should be noted that, according to the established case-law of the Court, in a case involving a permit, such as that at issue in the main proceedings, which does not formally concern an activity subject to an environmental impact assessment for the purposes of Annexes I and II to Directive 85/337, it may nevertheless be necessary for such an assessment to be carried out where that measure constitutes a stage in a procedure the ultimate purpose of which is to grant the right to proceed with an activity which constitutes a project within the meaning of Article 2(1) of the directive (see, to that effect, *Abraham and Others*, paragraph 25).

33 According to that same line of authority, where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 53, and *Abraham and Others*, paragraph 26). It has also been held that a national measure which provides that an environmental impact assessment may be carried out only at the initial stage of the consent procedure, and not at a later stage in the procedure, would be incompatible with Directive 85/337 (see, to that effect, Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraphs 105 and 106).

34 In the present case, it is therefore necessary to point out to the Raad van State that it is for it to determine, in the light of the case-law cited at paragraphs 27, 32 and 33 above and on the basis of the national legislation applicable, whether a decision such as that at issue in the main proceedings can be regarded as a stage in a consent procedure

carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the relevant provisions of Directive 85/337 to be carried out.

35 For the purposes of examining the facts, it is appropriate to remind the national court that the Court has already held that works to alter the infrastructure of an existing airport, without extension of the runway, are covered by point 13 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (*Abraham and Others,* paragraph 40).

36 The Court has also stated that the objective of the European Union legislation cannot be circumvented by the splitting of projects and that failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of Directive 85/377 (*Abraham and Others*, paragraph 27).

37 If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure.

38 The answer to the questions referred is, therefore, that the second indent of Article 1(2) of Directive 85/337 and point 7 of Annex I to the directive are to be interpreted as meaning that:

— the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' or 'construction', respectively, within the meaning of those provisions;

— however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage of the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The second indent of Article 1(2) of, and point 7 of Annex 1 to, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, are to be interpreted as meaning that:

— **the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' or 'construction', respectively, within the meaning of those provisions;**

— **however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage in the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.**

[Signatures]

Trinity Term
[2024] UKSC 20
On appeal from: [2022] EWCA Civ 187

JUDGMENT

R (on the application of Finch on behalf of the Weald Action Group) (Appellant) *v* Surrey County Council and others (Respondents)

before

Lord Kitchin
Lord Sales
Lord Leggatt
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
20 June 2024

Heard on 21 and 22 June 2023

Appellant
Marc Willers KC
Estelle Dehon KC
Ruchi Parekh
(Instructed by Leigh Day (London))

1st Respondent
Harriet Townsend
Alex Williams
(Instructed by Surrey County Council Legal & Democratic Services)

2nd Respondent
David Elvin KC
Matthew Fraser
(Instructed by Hill Dickinson LLP (Manchester))

3rd Respondent
Richard Moules KC
Nick Grant
(Instructed by Government Legal Department)

1st Intervener – Friends of the Earth (written submissions only)
Paul Brown KC
Nina Pindham
(Instructed by Richard Buxton Solicitors)

2nd Intervener – Greenpeace UK (written submissions only)
Ruth Crawford KC
Richard Harwood KC
David Welsh
(Instructed by Harper Macleod LLP (Edinburgh))

3rd Intervener – Office for Environmental Protection (written submissions only)
Stephen Tromans KC
Ruth Keating
(Instructed by Head of Litigation and Casework)

4th Intervener – West Cumbria Mining Ltd (written submissions only)
Gregory Jones KC
Alexander Greaves
(Instructed by Ward Hadaway (Newcastle))

LORD LEGGATT (with whom Lord Kitchin and Lady Rose agree):

1. Introduction

1. Anyone interested in the future of our planet is aware by now of the impact on its climate of burning fossil fuels - chiefly oil, coal and gas. When fossil fuels are burnt, they release carbon dioxide and other "greenhouse gases" - so called because they act like a greenhouse in the earth's atmosphere, trapping the sun's heat and causing global surface temperatures to rise. According to the United Nations Environment Programme ("UNEP") Production Gap Report 2023, p 3, close to 90% of global carbon dioxide emissions stem from burning fossil fuels.

2. The whole purpose of extracting fossil fuels is to make hydrocarbons available for combustion. It can therefore be said with virtual certainty that, once oil has been extracted from the ground, the carbon contained within it will sooner or later be released into the atmosphere as carbon dioxide and so will contribute to global warming. This is true even if only the net increase in greenhouse gas emissions is considered. Leaving oil in the ground in one place does not result in a corresponding increase in production elsewhere: see UNEP's 2019 Production Gap Report, p 50, which reported, based on studies using elasticities of supply and demand from the economics literature, that each barrel of oil left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term.

3. Before a developer is allowed to proceed with a project which is likely to have significant effects on the environment, legislation in the United Kingdom and many other countries requires an environmental impact assessment ("EIA") to be carried out. The object of an EIA is to ensure that the environmental impact of a project is exposed to public debate and considered in the decision-making process. The legislation does not prevent the competent authority from giving development consent for projects which will cause significant harm to the environment. But it aims to ensure that, if such consent is given, it is given with full knowledge of the environmental cost.

4. This appeal raises a question about whether the greenhouse gas ("GHG") emissions which will occur when oil extracted from an oil well, after being refined, is burnt as fuel must be included in the EIA required before development consent may be given for the extraction of the oil. The answer to this question depends on whether, for the purpose of the applicable legislation, the effect on climate measured by the GHG emissions that will occur upon combustion of the oil is an effect of the project on climate.

5. The competent authority, Surrey County Council, initially considered that the EIA for a project to extract oil for commercial purposes at a well site in Surrey should

include an assessment of the combustion emissions from the oil to be produced. The council advised the developer that its environmental statement describing the likely significant effects of the project on the environment should assess the effect of the project on climate and "should consider, in particular, the global warming potential of the oil and gas that would be produced by the proposed well site." But later the council changed its mind. It accepted as sufficient an environmental statement which assessed only direct releases of greenhouse gases at the project site over the lifetime of the project and contained no assessment of the impact on climate of the combustion of the oil. In consequence, no information about the combustion emissions was made available to the public or considered by the council before it granted development consent for the project.

6. The issue which this court must now decide is whether it was lawful for the council to restrict the scope of the EIA in this way. In defence of the council's decision to do so, two alternative arguments are made. First, it is said that as a matter of law the combustion emissions could not be regarded as environmental effects of the project within the meaning of the legislation. So the council was right to omit them from the EIA. Alternatively, it is said that whether the combustion emissions were effects of the project was a matter of evaluative judgment for the council. Hence the council's decision not to assess the combustion emissions can be challenged only on the limited grounds on which a court can review an exercise of discretion by a public authority. Here, it is argued, there is no proper ground for such a challenge.

7. I am not persuaded by either argument. It is agreed that the project under consideration involves the extraction of oil for commercial purposes for a period estimated at 20 years in quantities sufficient to make an EIA mandatory. It is also agreed that it is not merely likely, but inevitable, that the oil extracted will be sent to refineries and that the refined oil will eventually undergo combustion, which will produce GHG emissions. It is not disputed that these emissions, which can easily be quantified, will have a significant impact on climate. The only issue is whether the combustion emissions are effects of the project at all. It seems to me plain that they are.

8. Before explaining my reasons for so concluding, I must identify the applicable legislative provisions and say a little more about the factual and procedural background to this appeal.

2. The legislation

9. The legislation which the council had to apply was contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571). I will refer to these as "the 2017 Regulations". The 2017 Regulations are one of a number of UK statutory instruments designed to implement Directive 2011/92/EU of

the European Parliament and of the Council, as amended by Directive 2014/52/EU. I will refer to Directive 2011/92/EU, as amended, as "the EIA Directive" and to Directive 2014/52/EU as "the 2014 Directive".

10. We are concerned with the law as it stood in September 2019 when the council's decision to grant development consent for the project was taken. This was before the United Kingdom left the European Union. It is not suggested that the analysis of this case is affected by any changes made to English law as a result of Brexit.

11. The 2017 Regulations are to be interpreted in line with the EIA Directive which they were intended to implement. In these circumstances it is appropriate to focus directly on the provisions of the EIA Directive: see eg *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52; [2021] PTSR 190, para 136.

The EIA Directive

12. The principle underpinning the EIA Directive, as stated in recital (7), is that:

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out."

"Development consent" is defined in article 1 as "the decision of the competent authority or authorities which entitles the developer to proceed with the project." The term "project" is widely defined and specifically includes "the extraction of mineral resources."

13. The general obligation imposed by the EIA Directive is set out in article 2(1):

> "Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in article 4."

14. Certain projects - such as oil refineries, power stations and waste disposal installations among others - are regarded as inherently likely to have significant effects on the environment and therefore automatically require development consent and an EIA: see article 4(1). These projects are listed in Annex I. The list includes, at item 14:

> "Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 cubic metres/day in the case of gas."

It is agreed that the project here falls within this description. Development consent for the project and an EIA were therefore required.

15. As defined in article 1(2)(g) of the EIA Directive, "environmental impact assessment" is a process consisting of: (i) the preparation of an EIA report by the developer; (ii) the carrying out of consultations, including public consultation; (iii) the examination by the competent authority of the information received; (iv) a reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of its examination; and (v) the integration of this reasoned conclusion into any decisions taken by the competent authority.

16. Article 3(1) requires the EIA to "identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project" on various factors, which include "climate." Article 5(1) specifies information which the developer must provide in an EIA report where an EIA is required. This information includes "a description of the likely significant effects of the project on the environment" and any additional information specified in Annex IV relevant to the particular project or type of project in question: see article 5(1)(b) and (f). The information specified in Annex IV includes, at para 5, a "description of the likely significant effects of the project on the environment resulting from, inter alia":

> "…
>
> (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) …"

17. Annex IV, para 5, further stipulates:

> "The description of the likely significant effects on the factors specified in article 3(1) should cover the direct effects and any

> indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project."

Public Participation

18. One of the objects of the EIA Directive is to provide for public participation in environmental decision-making.

19. The European Union and the United Kingdom are both parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, known as "the Aarhus Convention", which was adopted in 1998 and ratified by the EU and the UK in 2005. As its full name indicates, this international agreement is designed to secure three rights in relation to environmental matters: a right of access to information, a right of public participation in decision-making, and a right of access to justice. The Aarhus Convention was itself partly based on Council Directive 85/337/EEC of 27 June 1985, which introduced the EIA procedure within the European Economic Community (as it was then called). That directive was amended after the Aarhus Convention came into force by Directive 2003/35/EC to implement obligations arising under the Aarhus Convention and was later codified in the EIA Directive. Recital (18) to the EIA Directive refers to the Aarhus Convention and recital (19) records that:

> "Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and wellbeing."

20. Obligations arising under the Aarhus Convention have been built into articles 6, 8 and 9 of the EIA Directive. Thus, article 6 imposes obligations on Member States to inform the public early in the decision-making procedure of various matters, which include details of the arrangements made for public participation in the process; to make available to the public concerned the information gathered where an EIA is required; and to give the public concerned early and effective opportunities to express comments and opinions before the decision on the request for development consent is taken. The "public concerned" is defined in article 1(2)(e) as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures" required by the EIA Directive and specifically includes NGOs promoting environmental protection. Article 8 of the EIA Directive requires the results of such public consultation to be "duly taken into account" in the decision-making procedure; and article 9(1) provides that the public must be promptly informed of the decision taken and of "the

main reasons and considerations on which the decision is based, including information about the public participation process."

21. The rationale underpinning these public participation requirements is expressed in recital (16) to the EIA Directive:

> "Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken."

Two important ideas are included within this rationale. First, public participation is necessary to increase the democratic legitimacy of decisions which affect the environment. Second, the public participation requirements serve an important educational function, contributing to public awareness of environmental issues. Guaranteeing rights of public participation in decision-making and promoting education of the public in environmental matters does not guarantee that greater priority will be given to protecting the environment. But the assumption is that it is likely to have that result, or at least that it is a prerequisite. You can only care about what you know about.

The 2014 amendments

22. As well as the provisions implementing the Aarhus Convention, it is relevant to note amendments to the EIA Directive made by the 2014 Directive. These included the incorporation in Annex IV of climate and GHG emissions as specific factors which must be addressed in the description of the likely significant effects of the project on the environment (see para 16 above).

23. The rationale for these amendments is explained in recitals (7) and (13) to the 2014 Directive. Recital (7) stated:

> "Over the last decade, environmental issues, such as … climate change … have become more important in policy making. They should therefore also constitute important elements in assessment and decision-making processes."

Recital (13) stated:

> "Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change."

24. Further background to the amendments appears from a proposal to amend the EIA Directive sent by the European Commission to the Council on 26 October 2012, accompanied by an impact assessment, and from *Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment* published by the Commission in 2013 ("the 2013 Guidance") in anticipation of the relevant amendments being made. These documents explain that, although the EIA Directive had previously included "climate" as a factor specified in article 3(1), experience had shown that climate change issues were not being adequately identified and assessed. One of the aims of the 2014 Directive was to change this, including by the incorporation of an explicit requirement to consider GHG emissions. The aim of the 2013 Guidance was to help Member States improve the way in which climate change (and biodiversity) issues were integrated into the EIA process.

The 2017 Regulations

25. The EIA Directive has been transposed into English law through a series of statutory instruments applicable to different types of project for which, under the EIA Directive, development consent and an EIA are required. There are separate statutory regimes for - to give just a few examples - projects related to forestry, harbour works, marine works, pipeline works, offshore petroleum works and nuclear reactor decommissioning works.

26. The regulations applicable to projects for offshore petroleum production in an amount exceeding 500 tonnes per day (and therefore falling within item 14 of Annex I to the EIA Directive) are the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (SI 1999/360). Under those regulations, the authority responsible for deciding whether to grant development consent and for carrying out an EIA when required is the Secretary of State.

27. In the case of projects for onshore petroleum production (and many other types of project), the United Kingdom has chosen to implement the EIA Directive through the town and country planning regime, by way of the 2017 Regulations. The responsibility for deciding whether to grant development consent and for carrying out an EIA when required is conferred by the 2017 Regulations on the "relevant planning authority" which is, broadly speaking, the body responsible for determining an application for planning permission for the development. Where the development involves the

extraction of oil or other minerals, this is the county council for the area in which it is proposed that the extraction will take place.

28. I pause to note that the EIA Directive did not oblige the UK to adopt this approach. Article 2(2) of the EIA Directive states that the EIA "may be integrated into the existing procedures for development consent to projects in the Member States" or into "other procedures or into procedures to be established to comply with the aims of [the] Directive." There is nothing in the EIA Directive which prevented the UK, if it thought necessary or fit, from establishing a national regime for decisions whether to give development consent for projects for onshore oil production - just as the UK has done in relation to projects for offshore oil production. I will return to this point when addressing a suggestion that, because the public authority responsible for granting development consent here is a county council, the EIA process cannot require an assessment of the combustion emissions, as such effects on climate are properly considered at a national level. A short answer is that this looks at the matter the wrong way round. If (which I do not accept) a county council cannot carry out EIAs for projects for onshore petroleum production that are adequate to comply with the aims of the EIA Directive, then a different procedure should be established - if necessary, at a national level - that will achieve such compliance.

29. Regulation 3 of the 2017 Regulations enacts the basic rule that:

> "The relevant planning authority, the Secretary of State or an inspector must not grant planning permission or subsequent consent for EIA development, unless an EIA has been carried out in respect of that development."

The definition of "EIA development" includes (subject to exemptions not relevant in this case) development of a description mentioned in Schedule 1 to the 2017 Regulations, which reproduces Annex I to the EIA Directive. It therefore encompasses the project for the extraction of oil which is the subject of this case.

30. The 2017 Regulations contain provisions which mirror the provisions of the EIA Directive referred to at paras 14-17 above. The EIA report which under article 5(1) of the EIA Directive the developer must prepare is referred to in the 2017 Regulations as an "environmental statement."

3. Factual background

The project

31. The relevant "EIA development" in this case is a project to expand oil production from a well site at Horse Hill near Horley in Surrey. The developer, a company called Horse Hill Developments Ltd, applied to Surrey County Council, as the relevant mineral planning authority, for planning permission to retain and extend the existing well site (comprising two wells) and drill four new wells, and to extract hydrocarbons from the six wells for commercial production. The plan was to carry out the project over 25 years in six phases, starting with construction works to modify the well site, drill the new wells and install facilities for exporting crude oil from the site, and ending with decommissioning and site restoration. The relevant phase is phase 4, which encompasses the extraction of oil from the wells over 20 years. It is estimated that over this period the total quantity of oil produced could be of the order of 3.3 million tonnes.

The scope of the environmental statement

32. The 2017 Regulations (in regulation 15, which implements article 5(2) of the EIA Directive) allow the developer, before making an application for planning permission for EIA development, to ask the relevant planning authority for a "scoping opinion" on the information to be provided in the environmental statement. There is nothing which prevents the planning authority from deciding to grant planning permission if the environmental statement does not conform to the scoping opinion. But there is an expectation that, where there is a scoping opinion, the environmental statement will be based on it. This is explicit in regulation 18(4), giving effect to article 5(1), which states that, where a scoping opinion has been issued, the environmental statement "must … be based" on that opinion.

33. In this case the developer requested, and the council issued, a scoping opinion. The scoping opinion said (in para 3.13) that "the indirect effects associated with the production and sale of fossil fuels which would likely be used in the generation of heat or power, consequently giving rise to carbon emissions, cannot be dismissed as insignificant." This led (in para 3.14) to the following recommendation:

> "Given the nature of the proposed development, which is concerned with the production of fossil fuels, the use of which will result in the introduction of additional greenhouse gases into the atmosphere, it is recommended that the submitted EIA include an assessment of the effect of the scheme on the climate. *That assessment should consider, in particular, the*

> *global warming potential of the oil and gas that would be produced by the proposed well site*."
> (emphasis added)

34. The developer did not comply with this recommendation. The environmental statement submitted by the developer contained no information about the global warming potential of the oil that would be produced by the proposed well site. The section dealing with "Greenhouse Gas Emissions and The Climate" stated that:

> "The scope of the assessment is confined to the direct releases of greenhouse gases from within the well site boundary resulting from the site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development."

35. The decision to restrict the scope of the assessment in this way was explained (in paras 121 and 122 of the environmental statement) on these grounds:

> "121. … The essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by facilities and process beyond the planning application boundary and outwith the control of the site operators.
>
> 122. The assessment methodology pays regard to national planning policy and guidance that establishes that decision-makers should 'focus on whether the development is an acceptable use of land, rather than on control of processes or emissions where these are subject to approval under pollution control regimes'. These non-planning regimes regulate hydrocarbon development and other downstream industrial processes and decision-makers can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm."

36. As I read these paragraphs (in agreement with Moylan LJ at para 116 of the Court of Appeal judgment), the developer was giving two, or possibly three, reasons for confining the scope of the assessment to "the direct releases of greenhouse gases from within the well site boundary" contrary to the council's scoping opinion. The first reason (or pair of reasons) was that it was unnecessary to assess GHG emissions resulting from the subsequent processing and use of the hydrocarbons beyond the well site boundary because such processes and use (a) were not part of the proposed

development and (b) were "outwith the control of the site operators." The other reason given (in para 122) was that the planning authority should not concern itself with GHG emissions that will occur "downstream" when the oil produced from the wells is processed and used because such processes are regulated by other, non-planning regimes, and the planning authority can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm.

The council's decision

37. The council accepted the developer's explanation for not preparing an environmental statement which complied with the scoping opinion. The environmental statement was reviewed by a council officer, Dr Jessica Salder. Her review noted (at para 5.15) that the assessment of the impact of the proposed development on GHG emissions and climate change was limited to "the direct greenhouse gas emissions" of the development and operation of the proposed well site and that "[t]he potential contribution of the hydrocarbons that would be produced over the lifetime of the well site is not covered." The review also noted that the reasons for excluding those emissions were set out in paras 121 and 122 of the environmental statement (quoted above) and said that the council accepted the justification given there for excluding consideration of the global warming potential of the produced hydrocarbons from the scope of the EIA process.

38. At a meeting on 11 September 2019, the council's planning and regulatory committee decided that planning permission should be granted for the project. The committee had sight of an officer's report which included consideration of the effect of the development on climate. But because of the council's acceptance of the approach taken in the developer's environmental statement, this report ignored the combustion emissions. This limitation in the scope of the EIA was recognised, even if only obliquely, in the conclusion (at para 97 of the report) that:

> "the proposed development would not give rise to significant impacts on the climate as a consequence of the emissions of greenhouse gases *directly* attributable to the implementation and operation of the scheme." (emphasis added)

The report said nothing about impacts on the climate as a consequence of GHG emissions *indirectly* attributable to the operation of the well site, as no assessment had been made of those indirect effects of the project.

4. Classifying GHG emissions

39. It is convenient at this stage to introduce some terminology which, although not used in the EIA Directive and 2017 Regulations, has become widely used in reporting GHG emissions and was used in the judgments of the Court of Appeal. The terminology derives from the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard (the "GHG Protocol"). This is a document published by the Greenhouse Gas Protocol Initiative, an international initiative involving businesses, NGOs, governments and others. Its aim is to develop internationally accepted GHG accounting and reporting standards for business and to promote their broad adoption.

40. The GHG Protocol classifies GHG emissions using three categories, labelled "scope 1", "scope 2" and "scope 3". Scope 1 emissions are defined as direct GHG emissions that occur from sources that are owned or controlled by an entity. Scope 2 emissions are a special category of indirect emissions. This category consists of GHG emissions from the generation of purchased electricity consumed by an entity. Scope 2 emissions occur at the facility where the electricity is generated. Scope 3 encompasses all other indirect emissions. Scope 3 emissions are consequences of the activities of the entity but (like scope 2 emissions) occur from sources not owned or controlled by the entity. Some examples of scope 3 activities given in the GHG Protocol (at p 25) are extraction and production of purchased materials, transportation of sold products, and use of sold products and services.

41. In November 2021 the International Financial Reporting Standards ("IFRS") Foundation announced the formation of the International Sustainability Standards Board. The Board's aim is to develop international standards for the disclosure of information related to sustainability. Sustainability is defined very broadly and includes direct and indirect effects of the entity's business on the environment. So far two standards have been issued: IFRS S1 and IFRS S2. IFRS S1 establishes general requirements for disclosure of sustainability-related financial information. IFRS S2 is concerned with disclosure of climate-related information. Among other information, IFRS S2 requires entities to disclose their absolute gross GHG emissions during the reporting period, classified as scope 1, scope 2 and scope 3 GHG emissions. Scope 3 GHG emissions are themselves required to be classified in 15 categories derived from the GHG Protocol. These categories include "downstream transportation and distribution", "processing of sold products" and "use of sold products".

42. The UK Government is currently consulting on whether to endorse IFRS S2 for use in the UK and, in particular, whether to introduce reporting requirements for UK companies which include an obligation to report their scope 3 GHG emissions: see "Scope 3 Emissions in the UK Reporting Landscape: A Call for Evidence" (October 2023).

43. Using the taxonomy adopted in the GHG Protocol Standard and IFRS S2, the council's decision to confine the scope of the assessment of GHG emissions to "the direct releases of greenhouse gases from within the well site boundary" (see para 37 above) meant that only scope 1 GHG emissions were assessed. That is, only direct GHG emissions from sources within the control of the developer / site operator were included in the EIA. No indirect GHG emissions resulting from the project but occurring from sources outside the control of the developer / site operator were assessed. As it happens, there were no relevant scope 2 GHG emissions. This is because the project was intended to generate its own electricity. There was therefore no plan to consume any purchased electricity generated at facilities elsewhere. So the GHG emissions from the generation of electricity used in the operation of the well site would all be scope 1 GHG emissions. The combustion emissions which are the centre of controversy here are scope 3 GHG emissions, as they are indirect GHG emissions not included in scope 2. Under IFRS S2 they fall within scope 3, category (11): emissions from the use of sold products.

5. These proceedings

The claim

44. The claimant, who lives near the site and represents an association called the Weald Action Group, has brought this claim for judicial review of the council's decision to grant planning permission for the project. Her primary ground of challenge (and the only one still relevant on this appeal) is that the council did not comply with the obligations imposed by the EIA Directive and the 2017 Regulations because, in carrying out the EIA required for the project, it failed to assess the combustion emissions that will result from the oil to be produced. There are three defendants to the claim, all of whom oppose it. They are the council, the developer and the Secretary of State for Levelling Up, Housing and Communities.

The High Court decision

45. In the High Court Holgate J dismissed the claim for reasons given in a characteristically clear and comprehensive judgment: [2020] EWHC 3566 (Admin); [2021] PTSR 1160. The judge found, at para 69, that it is impossible to say where the oil produced would be refined or used, and whether this would be in the United Kingdom or abroad. But the judge also made this important finding, at para 100, which is an agreed fact on this appeal:

> "… it is *inevitable* that oil produced from the site will be refined and, as an end product, will eventually undergo combustion, and that that combustion will produce GHG emissions." (emphasis added)

46. Even so, the judge concluded that assessment of the combustion emissions was, as a matter of law, incapable of falling within the scope of the EIA required by the 2017 Regulations: see para 126. Alternatively, if that was wrong and it was legally possible to take the view that the combustion emissions fell within the scope of the required EIA, the judge thought it impossible to say that the council's opinion that the combustion emissions were not indirect effects of the proposed development was irrational or otherwise unlawful: see paras 127, 132.

Decision of the Court of Appeal

47. The Court of Appeal, by a majority, affirmed the judge's decision, on the basis of his alternative reasoning: [2022] EWCA Civ 187; [2022] PTSR 958. The majority (Sir Keith Lindblom, Senior President of Tribunals, and Lewison LJ) did not agree with the judge that, as a matter of law, the combustion emissions were incapable of being regarded as effects on climate requiring assessment in the EIA. In their view, whether the combustion emissions are indirect effects of the extraction of the oil which therefore had to be assessed depends on whether there was a "sufficient causal connection" between the two, which they saw as a matter of fact and evaluative judgment for the council: see paras 43, 57, 60, 63, 141. The Senior President was satisfied that, in the circumstances of this case, the council had a reasonable and lawful basis for excluding the combustion emissions from the EIA: paras 60-66. Lewison LJ was more doubtful but ultimately concluded, "not without hesitation", that the reasons given by the council for its decision "just about pass muster": para 149.

48. Moylan LJ dissented. He agreed with the majority that whether the combustion emissions needed to be assessed was a matter to be determined by the council. But he considered that cogent reasons would be required to exclude those GHG emissions from assessment and that the reasons given by the council were legally flawed: paras 129-130.

This appeal

49. On this further appeal by the claimant, the parties' positions are as follows:

(i) The claimant contends that, on the proper interpretation of the legislation, the "effects of the project" on climate which the council needed to assess as part of the EIA included the combustion emissions.

(ii) Two of the defendants - the council and the Secretary of State - invite this court to endorse the analysis of the majority of the Court of Appeal (and alternative approach of the judge) that the council was entitled to decide, as a

matter of evaluative judgment, that the combustion emissions were not "effects of the project" on climate.

(iii) The developer submits (as its primary position) that the judge was right to hold that the combustion emissions cannot as a matter of law be regarded as "effects of the project" on climate.

50. With the court's permission, four interveners have also made written submissions. I have found particularly helpful submissions made by the Office for Environmental Protection. This is a public body established under section 22 of the Environment Act 2021 and sponsored by the Department for the Environment, Food and Rural Affairs. Its principal objective is to contribute to environmental protection and the improvement of the natural environment.

51. Two of the interveners, Friends of the Earth Ltd and Greenpeace UK, support the claimant's case. Another, West Cumbria Mining Ltd, supports the approach of the majority of the Court of Appeal. The submissions made by the Office for Environmental Protection do not take sides between the parties but explain the reasons for its concern that the decisions of the lower courts, if upheld, "could have an adverse effect on sound environmental decision making and hence on environmental protection and the improvement of the natural environment."

6. The issue

52. The overall issue in the appeal is whether, under the EIA Directive and the 2017 Regulations, it was lawful for the council not to include the combustion emissions in the EIA for the proposed project.

53. The council could not lawfully grant planning permission for the project unless an EIA had been carried out which complied with the obligation to "identify, describe and assess in an appropriate manner … the direct and indirect significant effects" of the project on (among other factors) "climate": see regulation 4(2), reflecting article 3(1) of the EIA Directive. If the significant effects of the project on climate include the combustion emissions, the council was therefore obliged to assess them as part of the EIA and its failure to do so renders the decision to grant planning permission unlawful. On the other hand, if (as the judge held) the combustion emissions were incapable as a matter of law of being regarded as "effects of the project" on climate within the meaning of the legislation, then the council was right not to assess them and its decision to grant planning permission was lawful. Its decision was also lawful if (as the majority of the Court of Appeal held) the question whether the combustion emissions are "effects of the project" on climate within the meaning of the legislation was a matter of

evaluative judgment for the council and the council's reasons for leaving the combustion emissions out of account were lawful.

7. The meaning and application of legislation

54. The approach taken by the Court of Appeal raises a question about the respective roles of the competent authority and the court when a dispute arises about whether the authority has correctly applied legislation to the facts of a particular case.

55. Interpreting the law, by establishing the meaning and legal effect of legislation, is the court's role. If a decision-making authority bases its decision on an interpretation of legislation which the court concludes was mistaken, then the authority makes an error of law and its decision is unlawful.

56. Interpreting a legislative provision requires the court to identify, from the language and purpose of the legislation, the criteria to be applied in deciding whether the facts of any individual case fall within its scope. These criteria may be so precise that, when applied to the facts of a given case, they rationally yield only one answer. But sometimes, as Lord Mustill pointed out in *R v Monopolies and Mergers Commission, Ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, 32, the criteria are sufficiently imprecise that there is room for different decision-makers, each acting rationally, to reach different answers. In such a case the court will not interfere with the decision taken unless it is "irrational" in the sense either that it is outside the range of reasonable decisions open to the decision-maker or that there is a demonstrable flaw in the reasoning which led to the decision. Examples of such a flaw would be that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error: see eg *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649, para 98.

57. The question in *South Yorkshire Transport* was whether, for the purpose of particular competition legislation, an area of South Yorkshire in which a transport company was providing bus services constituted "a substantial part of the United Kingdom." The House of Lords held that, even after eliminating inappropriate senses of the term "substantial", the meaning was broad enough to call for an exercise of judgment and that the conclusion arrived at by the decision-maker was well within the "permissible field of judgment."

58. The term "substantial" is intrinsically vague because, in the absence of some further, more precise criterion, there will be cases in which the question whether the term applies has no answer on which reasonable people who understand the meaning of the term could all be expected to agree. The same is true of the term "significant" which

is used in article 3(1) and other provisions of the EIA Directive. Deciding whether an effect of a project on the environment is "significant" clearly requires a value judgment and carries the potential for cases to arise in which different decision-makers may legitimately reach different conclusions without it being possible to say that any of them has made an error in interpreting or applying the term.

59. The concept of "the effects of a project" on the environment is not - or at least not obviously - vague in this way. One might think that whether a particular environmental impact is or is not an effect of the project is a question which, in principle, admits of only one answer. In my view, in the great majority of cases that impression is indeed correct. I think it is true here. But it will be necessary to consider the contrary view taken by the Court of Appeal that whether something is an "effect of the project" is a matter of degree which requires the decision-making authority to evaluate whether there is a "sufficient causal connection" between the project and the putative effect. The concept of a "sufficient causal connection" is intrinsically vague. If no more precise criterion can be identified, it would leave a wide range of cases in which the question whether a particular environmental impact is or is not an "effect of the project" has no single right or wrong answer.

60. As an initial comment, this would be a very unsatisfactory state of affairs. It would mean that in cases of the present kind there would be no consistency, or means of ensuring consistency, between decisions made by different planning authorities when faced with similar issues, or even between decisions made by the same authority on different occasions in relation to similar projects. That would be all the more regrettable when issues relating to climate change and the extent to which disclosure of information about GHG emissions should be required are becoming more and more salient in policy-making and public debate. To treat inconsistent approaches to questions of whether and when direct or indirect GHG emissions should be included in EIAs as equally valid would be a form of arbitrary administration. The fact that the interpretation of the EIA Directive favoured by the Court of Appeal would have such an unreasonable result is itself a good reason to reject it.

8. Interpreting the EIA Directive

61. In interpreting the EIA Directive, certain core principles are not in dispute. To determine what is meant by the "direct and indirect … effects of a project", it is necessary to examine the language and in particular the purpose of the EIA Directive: *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, 401. The Court of Justice of the European Union ("CJEU") has repeatedly emphasised that the EIA Directive is wide in scope and its purpose very broad: see eg *Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1997] All ER (EC) 134, para 31; *World Wildlife Fund (WWF) v Autonome Provinz Bozen* (Case C-435/97) [1999] ECR I-5613, para 40; *Abraham v Wallonia* (Case C-2/07) [2008] Env

LR 32, paras 32 and 42. Concisely stated, that purpose is to ensure that decisions whether to give development consent for projects which may affect the environment are made on the basis of full information: *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, 404; *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 615.

62. It is also important to keep in mind that the legislation is essentially procedural in nature. It is not concerned with the substance of the decision whether to grant development consent but with how the decision is taken. Thus, as the House of Lords held in *Berkeley*, it is no answer to a challenge based on failure to carry out an EIA that complies with the EIA Directive to say that complying with the EIA Directive would not have affected the decision. It is essential to the validity of the decision that, before it is made, there has been a systematic and comprehensive assessment of the likely significant effects of the project on the environment in accordance with the EIA Directive. As well explained by one writer on the subject:

> "EIA is not a procedure for preventing actions with significant environmental impacts from being implemented, although in certain circumstances this could be the appropriate outcome of the process. Rather the intention is that actions are authorised in the full knowledge of their environmental consequences."

See Christopher Wood, Environmental Impact Assessment: A Comparative Review, 2nd ed (2002), p 3.

63. As noted earlier, public participation is also integral to the process of assessment. This was also emphasised in *Berkeley*, where Lord Hoffmann stated, at p 615:

> "The directly enforceable right of the citizen which is accorded by the [EIA] Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues."

64. With these principles in mind, I turn to the key question of what, on the proper interpretation of the EIA Directive, is meant by the "direct and indirect … effects of a project" on the factors specified in article 3(1) - and, in particular, on "climate" - which the EIA is required to identify, describe and assess.

9. What are "effects of a project"?

65. What are or are not "effects of a project" is, to state the obvious, a question of causation. An effect is the obverse of a cause.

Causation in fact

66. Whether one event or state of affairs (Y) is an effect of another event or state of affairs (X) - or, to say the same thing the other way round, whether X is a cause of Y - is in the first place a question of fact. To determine whether two events are causally connected, we apply scientific knowledge, understanding of human behaviour and other knowledge about the world. Such knowledge may of course increase as new research is undertaken and new discoveries are made. Understanding of climate change is a good illustration. Until quite recently it was uncertain and controversial whether global temperatures have been rising as a result of human activities. But there is now overwhelming scientific proof of this phenomenon demonstrating the past, present and likely future effects on climate of, among other human activities, burning fossil fuels to generate energy.

Causation in law

67. Establishing that, as a matter of fact, there is a causal relationship between events X and Y, does not by itself answer the question whether, as a matter of law, X is to be regarded as a cause of Y (and Y as an effect of X). To answer that question, it is necessary to understand the purpose for which the question is being asked: see eg *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 29-31.

68. Depending on the context, various tests of causation may be applied, some more demanding than others. A test often used at least as a minimum requirement is whether X is a necessary condition for the occurrence of Y. This is known by lawyers as the "but for" test because one simple way of expressing it is to ask: would event Y have occurred but for the occurrence of event X? The "but for" test is generally seen as a weak test of causation because, in any given situation, many events (or states of affairs) will satisfy the "but for" test which would not usually be regarded as causes of the event under consideration: see eg *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2021] AC 649, para 181.

69. The strongest possible test of causation, which is seldom satisfied when questions of causation arise in law, requires the occurrence of event X to be both a necessary and sufficient condition for the occurrence of Y. If X is a sufficient cause of

Y, then every time X happens Y will always follow. This is the kind of unbreakable connection that exists, for example, where laws of physics, such as Newton's laws of motion, operate.

70. An example of a test not as strong as this but much stronger than the "but for" test is the interpretation placed on pollution control legislation in the *Environment Agency* case mentioned earlier. The legislation made it an offence to cause polluting matter to enter controlled waters. Diesel oil stored in a tank in the defendant's yard had overflowed into a river but only because an outlet tap without a lock had been turned on by a person unknown. The question was whether the defendant had caused the oil to enter the river. The House of Lords held that the criterion for identifying which intervening acts and events negative causal connection for this purpose was whether the intervening act or event was a matter of ordinary occurrence or was something extraordinary. If, as on the facts of that case, the third party act which was the immediate cause of the pollution was a matter of ordinary occurrence, it should not be regarded as negativing the causal effect of the defendant's acts. The proper conclusion would therefore be that the defendant had caused the polluting matter to enter the river.

71. A similar test applies in insurance law where, unless the insurance policy otherwise provides, the insurer is liable only for losses "proximately" caused by a peril insured against. As explained in *Financial Conduct Authority v Arch Insurance*, paras 164-168, the term "proximate" means "real or efficient" and whether the occurrence of an insured peril was the proximate (or efficient) cause of the loss involves making a judgment as to whether it made the loss inevitable - if not, which could seldom if ever be said, in all conceivable circumstances - then in the ordinary course of events. For this purpose, human actions are not generally regarded as negativing causal connection, provided at least that those actions were not wholly unreasonable or erratic.

Predicting likely effects

72. Typically, when questions of causation arise in law the inquiry involves looking backwards to determine whether one past event caused another past event. In determining the required scope of an EIA, however, the inquiry is forward-looking. The question is: on the assumption that the project goes ahead, what possible future effects on the environment will constitute "effects of the project" which (if significant) must therefore be assessed? The EIA Directive answers that question by imposing the test of whether the effect is "likely". Thus, article 5(1)(b) requires the information provided by the developer to include "a description of the *likely* significant effects of the project on the environment" (emphasis added) and Annex IV further specifies what this obligation involves.

73. The term "likely" can bear more than one meaning. It can mean "more probable than not", or it may connote some other (lesser or greater) degree of probability. A guide provided by the Intergovernmental Panel on Climate Change, quoted with approval by the European Commission in its 2013 Guidance at p 40, equates the term "likely" with a probability of between 66% and 100%. Arguably, this is too strict a standard. But, as I will soon discuss, there is no need to express any view on this question to decide this case.

74. Whatever the precise meaning of the term, to determine that a potential effect is "likely" requires evidence on which to base such a determination. If evidence is lacking so that a possible future occurrence is a matter of speculation or conjecture, then a rational person would not feel able to judge that it is "likely". Such agnosticism is not the same as judging the event to be unlikely. It reflects a belief that there is too little knowledge on which to base a judgment.

75. The need for sufficient evidence on which to base an assessment is not spelt out as a requirement in the EIA Directive. But it can be deduced from the description and purpose of the EIA procedure. As set out in article 1(2)(g), stage (iv) of that procedure - which follows (i) the preparation of the environmental statement by the developer, (ii) the carrying out of consultations, and (iii) the examination by the competent authority of the information received - is:

> "[a] reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of [its] examination;"

76. The initial, information gathering stages of the process, including the preparation of the environmental statement, are thus directed towards the ability to reach a reasoned conclusion on the significant effects of the project on the environment. This is confirmed in article 5(1), which provides that the environmental statement shall "include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment." Similarly, article 5(3)(c) provides that, "where necessary, the competent authority shall seek from the developer supplementary information, in accordance with Annex IV, which is directly relevant to reaching [a] reasoned conclusion on the significant effects of the project on the environment."

77. Implicit in these provisions, and in the aims of the EIA Directive, is the criterion that material should be included in the environmental statement and taken into account in the procedure only if it is information on which a reasoned conclusion could properly be based. Conjecture and speculation have no place in the EIA process. Thus, if there is

insufficient evidence available to found a reasoned conclusion that a possible environmental effect is "likely", there is no requirement to identify, describe and try to assess this putative effect. This criterion must also govern, where a possible effect is regarded as "likely", the nature and extent of the assessment of the effect.

78. There is here an area of evaluative judgment involved in determining the scope of an EIA. Judging whether a possible effect of a project is likely and capable of assessment may, depending on the circumstances, be a matter on which different decision-makers, each acting rationally, may take different views.

Causation in this case

79. In this case there is no uncertainty about the relevant facts. It is known with certainty that the extraction of oil at the proposed well site in Surrey - which is the activity giving rise to the requirement to carry out an EIA - would initiate a causal chain that would lead to the combustion of the oil and release of greenhouse gases into the atmosphere. It is not necessary to consider what is meant by "likely" because it is an agreed fact that, if the project goes ahead, this chain of events and the resulting effects on climate are not merely likely but inevitable.

80. Expressed in terms of necessary and sufficient conditions, this is not simply a case in which the "but for" test is satisfied in that, but for the extraction of the oil, the oil would stay in the ground and so would not be burnt as fuel. On the agreed facts, the extraction of the oil is not just a necessary condition of burning it as fuel; it is also sufficient to bring about that result because it is agreed that extracting the oil from the ground guarantees that it will be refined and burnt as fuel. As discussed above, a situation where X is both necessary and sufficient to bring about Y is the strongest possible form of causal connection - much stronger than is required as a test of causation for most legal purposes.

81. It is also common ground that general estimates of combustion emissions can be made using methodology such as that described in guidance issued by the Institute of Environmental Management and Assessment. Estimating the combustion emissions which will occur if the project proceeds is not a difficult task. It could easily have been performed by the developer and has in fact been performed by Dr Jessica Salder, the council officer who reviewed the environmental statement, when she made a witness statement in these proceedings. All that is required is to identify from published sources a suitable "conversion factor" - which is the estimated amount of carbon dioxide emitted upon combustion of each tonne of oil produced. The total estimated quantity of oil to be produced is then multiplied by this conversion factor to calculate the total combustion emissions. In her evidence Dr Salder used a conversion factor of 3.22 tonnes of carbon dioxide for each tonne of oil produced. Multiplying the total estimated

output from the proposed project of 3.3 million tonnes of oil (see para 31 above) by this factor gives an estimated total of 10.6 million tonnes of CO_2 emissions over the lifetime of the project.

82. It is instructive to compare the amount of these emissions with the "direct" GHG emissions at the well site over the lifetime of the project which were included in the environmental statement. The estimated amount of the "direct" GHG emissions was 140,958 tonnes of CO_2. As well as providing this figure, the developer calculated the proportion which this figure would represent of the total UK carbon budget. Based on this calculation, the environmental statement described the effects of the proposed development on climate as "negligible". Had the combustion emissions been included in the assessment, the figure for GHG emissions attributable to the project would have been nearly two orders of magnitude greater and could not have been dismissed as "negligible" in that way.

Direct and indirect effects

83. Article 3(1) of the EIA Directive requires the EIA to assess both the "direct and indirect" effects of a project on the specified environmental factors, one of which is climate. The express requirement to assess indirect as well as direct effects is clearly intended to emphasise the wide causal reach of the required assessment. This is further emphasised by the stipulation in Annex IV, para 5, that the description of the likely significant effects on the factors specified in article 3(1) should cover both the direct effects and "any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project." It would be hard to devise broader wording than this.

84. From one point of view the distinction between "direct" and "indirect" effects does not matter, as both types of effect must be assessed in the EIA process. There is still, I think, some value in considering what these terms mean. No case law has been cited which has sought to define "direct" and "indirect" effects. A natural way to understand the distinction - and how it is commonly used in social sciences - is to define a direct effect of one event on another event as an effect which is not mediated by one or more variables. An indirect effect, by contrast, is one which depends on one or more variable intermediate factors that may alter the total effect observed: see eg J Pearl, "Direct and indirect effects" in Proceedings of the American Statistical Association, Joint Statistical Meetings (2005), pp 1572–1581.

85. On this definition combustion emissions are direct effects of the extraction of oil because they are almost entirely independent of any intermediate variables. To know that combustion emissions will occur and quantify them, there is no need to know anything about where the oil will go after it is extracted or what the oil will be used for

or when or where it will be burnt. It is sufficient to know - as is known with virtual certainty - that the oil will be refined and ultimately used as fuel. There are no variables in the intervening events which will significantly alter the fact or amount of the combustion emissions or their impact on climate. So on this definition the combustion emissions are a direct effect of the activity of extracting the oil.

86. An alternative approach is to draw the distinction by reference to the immediate source of the impact. This approach gets some support from guidance issued by the European Commission. In May 1999 the European Commission published *Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions*. These Guidelines were said to be intended for use by EIA practitioners and developers and to be designed to apply to a wide range of projects and to assist in the EIA process throughout Member States.

87. After observing that there are no agreed and accepted definitions, the Guidelines define "indirect impacts" as:

> "Impacts on the environment, which are not a direct result of the project, often produced away from or as a result of a complex pathway. Sometimes referred to as second or third level impacts, or secondary impacts."

This definition offers little assistance beyond spelling out that, as might be thought obvious, indirect effects can be and often are produced away from the site of the project.

88. Somewhat more useful are the definitions given in the 2013 Guidance referred to at para 24 above. This defines "direct effects" as:

> "Environmental effects directly caused by the preparation, construction or operation of a project in a particular location." (p 6)

"Indirect effects/impacts" are defined as:

> "Effects/impacts that occur away from the immediate location or timing of the proposed action, eg quarrying of aggregates elsewhere in the country as a result of a new road proposal, or as a consequence of the operation of the project (see also secondary effects)." (p 7)

The definition of "secondary effects", to which cross-reference is made, is:

> "Effects that occur as a consequence of a primary effect or as a result of a complex pathway." (p 8)

89. When applied to GHG emissions, these definitions distinguish between those which are "direct" and "indirect" effects in much the same way as the GHG Protocol and IFRS S2. As noted earlier, those standards define direct GHG emissions (labelled "scope 1") as GHG emissions that occur from sources that are owned or controlled by an entity. Indirect GHG emissions (ie scope 2 and 3) are defined as GHG emissions that are a consequence of the activities of an entity but occur at sources owned or controlled by another entity.

90. On these definitions the combustion emissions are indirect effects of the project, as they will occur, probably far away from the project site, at sources owned or controlled by entities other than the developer / site operator. They are like impacts from the quarrying of aggregates in the illustration given by the Commission in defining "indirect effects." If the quarrying of aggregates used in building a new road would be likely to generate significant GHG emissions, the Commission contemplates, correctly in my view, that these would be indirect effects of the project which, if significant, must therefore be assessed. I can see no reason why combustion emissions that will occur elsewhere as a consequence of the operation of a project to extract oil should be regarded differently.

91. The 2013 Guidance, at p 29, also provides a table of "examples of main climate change and biodiversity concerns to consider as part of EIA." Under the heading "climate change mitigation" the table lists: "direct GHG emissions"; "indirect GHG emissions due to increased demand for energy"; and "indirect GHG emissions caused by any supporting activities or infrastructure that is directly linked to the implementation of the proposed project (eg transport …)." In the terminology of the GHG Protocol and IFRS S2, the first of these categories corresponds broadly to scope 1 GHG emissions, the second to scope 2 GHG emissions, and the third to certain types of scope 3 GHG emissions.

92. Doubtless the categories given as examples were chosen because they are likely to be relevant to many different types of project - unlike combustion emissions which arise as a consequence of projects for the extraction of fossil fuels. But there is no suggestion that the categories stated as examples are considered to be exhaustive of the circumstances in which GHG emissions can occur as indirect effects of a project. To the contrary, the 2013 Guidance states expressly that they are examples only, that the list "is not comprehensive", that "the issues and impacts relevant to a particular EIA should be defined by the specific context of each project", that "flexibility is therefore needed",

and that the table provided "should be used only as a starting point for discussion." The examples given therefore cannot be read as somehow cutting down the definition of "indirect effects" given earlier in the 2013 Guidance. Applying that definition, the combustion emissions are "indirect effects" of the project in issue here.

Transboundary effects

93. It is worth emphasising that the EIA Directive does not impose any geographical limit on the scope of the environmental effects of a project which must be identified, described and assessed when an EIA is required. In principle, all likely significant effects of the project must be assessed, irrespective of where (or when) those effects will be generated or felt. There is no justification for limiting the scope of the assessment to effects which are expected to occur at or near the site of the project. The fact that an environmental impact will occur or have its immediate source at a location away from the project site is not a reason to exclude it from assessment. There is no principle that, if environmental harm is exported, it may be ignored.

94. That is no less true if the effect will be produced or felt outside the territorial jurisdiction of the state (here, the UK) whose national law requires the EIA to be carried out. If there were otherwise any doubt about this, it is removed by the express inclusion in Annex IV, para 5, of "transboundary" effects in the description of the likely significant effects on the factors specified in article 3(1) which should be covered (see para 83 above).

95. The developer in the present case advanced an argument that the express requirement to assess "transboundary" effects actually tells in favour of a narrow interpretation of the scope of the effects on climate which are to be assessed. This paradoxical claim makes no more sense on analysis than it does at first sight. The argument is based on article 7 of the EIA Directive. Article 7 applies where a Member State is aware that a project intended to be carried out in one Member State is likely to have significant effects on the environment in another Member State. In such a case the Member State in whose territory the project is intended to be carried out must give the other Member State an opportunity to participate in the environmental decision-making procedures. Article 7 also requires the Member States concerned to enter into consultations regarding the potential transboundary effects of the project. The argument made is that it cannot sensibly have been intended that the article 7 procedure should have to be invoked in any case where a project is likely to give rise to "downstream" GHG emissions in another Member State.

96. Plainly it would be impossibly burdensome if, for example, in relation to the present project it were necessary to give every Member State of the European Union an opportunity to participate in the environmental decision-making procedures on the

footing that oil produced from the well site might find its way into that country and generate GHG emissions when used as fuel. But that is a false fear. There is no risk of such an obligation arising, for two reasons. First, there is no way of knowing where the oil produced from the well site will ultimately be used as fuel. There is therefore no foreign state of which it can be said (on anything more than speculation) that the oil is likely to be consumed there. Second, and more fundamentally, it is wrong in any event to treat the impact on climate of GHG emissions as local to the places where the combustion occurs.

97. Climate change is a global problem precisely because there is no correlation between where GHGs are released and where climate change is felt. Wherever GHG emissions occur, they contribute to global warming. This is also why the relevance of GHG emissions caused by a project does not depend on where the combustion takes place. If an activity is carried on which will inevitably result in significant GHG emissions, people who carry on the activity cannot be heard to say: "These emissions are not effects of our activity because they are occurring far away among people of whom we know nothing."

98. On a proper interpretation, the obligations set out in article 7 of the EIA Directive are not triggered by awareness that, as a consequence of a project intended to be carried out in one Member State, GHG emissions are likely to occur in another Member State. To avoid absurdity, the reference in article 7(1) to "effects on the environment in another Member State" must be read as meaning effects on the environment which are specific to that other Member State rather than purely global effects that affect the whole world. Thus effects on climate of GHG emissions occurring in one state as a consequence of a project undertaken in another state do not fall within article 7.

99. This conclusion is reinforced by the 1991 UN Convention on Environmental Impact Assessment in a Transboundary Context (known as the "Espoo Convention"), to which - as recital (15) of the EIA Directive confirms - article 7 is intended to give effect. Article 1(8) of the Espoo Convention defines a "transboundary impact" to mean "any impact, *not exclusively of a global nature*, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party" (emphasis added). The EIA Directive does not itself define a "transboundary impact" or "transboundary effect", but it is reasonable to interpret these terms where they are used in the EIA Directive as having a similar meaning to their meaning in the Espoo Convention.

100. The fact that the combustion emissions from the oil produced are likely to occur outside the UK therefore does not give rise to any requirement to invoke the article 7 procedure. As the effects of GHG emissions on the environment are exclusively of a global nature, they are not "transboundary effects" which engage obligations of

consultation between the nation in which the oil is produced and the nation(s) in which its combustion occurs.

10. The council's approach

101. Coming now to the EIA carried out in this case, the legal error made as regards the scope of the assessment is apparent on the face of the relevant reports. The environmental statement explained that the developer had confined its assessment of GHG emissions to the "direct releases of greenhouse gases from within the well site boundary." Admittedly, therefore, the developer chose to provide information only about the direct effects of the project on climate and to exclude indirect effects, contrary to the express requirement in the EIA Directive and 2017 Regulations that indirect effects must be included. The council accepted and adopted this approach. As a result, the officer's report on which the council's decision to grant development consent was based advised that the proposed development would not give rise to significant effects on the climate by way of GHG emissions "directly attributable" to the operation of the scheme. GHG emissions indirectly caused by the project were not considered. Again, therefore, the scope of the assessment self-evidently did not comply with the legal requirement to assess both direct and indirect effects of the proposed development.

Effects "outwith the control" of the site operators

102. The flaws in the reasons given by the developer and accepted by the council for limiting the scope of the assessment in this way are also in my view plain. The fact that the combustion emissions would emanate from activities beyond the well site boundary which were not themselves part of the project was not a valid reason to exclude them. An impact is not precluded from being an effect of a project by the fact that its immediate source is another activity that occurs away from the project site. As already discussed, it is in the very nature of "indirect" effects that they may occur as a result of a complex pathway involving intermediate activities away from the place where the project is located.

103. The associated reason given that GHG emissions beyond the well site boundary are "outwith the control of the site operators" (see para 36 above) was equally flawed. The combustion emissions are manifestly not outwith the control of the site operators. They are entirely within their control. If no oil is extracted, no combustion emissions will occur. Conversely, any extraction of oil by the site operators will in due course result in GHG emissions upon its inevitable combustion. It is true that the time and place at which the combustion takes place are not within the control of the site operators. But the effect of the combustion emissions on climate does not depend on when or where the combustion takes place. Those factors are irrelevant to the size and significance of the environmental impact.

104. One potential benefit of the EIA process is that it may sometimes result in the identification of ways in which the design of the project can be modified without undue detriment to its aims so as to avoid or reduce what would otherwise have been a significant adverse environmental effect of the project. The EIA Directive contains provisions specifically aimed at this. Thus, article 5(1)(c) states that the information provided by the developer in the environmental statement must include "a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment"; see also Annex IV, para 7. And where development consent is granted, the decision to grant it must incorporate "a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment": see article 8a(1)(b). Member States must ensure that any such features or measures are implemented by the developer: article 8a(4).

105. In the case of oil extraction, there are no measures within the control of the developer which, if the project proceeds, would avoid or reduce the combustion emissions and their impact on climate. But that is not a reason to dispense with an EIA. Identifying mitigating measures, where they are available, may be a valuable result of the EIA process. But it is not its sole - or even its main - purpose. If there are no measures which could be taken to mitigate adverse environmental effects of a project, then this is itself something the decision-maker and the public need to know. The EIA process would not fulfil its essential purpose of ensuring that decisions likely to affect the environment are made on the basis of full information if the fact that significant adverse effects are unavoidable were treated as a reason not to identify and assess them.

Other environmental regimes

106. The further reason given by the developer and accepted by the council for confining the assessment to direct GHG emissions from sources within the well site boundary was that the council should not concern itself with emissions that will occur "downstream" when the oil produced from the wells is processed and used because such processes are regulated by other, non-planning regimes and the council "can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm" (see para 36 above).

107. Para 122 of the developer's environmental statement, which made this argument, quoted from the National Planning Policy Framework (July 2018), para 183, which stated:

> "The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these

> are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. …"

Reference was also made in footnotes to para 122 to the National Planning Practice Guidance, Minerals, para 012, which was in similar terms, and to *R (Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin). This case was cited for the proposition that a "local planning authority may consider that matters of regulatory control can be left to a statutory regulatory authority to consider."

108. It was a clear legal error to regard this aspect of planning policy as a justification for limiting the scope of an EIA. An assumption made for planning purposes that non-planning regimes will operate effectively to avoid or mitigate significant environmental effects does not remove the obligation to identify and assess in the EIA the effects which the planning authority is assuming will be avoided or mitigated. This is clear from a line of authority referred to in the *Frack Free Balcombe Residents Association* case. In *R (Lebus) v South Cambridgeshire District Council* [2002] EWHC 2009 (Admin); [2003] Env LR 17, paras 41-46, Sullivan J held that it is an error of law to reason that no environmental statement is needed because, although a project would otherwise have significant effects on the environment, mitigation measures will render them insignificant. What is required in such a case is an environmental statement setting out the likely significant effects and the measures which can be taken to mitigate them; see also *R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710, paras 49-51. The same principle must apply in determining the scope of the assessment required where an environmental statement is carried out.

109. As pointed out in those cases, the requirement in the EIA Directive to describe "measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment" (see para 104 above) implies that the potentially significant environmental impacts of a development should be described together with the measures expected to avoid or reduce them. The public is thereby able to understand the assumption made and to comment on it.

110. In any case it does not appear that there are any separate pollution control or other non-planning regimes which could be relied on to avoid or reduce the combustion emissions which would be indirect effects of the project proposed here. No such regimes have been identified in these proceedings. Indeed, it follows from the agreed fact that it is inevitable that oil produced from the well site will be refined and will eventually undergo combustion, which will produce GHG emissions, that the combustion emissions are unavoidable if the project proceeds and no pollution control regime could be relied on to prevent or reduce them.

111. The reasons accepted by the council for excluding the combustion emissions from consideration and assessing only direct GHG emissions from within the well site boundary are therefore demonstrably flawed. Unless there is some other reason not given in the environmental statement or the council's review of it which required the EIA to exclude the combustion emissions, it follows that the council's decision was unlawful.

11. The judge's approach

112. Although the Court of Appeal did not think that there was any such reason, the judge did. I will therefore consider next the judge's view that assessment of the combustion emissions was, as a matter of law, incapable of falling within the scope of the EIA required by the legislation. As discussed earlier, to justify that conclusion, it would be necessary through interpretation of the EIA Directive and the 2017 Regulations to identify a criterion governing the scope of the EIA which, when applied, dictates - without any room for reasonable differences of opinion - that the combustion emissions are not likely effects of the project on climate.

113. What might that criterion be? The judge's reason for his conclusion was expressed in this passage (at para 126) of his judgment:

> "In my judgment the scope of that obligation [ie the obligation to assess the environmental effects of the project] does not include the environmental effects of consumers using (in locations which are unknown and unrelated to the development site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed. I therefore conclude that, in the circumstances of this case, the assessment of GHG emissions from the future combustion of refined oil products said to emanate from the development site was, as a matter of law, incapable of falling within the scope of the EIA required by the 2017 Regulations …"

114. This reasoning needs to be unpicked. One point made, although only parenthetically, is that the combustion emissions will occur in "locations which are unknown and unrelated to the development site." In so far as the judge relied on this fact, I have already pointed out its irrelevance. The effect of the combustion emissions on climate does not depend on where they occur, and it is thus unnecessary to know where the emissions will occur to assess their environmental impact. There is therefore no justification for restricting the scope of the assessment to GHG emissions occurring at known locations at or related to the development site. To the contrary, such a

restriction is inconsistent with the language and purpose of the EIA Directive and the 2017 Regulations.

115. I do not, however, perceive the judge's reference to the locations where the combustion emissions will occur as essential to his reasoning. I understand his central point to be that the source of the emissions will not be use of the oil in the state in which it is extracted from the ground but the use of "an end product which will be made in a separate facility from materials to be supplied from the development." Hence the fact that the oil will undergo an intermediate process of being refined in a separate facility before it is burnt as fuel is seen as pivotal. This is what, in the judge's view, entails that the combustion emissions are incapable as a matter of law of being effects of the project within the meaning of the legislation.

116. This view also has the support of the Court of Session (Inner House) in *Greenpeace Ltd v Advocate General* [2021] CSIH 53; 2021 SLT 1303, para 65, which in obiter dicta agreed with Holgate J's reasoning and conclusion that the effects of the project do not include effects of "the consumption of any retailed product ultimately emerging as a result of a refinement of the raw material."

The relevance of refinement

117. This is also the position which the developer seeks to defend on this appeal. Counsel for the developer submitted that the combustion emissions cannot be regarded as effects of the project because the crude oil produced from the well site could not itself be used as fuel. What results in the combustion of the oil, so it was argued, is the separate activity of manufacturing fuel products at a refinery. Crude oil refineries are projects which themselves require development consent and an EIA (at least if they are situated in the UK or the European Union). Mr David Elvin KC for the developer expressly accepted that, in carrying out an EIA for a refinery, it would be necessary to assess the combustion emissions from the refined oil because they would be effects of the activity of refining the crude oil. But he submitted that these emissions cannot, in law, be regarded as effects of the activity of extracting the crude oil because of the need for this intermediate refining process to take place before the oil can be used.

118. I cannot accept that the existence of this intermediate process has the legal significance contended for by the developer and attributed to it by the judge. The process of refining crude oil does not alter the basic nature and intended use of the commodity. Given that the process of refining the oil is one which it is always expected and intended that the oil will undergo - and which it is agreed that the oil produced here will inevitably undergo - it is unreasonable to regard it as breaking the causal connection between the extraction of the oil and its use.

119. The judge was clearly concerned that, if it were to be accepted that combustion emissions are environmental effects of the extraction of the oil, then this would have "ramifications far beyond the legal merits of the present challenge as they relate to the production of crude oil" (para 4). The judge drew a comparison with the production of other minerals and raw materials for use in industrial processes. He observed that, for example, the production of metals, followed by their use to manufacture parts for motor vehicles and the assembly of such vehicles, will result in GHG emissions from the cars, vans and lorries when they are eventually purchased and driven (para 4). The judge also gave an example of a factory that manufactures components for use in the construction of aircraft. He observed that such manufacture will result in GHG emissions, not just from the industrial processes involved but ultimately from the fuel burnt when the aircraft are used for aviation (para 5). Holgate J was clearly worried that, if all the GHG emissions generated from these activities had to be assessed, the EIA process would be unduly onerous and unworkable.

120. In my view, this concern was misplaced. Recognising that combustion emissions are effects of producing crude oil does not open floodgates in the way the judge feared. There are sound reasons for distinguishing examples of the kind he gave, without resorting to the artificial notion that refining crude oil transforms it into something fundamentally different and so breaks the chain of causation between the extraction of the oil and its use.

121. Oil is a very different commodity from, say, iron or steel, which have many possible uses and can be incorporated into many different types of end product used for all sorts of different purposes. In the case of a facility to manufacture steel, it could reasonably be said that environmental effects of the use of products which the steel will be used to make are not effects of manufacturing the steel. That is because the manufacture of the steel is far from being sufficient to bring about those effects. Such effects will depend on innumerable decisions made "downstream" about how the steel is used and how products made from the steel are used. This indeterminacy regarding future use would also make it impossible to identify any such effects as "likely" or to make any meaningful assessment of them at the time of the decision whether to grant development consent for the construction and operation of the steel factory.

122. Similar considerations apply to Holgate J's examples of manufacturing components for use in the construction of motor vehicles or aircraft. Where a component is manufactured which forms a small part of a much larger object, such as a motor vehicle or aircraft, the view might reasonably be taken that the contribution of the component is not material enough to justify attributing the impact on the environment of the end product to the activity of manufacturing the component part. In any event, the number of motor vehicles or aircraft in which such parts will be incorporated and the use which will subsequently be made of them may be so conjectural that no realistic estimate could be made of GHG emissions arising from such use on which a reasoned conclusion could be based. I have discussed above that the EIA process does not require

that attempts be made to measure or assess putative effects which are incapable of such assessment.

123. But that is not the position here. The oil produced from the well site will not be used in the creation of a different type of object, in the way that a component part is incorporated - along with many other different and equally necessary components - in manufacturing a motor vehicle or aircraft. Refining the oil is simply a process that it inevitably undergoes on the pathway from extraction to combustion. Nor is there any element of conjecture or speculation about what will ultimately happen to the oil. It is agreed that it will inevitably be burnt as fuel. And a reasonable estimate can readily be made of the quantity of GHGs which will be released when that happens.

124. It is also instructive to compare what the position would be if the fossil fuel extracted from the ground were, for example, coal. Coal need not undergo any intermediate process before it is burnt as fuel. So, on the developer's approach, the combustion emissions from the coal would be effects that it would be necessary to assess in an EIA for a project to mine coal. I do not think it rational to distinguish between combustion emissions from different fossil fuels on this basis.

125. Nor can it affect the analysis that crude oil refineries are themselves among the projects referred to in article 4(1) and Annex I of the EIA Directive which automatically require an EIA before development consent may be granted. There is no reason to suppose that oil produced by the well site in Surrey would be sent to a refinery for which an EIA would be required before the oil could be refined (or even that the refinery would necessarily have required an EIA pursuant to the EIA Directive when it was built). More importantly, there is no rule that the same effect on the environment cannot result from more than one activity or that, if particular effects have been or will be assessed in the context of one project, this dispenses with the need to assess them as part of an EIA required for another project. It is in any event an objective of the EIA Directive, recorded in recital (2), that effects on the environment should be taken into account at the earliest possible stage in decision-making. That entails that, whatever other assessments might be required in which some of those GHG emissions are included, an assessment of the GHG emissions from the combustion of oil should be made before permission is given to extract the oil from the ground and the oil begins the journey which will inevitably end with these emissions.

126. For these reasons, the fact that the crude oil produced from the well site would need to be refined before it is used as fuel is not a valid ground for excluding the combustion emissions from the scope of the EIA. Still less does the need to process the oil at a refinery justify the conclusion that the combustion emissions cannot as a matter of law count as effects of the project.

The project "itself"

127. Can anything else provide a criterion which, when applied, leads to the conclusion that the combustion emissions are not, as a matter of law, effects of the project on climate and are therefore incapable of falling within the scope of the EIA? At para 101 of his judgment Holgate J said that "the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought." It is impossible to disagree with this statement as it merely repeats what the legislation says.

128. Holgate J also said, at para 110, that "indirect effects" of the proposed development cover "consequences which are less immediate, but they must, nevertheless, be effects which *the development itself* has on the environment" (emphasis in original). Outside the realms of Kantian metaphysics, there is no such thing as "the development itself" which enjoys some sort of separate noumenal existence. There are only the human activities which constitute the physical development (or "project", to use the terminology of the EIA Directive).

129. If referring to "the project itself" is intended to emphasise that it is necessary to distinguish between direct and indirect effects of the project, or between local and geographically distant effects, then that is untenable for the reasons I have already explained. The EIA must include all effects of the project, whether direct or indirect, immediate or remote. Further, the fact that something is an effect of the project does not mean that it cannot also be an effect of something else. It does not follow that because the combustion emissions are effects of some other activity, such as the refinement of the oil or its subsequent use as fuel by consumers, then they cannot also be effects of the project of extracting the oil. As Lord Hoffmann pointed out several times in the *Environment Agency* case, the fact that an activity has caused an environmental impact (or other event) is not inconsistent with another activity having caused it as well.

130. In short, the assertion that "effects of the project" must be effects which "the project" or "*the project itself*" has on the environment does not take matters any further.

12. The Court of Appeal's approach

131. As already noted, the Court of Appeal did not think it possible to say that the combustion emissions are legally incapable of being an environmental effect requiring assessment under the legislation. All the same, the Senior President of Tribunals attached significance to the intermediate steps which would have to occur before combustion could take place. He did not adopt the judge's view that the need to refine the oil before it could be used as fuel was a critical consideration. But he emphasised the fact that the oil extracted at the project site would pass through "several other

distinct processes and activities, including, initially, its refinement, followed by the onward transportation and distribution of the refined products, and their eventual sale for use as fuel, which would only then, in various places at various times, produce emissions of greenhouse gases": see para 65.

132. In the view of the Senior President, whether the combustion emissions were "indirect effects" of the project depended on an evaluative judgment as to whether, given these intermediate events, there was a "sufficient causal connection" between the extraction of the oil and its eventual combustion. This was a question to which he thought that different decision-makers, each acting reasonably and lawfully, could give opposite answers. Thus, the Senior President concluded, at para 66, that:

> "the environmental effects of [the combustion] emissions could reasonably be seen as far removed from the proposed development itself, and not causally linked to it, because of the series of intervening stages between the extraction of the crude oil and the ultimate generation of those emissions …"

133. The first difficulty with this approach is that it is unclear how the decision-making authority is supposed to judge whether the existence or nature of the intervening stages between the extraction of the oil and the ultimate generation of emissions is such as to render the connection between them insufficiently close. Is the number of intervening stages supposed in itself to be important? Does the nature of these stages matter and, if so, how? Is the geographical distance between the project site and the places where the GHG emissions will take place supposed to be a relevant consideration and, if so, why? What else, if anything, would be relevant in making a judgment that there was or was not a "sufficient causal connection"? Without any criteria to answer these questions, developers and decision-making authorities are left completely adrift. If the idea is that it is for each decision-maker to decide for itself what factors to treat as relevant, this is not a reasonable interpretation of the EIA Directive. As discussed earlier in this judgment, it would be a recipe for unpredictable, inconsistent and arbitrary decision-making.

134. There is another fundamental problem with this approach. It is not just that it is intolerably vague. Considering the questions that I have posed above shows that it rests on a false premise. The fact that there is a series of intervening stages between the extraction of the oil and the ultimate generation of emissions does not itself provide any rational basis for denying that the two are causally linked. If there is a clear and inexorable causal path from event X to event Y, then Y is an effect of X. The number of intermediate steps along the way, the nature of those steps and the fact that Y occurs far away from X does not alter or affect that conclusion.

135. The Senior President gave two reasons to justify the proposition that a decision-maker could reasonably decide that the GHG emissions generated when the oil produced is burnt are not even indirect effects of the proposed development, because of the intervening stages through which the oil must pass (see para 65 of the Court of Appeal judgment). Both reasons are, in my opinion, mistaken. The first was that "decisions yet to be made 'downstream' would determine how much of the oil would end up being combusted." If true, that might make it impossible to assess what the likely quantity of combustion emissions would be. But it is not true. It was an error to say that how much of the oil would end up being combusted would depend on decisions yet to be made 'downstream'. It is common ground that *all* of the oil would be combusted. This follows from the agreed fact that it is inevitable that the oil produced would be refined and would eventually undergo combustion. There is no difficulty, let alone impossibility, in these circumstances in assessing the likely quantity of the combustion emissions.

136. The Senior President added a suggestion that the emissions generated by combustion of the oil would depend on "whether the economic demand for it would rise or fall." That is also incorrect. Rise or fall in demand would doubtless affect the price for which the oil is sold and purchased. But it has not been suggested - and it would be inconsistent with the agreed facts to suggest - that any such rise or fall in demand would result in any of the oil remaining unused.

137. The second reason given by the Senior President was that the claimant had not argued that any of the environmental impacts resulting from the intermediate process of refinement ought to have been included in the EIA for the project. He said, at para 65:

> "That is not part of the argument advanced … What is submitted, in effect, is that the county council could only reasonably conclude that environmental impacts several steps further away than refinement ought to have been assessed. That proposition is, in my view, untenable."

This reasoning is also invalid because it assumes that, just because something was not argued, it must be wrong, and that its invalidity can then be relied on to draw further inferences without the need to identify whether or why the argument not made could not have succeeded.

138. Given the agreed fact that all the oil produced would be refined, I see no reason why environmental impacts resulting from the process of refining the oil should not in principle fall within the scope of the EIA for the project of extracting the oil. There are, however, potential reasons why the view might reasonably be taken that it was not necessary to include an assessment of such impacts in the EIA. One would be that there

was insufficient information available on which to make a reasonable assessment of the relevant impacts. Another potential reason would be that, so far as it was possible to judge, such impacts were not themselves likely to be significant. I express no view about whether such reasons would in fact have been tenable as the question has never been raised or explored. What matters is that it cannot properly be assumed that, because the claimant has not complained about the failure to assess effects of refining the oil, the council could reasonably exclude the effect on climate of ultimate use of the oil as fuel from the EIA.

139. In my view, there was no basis on which the council could reasonably decide that it was unnecessary to assess the combustion emissions. These further suggested possible reasons for that decision, like the reasons actually relied on by the council, are flawed.

13. Relationship between EIA and national policy

140. There is another line of argument that I must consider as it appears to have weighed with the judge and the defendants have sought to make something of it. This is, broadly stated, that local planning authorities are unsuited or incompetent to incorporate into decisions whether to grant planning permission for a mineral extraction project an assessment of the potential contribution of the project to climate change. To understand the basis for this argument it is necessary to look, in overview, at UK national policy as regards climate change and the extraction of oil and gas.

The Paris Agreement and the production gap

141. In adopting the Paris Agreement on 12 December 2015, most of the nations of the world have acknowledged that climate change represents "an urgent and potentially irreversible threat to human societies and the planet" (Preamble to the decision to adopt the agreement) and have agreed on the goal of "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels": article 2(1)(a). It is left to each state party to decide what measures it will take towards achieving this goal by preparing, communicating and maintaining successive "nationally determined contributions" that it intends to achieve: see article 4(2).

142. To date, most state parties' planned contributions have focussed on setting targets for reducing GHG emissions from the consumption of fossil fuels within their own territory and taking measures aimed at reducing such consumption - for example, by promoting the development and use of alternative sources of energy. Comparatively little has been promised or done to reduce fossil fuel production. UNEP has published a series of reports highlighting and quantifying the "production gap" - that is, the difference between countries' planned fossil fuel production and global production

levels consistent with limiting global warming to 1.5°C or 2°C. In analysing governments' policies and plans, these reports use an accounting method which allocates carbon dioxide emissions from fossil fuel combustion to the location of extraction. UNEP has consistently found that, viewed overall, the world's governments plan to produce more than twice the amount of fossil fuels in 2030 than would be consistent with limiting global warming to 1.5°C: see eg UNEP Production Gap Report 2023, p 4. The reports also examine national policies, plans and projections in key countries (including the UK). The general picture is that many governments continue to support, finance, and expand fossil fuel production, even though such policies are irreconcilable with global climate commitments: see eg UNEP Production Gap Report 2023, p 11.

UK legislation

143. The principal UK legislation addressing climate change is the Climate Change Act 2008. This sets a target for the year 2050 for a reduction of GHG emissions from sources in the UK (section 1). The Act also provides for a national system of carbon budgeting. Section 4(1) places a duty on the Secretary of State to set a carbon budget for each succeeding period of five years and to ensure that the net amount of UK emissions during a budgetary period does not exceed this budget. Carbon budgets must be set with a view to meeting the target for 2050 (section 8(2)). Section 13 requires the Secretary of State to prepare proposals and policies for meeting the carbon budgets set under the Act. Each time a new carbon budget is set, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods (section 14). There is also a duty to report to Parliament each year with a statement giving details of the amount of UK emissions for the year (section 16). Other provisions of the Act include the formation of a Committee on Climate Change which has duties to give advice to the Secretary of State and to report to Parliament on progress towards meeting the carbon budgets (sections 32 to 38).

144. In calculating "UK emissions" for the purpose of the Climate Change Act 2008 and measures taken under it, GHG emissions from fossil fuels extracted in the UK are not included unless the emissions occur in the UK.

145. Despite its impact on climate UK national policy remains geared towards encouraging domestic production of oil and gas. The Petroleum Act 1998 establishes a system of licences to explore for and extract petroleum in the UK. The "principal objective" of the regime, as stated in section 9A, is that of "maximising the economic recovery of UK petroleum." Licences are granted by the Oil and Gas Authority (now named the North Sea Transition Authority), which conducts licensing rounds. A petroleum exploration and development licence grants exclusive rights within a defined area for a defined period in relation to hydrocarbon exploration, development and production. Such a licence confers exclusivity but does not give permission to carry out

operations. For this, other consents are needed, including planning permission from the relevant mineral planning authority. As noted earlier, where a project falls within the scope of the EIA Directive and 2017 Regulations, planning permission cannot be granted unless an EIA has been carried out (see para 29 above).

National planning policy

146. The National Planning Policy Framework (in the version published in February 2019) at para 205, stated that, "when determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy." (There was an exception in relation to the extraction of coal.) This was originally supplemented by para 209(a), which stated that minerals planning authorities should "recognise the benefits of on-shore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction." However, para 209(a) was removed after the High Court held in *R (Stephenson) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 519 (Admin); [2019] PTSR 2209 that the decision to include it was unlawful because it was made without proper public consultation.

Arguments founded on national policy

147. Against this background, an argument is made that it would be inappropriate for a local planning authority, in deciding whether to grant planning permission for the extraction of oil at a particular site, to take into account the effects on climate of the GHG emissions that will result from the combustion of the oil. It is said that whether or to what extent measures should be taken aimed at reducing GHG emissions from oil extracted in the UK is a matter which can only sensibly and properly be addressed at a national level. It would not be appropriate for a local planning authority to take decisions on the basis of its own views on these issues.

148. It is further argued that the object of the EIA process is to obtain information that has a bearing on the decision whether to grant development consent (or attach conditions to such consent) for a project rather than simply to generate information for its own sake. It is said that this object would not be served by obtaining information about combustion emissions in relation to a project of the present kind, as there is nothing that the local planning authority could in practice do with this information. The burden of gathering and assessing such information would be disproportionate when it could not inform the decisions to be taken in any practical way.

149. This in turn is said to indicate that an interpretation of the EIA Directive under which GHG emissions from the combustion of extracted oil are capable of being

regarded as "indirect effects of a project" cannot be correct. It cannot have been the intention that information about such GHG emissions should be taken into account in the EIA process, since such information could have no proper bearing on actions to be taken by local planning authorities.

150. I consider these arguments to be misguided. To begin with, I do not accept the premise that it would be wrong for a local planning authority, in deciding whether to grant planning permission, to take into account the fact that the proposed use of the land is one that will contribute to global warming through fossil fuel extraction. Of course, the authority must have regard to national policy; and in so far as UK national policy requires great weight to be given to the benefits of petroleum extraction, in particular for the economy, that must be taken into account. But it does not follow that the planning authority has to ignore adverse effects on climate of a proposed project or adopt an interpretation of what constitute such adverse effects which is contrary to reality. Just as *beneficial* indirect effects of a project on climate - for example, the "green" energy that would be generated by a project to develop a wind farm or solar farm - are clearly a relevant matter for the planning authority to consider, so corresponding *adverse* effects are also a material planning consideration.

151. Quite apart from this, the arguments based on UK national policy have two flaws. First, it is wrong to interpret the meaning and scope of the EIA Directive by reference to UK policy and legislation (or that of any other country) for controlling GHG emissions and regulating petroleum production. Such matters are irrelevant to the proper interpretation of the EIA Directive. It is not simply that policies which Member States (or non-Member States) choose to adopt are generally irrelevant in construing EU legislation, though that is true. It is also necessary to recall that the aim of the EIA is to establish general principles for assessing environmental effects. UK national policy is clearly relevant to the substantive decision whether to grant development consent. But it is irrelevant to the scope of EIA. For reasons discussed earlier, the fact (if and in so far as it is a fact) that a decision to grant development consent for a particular project is dictated by national policy does not dispense with the obligation to conduct an EIA; nor does it justify limiting the scope of the EIA.

152. The second, related flaw is also fundamental. The argument made is a version of the claim that, if information about environmental impacts would make no difference to the decision whether to grant development consent (or on what conditions), it is not legally necessary to obtain and assess such information in the EIA process. Such a contention was resoundingly rejected by the House of Lords in *Berkeley*. It misunderstands the procedural nature of the EIA. The fact (if it be the fact) that information will have no influence on whether the project is permitted to proceed does not make it pointless to obtain and assess the information. It remains essential to ensure that a project which is likely to have significant adverse effects on the environment is authorised with full knowledge of these consequences.

153. Looking at the matter more broadly, it needs to be recognised that the process of EIA takes place in a political context and that the information generated by an EIA will be considered within a political decision-making arena. It is therefore inevitable that economic, social and other policy factors will outweigh environmental factors in many instances. But this does not avoid or reduce the need for comprehensive and high-quality information about the likely significant environmental effects of a project. If anything, it enhances the importance of such information. Nowhere is this more so than where issues arise relating to climate change.

154. It is foreseeable in today's world that, when development consent is sought for a project to produce oil, members of the public concerned will express comments and opinions about the impact of the project on climate change and the potential contribution to global warming of the oil produced. Indeed, as Lewison LJ observed (at para 148 of the judgment of the Court of Appeal) the officers' report recorded that such objections were made in this case. (Objections raised by two local parish councils were specifically mentioned in the report along with other public representations.) Lewison LJ thought that the fact that objections based on climate change were noted and considered by the council was a reason tending to show that the EIA was adequate because "it cannot be said that [the council] completely ignored the potential global warming effect of the proposed development": para 149. In my view, this fact shows the opposite. It confirms the inadequacy of the EIA. It is not good enough that the potential global warming effect of the proposed development was not "completely ignored". The effect should have been properly assessed so that public debate could take place on an informed basis. That is a key democratic function of the EIA process. It was not fulfilled here.

14. Case law

155. Although many decisions of domestic and foreign courts were cited in argument on this appeal, most were of limited assistance. There is no previous decision of a court in this country or of the CJEU on the question we have to decide. Given the rapidly increasing prominence of issues relating to climate change and GHG emissions, more litigation raising such issues can be expected. But the question raised on this appeal must be answered by examining the wording and purpose of the EIA Directive, as transposed into UK law by the 2017 Regulations. The main relevance of decided cases lies not in providing analogies with the facts of this case but in helping to illuminate the purpose of the EIA Directive and the proper approach to its interpretation. Where decided cases assist with this, I have referred to them above.

156. That said, four further cases, for different reasons, deserve mention.

Abraham v Wallonia

157. In *Abraham v Wallonia* (Case C-2/07) [2008] Env LR 32 the CJEU held that, in deciding whether a project to modify an airport required an EIA, it was necessary to take into account the effects on the environment of a projected increase in the activity of the airport and air traffic which would result from the proposed construction works. This decision confirms that the effects of a project which must be covered by an EIA are not limited to effects of construction works but include effects of the operational phase of the project - that is, of the activity which takes place after such works have been executed. In *Abraham* this was held to be so even though the project required an EIA because it fell within a category described in what is now Annex I, para 7, of the EIA Directive as "construction" of airports.

158. The claimant has sought to derive more from *Abraham* than this by reference to para 43 of the judgment, which states:

> "It would be simplistic and contrary to [the approach required by the Directive] to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works."

This statement was repeated in *Ecologistas en Acción-CODA v Ayuntamiento de Madrid* (Case C-142/07) [2009] PTSR 458, para 39. The claimant submits that the reference to "the use and exploitation of the end product of those works" is applicable to the use as fuel of the oil that would be produced by the proposed well site.

159. However, this submission takes the statement out of context. It is clear from the context that the phrase "end product" in the passage quoted above was intended to refer to the facility or installation that results from construction works. In *Abraham* that was the reconfigured airport. The equivalent here is the functioning well site after modifications to the existing site, the drilling of new wells and the installation of facilities for exporting crude oil from the site. The "use and exploitation of the end product of those works" would consist in the production of oil from the expanded well site. The judgment in *Abraham* does not assist in determining the scope of the effects on the environment of, in that case, the increase in the activity of the airport or, in this case, the planned production of oil.

Squire

160. A second case relied on by the claimant is *R (Squire) v Shropshire Council* [2019] EWCA Civ 888; [2019] Env LR 36. This concerned a challenge to the grant of planning permission for a facility for the intensive rearing of chickens. A by-product of the planned activity would be the production of substantial quantities of poultry manure. This was to be spread as fertiliser on agricultural land in the local area, some of it owned by the poultry farmer / developer and some of it owned by others. The Court of Appeal held, at paras 62-69, that the EIA for the project was deficient and unlawful because it did not include a proper assessment of indirect environmental effects of the proposed development in the form of smell and dust that would emanate from the storage and spreading of the manure, including on third party land.

161. This case provides an illustration, if it be needed, that the "indirect effects of a project" on the environment can include emissions occurring "downstream" from the development from sources that are not owned or controlled by the site owner. In his judgment in Court of Appeal here, at para 65, the Senior President said that *Squire* can be distinguished on the ground that:

> "In that case the manure was a product of the development itself in its operation as a poultry enterprise: a waste product with a commercial value. The connection between the development and the impacts in question was clear as a matter of fact, and not dependent on a series of intermediate processes."

162. I do not consider this to be a valid distinction. In this case too the oil would be a product of the development itself in its operation as a mining enterprise: a product with a commercial value. The connection between the development and the impacts in question is also clear as a matter of fact: it is common ground that the extraction of the oil will inevitably result in clear (and quantifiable) impacts on the environment upon its combustion. The only potential difference is in the existence of intermediate processes. It is unclear whether this is even a factual difference, as there may well be intermediate steps between the production of manure and its use as fertiliser. But assuming this to be a point of factual difference, I have already explained why, in my view, reliance on this as a material distinction is misplaced.

Kilkenny Cheese

163. Attention was also devoted in argument to the decision of the Irish Supreme Court in *An Taisce – The National Trust for Ireland v An Bord Pleanála (Kilkenny Cheese Ltd, notice Party)* [2022] IESC 8; [2022] 2 IR 173 ("the Kilkenny Cheese

case"). The central issue in that case was whether or to what extent there was an obligation to include in the EIA for a proposed cheese factory the environmental effects of producing the milk needed to supply the factory. The Irish national planning authority, An Bord Pleanála ("the Board"), in granting permission for the project, calculated the gross CO_2 emissions likely to arise in producing the 450 million litres of milk (some 4.5% of the national milk supply) expected to be required by the factory each year. But the Board found that the milk would come from existing sources and thus was going to be produced in any event. It followed that there would be no significant net increase in GHG emissions as a result of the construction and operation of the factory: see para 108 of the court's judgment.

164. Even so, the Supreme Court accepted that establishing a new factory which would take 4.5% of the national milk supply may have some wider economic effects by increasing the overall demand for milk. This increase in overall demand might in turn stimulate an increase in milk production, with implications for the size of the national herd and therefore GHG emissions: see paras 75-78. The key question was whether these implications for general milk production and GHG emissions were "indirect significant effects of a project" within the meaning of article 3(1) of the EIA Directive which the EIA for the project was therefore required to identify and assess: para 79. The court answered this question in the negative.

165. The court's judgment, given by Gerard Hogan J, was handed down after the judgment of Holgate J but before the judgment of the Court of Appeal in this case. Two possible interpretations of article 3(1) were considered. The first was to say that article 3(1) "should be read in an open-ended fashion": para 87. The second was to adopt the approach of Holgate J in this case and say that, to fall within article 3(1), indirect effects must be "'effects which the development itself has on the environment'": para 102. Hogan J rejected the "open-ended" interpretation because he considered that it would lead to the imposition of obligations in carrying out EIAs which were impossibly onerous and unworkable: paras 100, 103-105. He endorsed Holgate J's approach, subject to the caveat that "there may well … be special and unusual cases where the causal connection between certain off-site activities and the operation and construction of the project itself is demonstrably strong and unbreakable." In such cases the significant indirect environmental effects of these off-site activities would need to be assessed: para 102.

166. This caveat is material since, if applied here, it would lead to the opposite result from that which Holgate J reached. The causal connection between the operation of the well site and the use of the oil produced as fuel is, by any standard, "demonstrably strong and unbreakable", as there are no realistic circumstances in which extraction of the oil will not lead to its use as fuel. Neither will occur without the other. Cause and end-result are inextricably linked so that, on the approach of the Irish Supreme Court, the environmental effects of combustion of the oil would need to be assessed.

167. I would, however, for the reasons already given, reject Holgate J's approach altogether. Where I respectfully differ from the Irish Supreme Court is that I think it is a false dilemma to assume that the only alternative approach is one that is entirely open-ended. I have explained why the EIA Directive does not, as I interpret it, impose obligations which are impossibly onerous and unworkable. In particular, only effects which evidence shows are likely to occur and which are capable of meaningful assessment must be assessed. In an important passage of the judgment, at para 110, the Irish Supreme Court gave a compelling justification for its decision which implicitly adopted these criteria. After observing that any future increase in total milk production "is likely not to be entirely independent of the operation of the factory", Hogan J said:

> "Beyond this, however, proof of causality such [as] would satisfy the requirements of the EIA in respect of 'direct and or indirect significant environmental effects' remains entirely elusive, contingent and speculative. Its very elusiveness means that it is incapable of measurement or assessment and, hence, cannot be the sort of significant indirect environment effect which article 3(1) of the EIA Directive must be taken necessarily to contemplate."

168. In my view, this reasoning clearly articulates the relevant distinction between that case and the present case.

Greenpeace Nordic

169. Since the oral hearing of this appeal, a court in Norway has decided the same issue that we must decide. The Norwegian case is a sequel to proceedings brought to challenge the grant of licences by the Norwegian government for petroleum production. One issue in the earlier Norwegian proceedings was whether, before the relevant area of the South Barents Sea had been opened for petroleum exploration and production, an EIA should have been carried out which assessed the possible combustion emissions if production licences were awarded and development consent given for plans for the development and operation of particular fields. That earlier case reached the Supreme Court of Norway which, by a majority of 11 to 4, rejected the challenge: see *Nature and Youth Norway v The State of Norway (represented by the Ministry of Petroleum and Energy)*, judgment dated 22 December 2020, HR-2020-2472-P (Case No 20-051052SIV-HRET).

170. The majority judgment explained that, at the time of the decision to open the relevant area, it was highly uncertain whether petroleum would be found and, if found, whether in amounts sufficient to make extraction commercially viable. The majority also emphasised that a production licence did not give an unconditional right to

extraction even if profitable discoveries should be made. Extraction would require development consent. Before this was granted, an EIA would normally be required, which would need to assess GHG emissions: see paras 216-223. Relevantly for the subsequent proceedings, the majority judgment also pointed out that, when assessing GHG emissions as part of the climate impact of a measure or project, it is irrelevant where geographically the GHG emissions occur, as the environmental effect of GHG emissions is in principle the same irrespective of where on earth the emissions take place: see para 225.

171. The later case was brought after development consent had been granted for three projects. All three projects involved the extraction of petroleum in quantities which made an EIA mandatory before consent could be granted. The EIAs carried out did not assess the combustion emissions from the oil and gas to be produced. On 18 January 2024 the Oslo District Court ruled that there was a legal requirement to assess the combustion emissions under both the EIA Directive and the Norwegian regulations which implement the EIA Directive. As such an assessment had not been made, the consents granted for the development and operation of the three oil fields were declared to be invalid: see *Greenpeace Nordic v The State of Norway (represented by the Ministry of Petroleum and Energy)*, Case No 23-099330TVI-TOSL/05.

172. In interpreting the EIA Directive, the court thought it clear, in particular from article 3(1) and Annex IV, para 5, that not only direct local environmental impacts resulting from the development and production are covered, and that all relevant climate impacts resulting from the project must be taken into account. The express requirement to assess "indirect" effects shows that "it cannot be decisive that the combustion emissions do not occur on site in connection with production, and that instead they occur later via one or more intermediate steps as combustion emissions elsewhere": p 52. In rejecting the Government's argument that combustion emissions are not effects of the project for the purpose of the EIA Directive, the court held, at pp53-54, that:

> "combustion emissions from petroleum extraction are such a significant and particularly characteristic consequence of these kinds of projects that they must clearly be considered indirect climate effects within the meaning of the EIA Directive. The whole purpose of petroleum extraction is to make geologically stored carbon available in the form of oil or gas. Greenhouse gas emissions from the carbon are thus both an inevitable and intentional effect from the project. … If combustion emissions are not included, this will mean that the provisions of the EIA Directive on the assessment of indirect climate impacts from petroleum operations will in practice have no real content."

173. As a judgment of a foreign court, although on the very question in issue before us, this decision only has authority in so far as its reasoning is persuasive. I do find the reasoning of the Oslo court persuasive and agree with it. It entirely accords with what I consider to be the proper interpretation of the EIA Directive.

15. Conclusion

174. The council's decision to grant planning permission for this project to extract petroleum was unlawful because (i) the EIA for the project failed to assess the effect on climate of the combustion of the oil to be produced, and (ii) the reasons for disregarding this effect were flawed. I would therefore allow the appeal.

LORD SALES (dissenting, with whom Lord Richards agrees):

175. This appeal is concerned with the obligation to carry out an environmental impact assessment ("EIA") in relation to a development to drill for oil. The question is whether the public authority with responsibility to carry out the EIA before granting planning consent for such development is required to assess the impact of greenhouse gas emissions resulting not just from the drilling operation itself but also from the eventual use of the oil as fuel, once it has been refined elsewhere. This depends on the proper construction of Directive 2011/92 EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive") and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations") which implement that Directive. These downstream emissions were referred to at the hearing by counsel for the appellant as scope 3 greenhouse gas emissions, drawing on the terminology used in the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard developed under the auspices of the World Resources Institute and the World Business Council for Sustainable Development ("the GHG Protocol").

176. The parties are agreed that the EIA Regulations accurately transpose the EIA Directive into national law, so it is appropriate to focus on the Directive, which is the basic source for the relevant rules, rather than the Regulations. The detail regarding the corresponding provisions in the EIA Regulations is set out in the judgment of Holgate J at first instance, [2020] EWHC 3566 (Admin); [2021] PTSR 1160, at paras 33-45 and it is not necessary to repeat it here. Article 3(1) of the EIA Directive provides that an EIA of a project should identify, describe and assess "the direct and indirect significant effects of a project" on various factors, including "land, soil, water, air and climate". Put shortly, the question which arises is whether, on proper interpretation of the EIA Directive, the downstream greenhouse gas emissions at issue are "indirect significant

effects" on the climate "of [the] project" in this case, namely the drilling to extract crude oil to be refined elsewhere and then used by consumers.

177. The first respondent ("the Council") is the local planning authority for its area. On 27 September 2019 it granted planning permission for development of an oil well at the Horse Hill Well Site ("the Site"), near Horley in Surrey. The second respondent ("HHDL") is the developer. It wishes to drill at the Site for crude oil which has been discovered there.

178. The appellant represents the Weald Action Group which objects to drilling at the Site. She has brought these judicial review proceedings to challenge the grant of planning permission.

179. The third respondent ("the Secretary of State") opposes the appeal. The first intervener, Friends of the Earth, made written submissions in support of the appellant's case, as they did below. Greenpeace Ltd was given permission to intervene in the appeal to make written submissions. It supports the appellant's case. The Office for Environmental Protection, an independent non-departmental public body established under section 22 of the Environment Act 2021, was also given permission to intervene in the appeal to make written submissions. It too supports the appellant's case. West Cumbria Mining Ltd has an interest in a similar mineral extraction development elsewhere and was also given permission to intervene in the appeal to make written submissions. It supports the submissions made by HHDL and the Secretary of State.

180. After the hearing, the court asked for additional submissions in writing to explain the background to amendments which were incorporated into the EIA Directive by Directive 2014/52/EU ("the 2014 Directive").

Scope 1, scope 2 and scope 3 greenhouse gas emissions

181. The appellant's counsel framed their submissions with reference to the concept of scope 3 greenhouse gas emissions. This calls for some explanation. The terminology of scope 1, scope 2 and scope 3 greenhouse gas emissions is taken from the GHG Protocol developed to assist companies to understand and report on their greenhouse gas emissions. The first edition of the GHG Protocol was issued in 2001. It defined three "scopes" of greenhouse gas emissions for accounting and reporting purposes. Scope 1 is direct emissions from sources that are owned or controlled by the company, for example emissions from combustion in owned or controlled boilers, furnaces, vehicles etc. Scope 2 is "electricity indirect [greenhouse gas] emissions" from the generation of purchased electricity consumed by the company within the organisational boundary, for which the company should account even though the emissions physically occur at the facility where the electricity is generated. Scope 3 is all other indirect greenhouse gas

emissions, an optional reporting category under the GHG Protocol that covers emissions which are a consequence of the activities of the company but occur from sources not owned or controlled by the company. This is a very wide category which covers both emissions which are "upstream" from the company's own activities but to which those activities give rise and emissions which are "downstream" from the company's activities.

182. Reference to scope 3 greenhouse gas emissions can be a useful shorthand and was treated as such in the course of argument. However, the EIA Directive does not refer to the GHG Protocol and does not employ the concepts or the scope 1, scope 2 and scope 3 framework set out in it. None of the authorities from the Court of Justice of the European Union (formerly the European Court of Justice – I refer to them both as "the CJEU") or domestic or other courts explains the scope and application of the EIA Directive in terms of the concepts used in the GHG Protocol.

Factual background

183. The extraction of hydrocarbons for exploration or production is a type of minerals development which requires planning permission to be granted by the local planning authority. Other regulatory approvals may be required as well, including environmental permits. Applications for planning permission for fossil fuel development relate both to the works on the site (such as well construction) and to the process of extraction of the fuel from the ground which follows. Planning permission for such development is not concerned with the refinement or processing of the extracted oil at other places.

184. On 16 January 2012 the Council granted planning permission for the construction of an exploratory well and for short-term testing for oil at the Site. When oil was discovered, HHDL applied for planning permission to drill and test an appraisal well and a sidetrack well, which was granted on 1 November 2017. Following further work, HHDL decided that the extraction of oil at the Site was commercially viable.

185. On 20 December 2018 HHDL applied for planning permission to drill a well at the Site and to operate it for commercial extraction of the oil ("the development"). The development would take place over a total period of about 25 years, allowing for a first stage of drilling and commissioning of the well, oil production lasting about 20 years, and then decommissioning and site restoration works.

186. The amount of crude oil to be extracted over the lifetime of the development could be as much as about 3.3 million tonnes. Once extracted, it would be taken by tankers to refineries elsewhere for processing. Once refined, it would become useable as fuel. The refined product is likely to be used predominantly for transportation, with

some used also for heat, manufacturing and petrochemicals. It is not possible to say at this stage whether the refining would take place in the UK or overseas, nor whether the refined product would be used in the UK or overseas.

187. The development is EIA development within the meaning of the EIA Directive and the EIA Regulations, and so required an EIA to be carried out before the grant of planning permission, because it is a project for the "extraction of petroleum … for commercial purposes where the amount extracted exceeds 500 tonnes/day": see article 4(1) of the EIA Directive and point 14 of Annex I to the EIA Directive ("Annex I") and regulation 2 of the EIA Regulations and para 14 of Schedule 1 to those Regulations.

188. Where an EIA is required, the developer has to submit an environmental statement to provide relevant environmental information to the local planning authority. The developer can ask the local planning authority for a scoping opinion to ascertain what matters should be covered in its environmental statement, and HHDL duly asked the Council for such an opinion.

189. On 25 October 2018 the Council issued its scoping opinion ("the Scoping Opinion"), which stated (para 3.9):

> "[The Council] is of the opinion that the primary focus for the EIA should be the potential effects of the scheme on population and human health (regulation 4(2)(a) [of the EIA Regulations]), on the water environment (regulation 4(2)(c) [of the EIA Regulations]) and on the global climate (regulation 4(2)(c) [of the EIA Regulations])."

190. The Scoping Opinion observed that direct emissions of greenhouse gases associated with the construction and operation of the well site, and the consumption of fuel by vehicle, plant and equipment associated with the well site, would be likely to be small in scale "and whilst contributing to increased concentrations of greenhouse gases in the atmosphere could not be classed as significant in their own right" (para 3.12). On the other hand, the Scoping Opinion said "the indirect effects associated with the production and sale of fossil fuels which would likely be used in the generation of heat or power, consequently giving rise to carbon emissions, cannot be dismissed as insignificant", but continued "[i]t is acknowledged that the contribution of the proposed development would be modest when considered in a national or regional context" (para 3.13). The Scoping Opinion set out the Council's recommendation, at para 3.14, that the environmental statement "should consider, in particular, the global warming potential of the oil and gas that would be produced by the proposed well site."

191. In December 2018 HHDL submitted its environmental statement ("the Environmental Statement"). This dealt with a wide range of matters relevant to the development. Chapter 6 of the statement addressed greenhouse gas emissions. It stated that the scope of the assessment it contained on that topic was "confined to the direct releases of greenhouse gases from within the well site boundary resulting from the site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development." The emissions assessed were those from the combustion of diesel fuel in the process of construction and by heavy goods vehicles servicing the development and by on-site engines and generators used in the development, and from the combustion of natural gas in flares in the course of the operation of the development. The Environmental Statement did not contain an assessment of the scope 3 greenhouse gas emissions associated with the downstream refining of the oil and use of the refined fuel away from the Site.

192. HHDL justified this by saying that "[t]he essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by facilities and process[es] beyond the planning application boundary and outwith the control of the site operators." It referred to national planning policy and guidance which indicated that decision-makers should focus on whether development is an acceptable use of land rather than on control of downstream emissions from hydrocarbons, which is the subject of regulation under regimes apart from planning law.

193. It is common ground, and indeed obvious, that it is inevitable that oil produced from the Site will be refined and that the refined end product will eventually undergo combustion which will produce greenhouse gas emissions. The refining process and eventual combustion of the refined oil will take place at locations other than the Site. It is agreed that it is scientifically possible to calculate the likely level of greenhouse gas emissions from the combustion of a given quantity of hydrocarbons using a methodology set out in guidance issued by the Institute of Environmental Management and Assessment.

194. In June 2019 the Council's designated officer, Dr Jessica Salder, carried out a review of the Environmental Statement ("the ES Review"). She concluded that the Environmental Statement responded "in an appropriate and proportionate manner" to regulation 4(2) and the relevant parts of Schedule 4 to the EIA Regulations (which correspond to article 1(g) and Annex IIA to the EIA Directive) and contained sufficient information to comply with the EIA Regulations and the EIA Directive. She stated that the Council accepted the justification given by HHDL for excluding consideration of the global warming potential of the hydrocarbons produced from the development from the scope of the EIA process.

195. The Council's Planning and Regulatory Committee ("the Council Committee") considered HHDL's planning application at a meeting on 11 September 2019, with the benefit of an officers' report ("the Officers' Report") which recommended the grant of planning permission for the development, subject to conditions. The report summarised the EIA process, which had included three consultation exercises. In all, 1,658 written representations had been received, of which about 921 supported the development and 717 objected to it. The issue of climate change was identified as one of about 30 main points of public concern. The report summarised the Environmental Statement on that topic. It stated that the Council had concluded that the development would not give rise to significant impacts on the climate as a result of emissions of greenhouse gases directly attributable to its implementation and operation. The officers were not thereby indicating that they had ignored the reference to "indirect" effects of the project contained in article 3(1) of the EIA Directive (they had already referred to the relevant legislation), but rather that they took the view that the downstream greenhouse gas emissions at issue in this case did not fall within the scope of that provision.

196. The Officers' Report set out the European Union and national policy context, including in relation to climate change. So far as concerns national policy guidance in relation to the grant of planning permission for mineral extraction, para 205 of the National Planning Policy Framework ("NPPF") states that great weight should be given to its benefits, including to the economy. Relevant national policy in relation to energy was set out in the UK's 2007 Energy White Paper, "Meeting the Energy Challenge" (Cm 7124), which included as policy goals reduction of CO2 emissions by some 60% by 2050 and maintenance of the reliability of energy supplies. The policy in the White Paper was reflected in a number of statutes, including the Climate Change Act 2008 and the Energy Act 2008. The Officers' Report explained that the Climate Change Act 2008 introduced a target for reduction of the UK's greenhouse gas emissions by 2050, with a system of national carbon budgets for five-year periods to drive progress towards that objective (in June 2019, the target set out in the Climate Change Act 2008 was amended to the current net zero target by the Climate Change Act 2008 (2050 Target Amendment) Order 2019, SI 2019/1056). In addition, the UK had signed up to the EU Renewable Energy Directive 2009/28/EC which set individual targets for each member state. The Government produces Annual Energy Statements which reflect the policy adumbrated in the 2007 Energy White Paper and recognise the need for investment in oil and gas production as a component of the transition towards a low carbon economy.

197. The Officers' Report referred to objections that the development would be incompatible with international and national objectives on climate change. The authors concluded that "given the production function of the development, it is not in conflict with the Government's policy and climate change agenda" and that on the basis of Government policy guidance "there is a national need for the development", subject to it satisfying other national policies and policies in the development plan. This view was repeated in an update prepared for the meeting of the Council Committee, which took account of the effect of a successful legal challenge to part of the Government's policy guidance in the NPPF. There is no challenge in this appeal to this assessment that the

development is supported by national policy in relation to energy production and climate change.

198. However, the appellant says that there is an inconsistency in the analysis of material planning considerations in the Officers' Report, as adopted by the Council in its decision ("the inconsistency point"). The Council did not take quantified downstream greenhouse gas emissions into account in its EIA in relation to its decision to grant planning permission, but it did take into account as a material consideration the Government's relevant policies relating to climate change, which had regard to the use to which the refined oil would ultimately be put as fuel for combustion. This is said to demonstrate unlawfulness on the part of the Council, in that the need for the oil which was to be extracted weighed in favour of the proposed development, but the Council omitted to weigh in the balance the negative impact that downstream greenhouse gas emissions would have on climate change. The inconsistency point was not one of the grounds of challenge in the appellant's pleaded claim in the High Court, but was introduced by way of reply submissions for the appellant in the Court of Appeal.

199. The Officers' Report also explained that in addition to planning permission, the operation of the Site would require other consents including an environmental permit issued by the Environment Agency and licences for drilling and flaring issued by the Oil and Gas Authority. It explained that the Government licenses the exploration, appraisal and production of hydrocarbons.

200. At its meeting on 11 September 2019 the Council Committee approved the grant of planning permission for the development.

The legal challenge

201. On 8 November 2019 the appellant commenced her judicial review challenge to the Council's decision to grant planning permission for the development. Permission to apply for judicial review was initially refused by Lang J. However, upon renewal of the application in the Court of Appeal Lewison LJ granted the appellant permission to apply for judicial review of the Council's decision on the grounds that (1) the Council failed to comply with its EIA obligations under the EIA Directive and the EIA Regulations by (a) failing to assess the indirect downstream greenhouse gas emissions in relation to the development arising from the combustion of the oil it will produce and/or (b) failing to take into account the environmental protection objectives established by the UK which are relevant to the project, namely the urgent need to address the climate crisis and the requirement to reduce greenhouse gas emissions by at least 100% below the 1990 baseline; (2) the Council misinterpreted provisions of the NPPF and the Minerals section of the national Planning Policy Guidance ("nPPG") as permitting downstream greenhouse gas emissions to be excluded from assessment, in breach of the EIA

Directive and the EIA Regulations; and (a new ground which Lewison LJ directed should be added to the claim) (3) the NPPF and the nPPG fail to conform with the EIA Directive and the EIA Regulations. As a result of the addition of ground (3), the Secretary of State was added as a party to the proceedings. The inconsistency point was not a part of the grounds of challenge.

202. Holgate J dismissed the claim on all grounds. In his view, the downstream greenhouse gas emissions were not effects, direct or indirect, "of [the] project" comprised in the development and so did not fall within article 3(1) of the EIA Directive. On its proper interpretation, the EIA Directive required there to be a closer connection between any direct and indirect effects relied upon and the project in question. He pointed out the wide-ranging effect of the appellant's submissions in relation to ground (1)(a), which was the main issue in the claim. The Environmental Statement and the Council's EIA assessed the greenhouse gases that would be produced from the operation of the development itself, but the appellant contended that the EIA should have assessed the greenhouse gases which would be emitted when the crude oil produced from the Site is refined elsewhere and then used by consumers. It was agreed that once the crude oil was transported off-site it enters, in effect, an international market, and the refined product could be used anywhere in the world. Moreover, if correct, the appellant's submissions would have ramifications for a range of other production processes. For example, the production of metals, then their use to manufacture components and then motor vehicles or aircraft, all at different locations where the processes will result in greenhouse gas emissions, will also lead to greenhouse gas emissions from their use by consumers and airlines. Holgate J also gave the example of the successive stages involved in the handling of waste, recycling, recovery and disposal to landfill, each one of which can generate greenhouse gases.

203. Holgate J set out the statutory and national policy framework and reviewed the facts in detail. As to ground (1)(a), he emphasised that the formula used in the EIA Directive is that an EIA is required of the effects (direct and indirect) "of the project" (the corresponding formula in the EIA Regulations used the word "development" in place of "project", in order to integrate the EIA Directive into the UK planning system through use of the relevant national terminology). Holgate J rejected the suggestion that it is sufficient if the environmental effects of consuming an end product will flow inevitably from the use of a raw material in making that product, and held instead that "the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought"; he observed that "[a]n inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments elsewhere which are not the subject of the application for planning permission and which do not form part of the same 'project'": para 101. His conclusion from a review of domestic and European case law on the EIA Directive was that, as a matter of law, on the proper interpretation of the Directive, an "EIA must address the environmental effects, both direct and indirect, of the development for which planning permission is sought ... but there is no requirement to assess matters which are not environmental effects of the development or project": para

126. He noted that an obligation could arise to carry out an EIA of any larger project of which the development forms part, but it was not suggested that the development was part of any such larger project.

204. Although not critical for his decision, Holgate J also pointed out that there are other measures in place within the UK for assessing and reducing greenhouse gas emissions from the combustion of oil products in motor vehicles, including the net zero target in the Climate Change Act 2008 and the statutory carbon budgets on a national level issued pursuant to that Act. In addition, the estimation of greenhouse gas emissions from downstream combustion of oil and control through the statutory carbon budgets is carried out at a national level annually and emissions of greenhouse gases from road transport are the subject of national policy designed to reduce them as part of the steps being taken to achieve the 2050 net zero target. As part of the national policy response to the need to reduce greenhouse gas emissions, a national Emissions Trading Scheme has been introduced by the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (SI 2012 No 3038).

205. Holgate J held that ground (1)(b) lived with ground (1)(a) and fell away with it. He considered grounds (2) and (3) together and rejected them because of his conclusion on ground (1)(a). In any event, the NPPF and the nPPG did not purport to limit the scope of EIA obligations arising under the EIA Directive and the EIA Regulations.

206. With permission granted by Lewison LJ, the appellant appealed to the Court of Appeal in relation to ground (1)(a). The Court of Appeal, by a majority (Sir Keith Lindblom, Senior President of Tribunals, and Lewison LJ, Moylan LJ dissenting), dismissed the appeal: [2022] EWCA Civ 187; [2022] PTSR 958. Sir Keith Lindblom reviewed the legislative regime and caselaw on that regime of the CJEU. Like Holgate J, Sir Keith Lindblom held that an EIA was required of the direct and indirect environmental effects "of the proposed development" itself (that is, of the construction and operation of the oil well at the Site) not of end products far-removed from that project: paras 31 and 38-39. The extraction of crude oil for commercial purposes was "the essential content and character of the proposed development": "[t]hat was the project", and neither the subsequent refinement of the crude oil nor the ultimate use of the products generated by that refinement were part of that project: para 33.

207. However, departing from Holgate J's approach, Sir Keith Lindblom considered that whether the degree of connection required between a development and its putative effects was sufficiently close for them to count as "indirect" effects of a project within the meaning of the EIA Directive and the EIA Regulations is a matter for evaluative assessment by the Council as the planning authority: paras 41-43. In his view, therefore, the outcome of the appeal turned not on a hard-edged question of law, but on the lawfulness of the decision of the Council to decide that the scope 3 greenhouse gas emissions were not "indirect significant effects" of the proposed development or project

(see article 3(1) of EIA Directive). This was a matter of fact and evaluative judgment for the Council, challengeable only on *Wednesbury* rationality grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223): para 57. The Council's assessment could not be said to be irrational: para 61. It was relevant to this conclusion that there were many intermediate steps to be gone through before the crude oil from the Site could be combusted as fuel, including that it had to be refined, yet it had not been suggested that the environmental impacts resulting from the intermediate process of refinement ought to have been subject to an EIA in the context of the development: paras 65-66.

208. Partly as a response to this analysis, the appellant introduced the inconsistency point in her submissions in the Court of Appeal. No objection seems to have been taken to this and it is agreed by the parties to be an issue for determination in the appeal to this court. Sir Keith Lindblom dismissed the challenge based on the inconsistency point: paras 90-92. He held that it was proper for the Council to take into account as material considerations that the development would "in a general sense" help to meet a continuing national need for identified reserves of on-shore hydrocarbons to be husbanded and the relevant Government policies relating to climate change. It was not incumbent on the Council to estimate the precise contribution which the oil produced at the Site might make to meeting the continuing national need for hydrocarbons, nor the particular impacts, positive or negative, of using the refined products of that oil.

209. Lewison LJ delivered a short concurring judgment. He agreed that the real question was not that posed by Holgate J, as to the proper interpretation of the EIA Directive, but the degree of connection needed to link a "project" and a putative effect. This was a question of fact or evaluative judgment for the Council as the planning authority, which could only be impugned for irrationality or on other public law grounds. He considered that the Council had not ignored the downstream global warming effect of the development and that it was lawfully entitled to decide that this was not an indirect effect of the project for the purposes of the EIA Directive.

210. Moylan LJ agreed with much of the judgment of Sir Keith Lindblom, but dissented on the basis that the Council's assessment regarding the lack of connection between the project and the downstream greenhouse gas emissions was legally flawed. He focused on point 14 in Annex I to the EIA Directive. Annex I sets out cases where an EIA is mandatory, without the need for any screening assessment. Point 14 is the provision of Annex I applicable in this case, which meant that an EIA of the development was required. Point 14 stipulates that an EIA is required in the case of a project of this description:

> "(14) Extraction of petroleum and natural gas *for commercial purposes* where the amount extracted exceeds 500 tonnes/day

> in the case of petroleum and 500,000 cubic metres/day in the case of gas." (emphasis added)

In Moylan LJ's view, the language of the provision indicates that it is the extraction of petroleum "for commercial purposes", and not the surface installations or the deep drilling (matters covered in point 2 of Annex II to the EIA Directive, headed "Extractive Industry", and in Schedule 2 to the EIA Regulations, as cases requiring a screening assessment) which caused the drafters of the EIA Directive to include this item in Annex I. He accepted the appellant's submission that since an EIA in relation to the development was required by point 14 of Annex I to the EIA Directive by virtue of the extraction of petroleum for commercial purposes, this showed that the downstream greenhouse gas emissions associated with it were impacts (and so indirect effects) of the project: paras 109-112 and 125-128. Moylan LJ referred in particular to the decision in *R (Squire) v Shropshire Council* [2019] EWCA Civ 888; [2019] Env LR 835 ("*Squire*") and the judgments of the CJEU in *Abraham v Wallonia* (Case C-2/07) [2008] Env LR 32 ("*Abraham*") and *Ecologistas en Acción-CODA v Ayuntamiento de Madrid* (Case C-142/07) [2009] PTSR 458 ("*Ecologistas*") and also called attention to amendments introduced into the EIA Directive by the 2014 Directive to provide for a specific and increased focus on climate change and greenhouse gas emissions. In his view cogent reasons would need to be given to justify exclusion of such emissions, which were an inevitable effect of the downstream use of the oil, from the EIA exercise, and those given by the Council were not sufficient.

The EIA legislative regime

The 1985 Directive

211. The requirement to undertake an EIA before granting planning consent for certain projects was first introduced into European law by Council Directive 85/337/EEC ("the 1985 Directive"). The essential elements of the regime were the same as those under the EIA Directive in its present form. In outline, by virtue of article 4(1) an EIA was required for projects listed in Annex I (the list being shorter than it now is in the EIA Directive) whereas, by virtue of article 4(2), for projects listed in Annex II a screening assessment would be required in order to determine whether they should be made subject to an EIA. Article 3 provided that an EIA should identify, describe and assess "the direct and indirect effects of a project on", among other factors, "soil, water, air, climate and the landscape". Article 2(2) provided that the EIA process could "be integrated into the existing procedures for consent to projects in the Member States"; so in the UK, by regulations to implement the 1985 Directive, it was made part of the procedure leading to the grant of planning permission. Article 1(5) provided that the 1985 Directive did not apply to "projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process."

212. The language used in article 3(1) of the EIA Directive which is central to this appeal, requiring an EIA to cover "significant indirect effects" of a project, is taken from the 1985 Directive, which was consolidated into the EIA Directive. The appellant relies on the similarity of that language with the way in which scope 3 emissions are defined in the GHG Protocol to refer to "indirect" greenhouse gas emissions in order to suggest that the EIA Directive requires an EIA for a project to cover all of the scope 3 emissions associated with that project.

213. However, the language of the EIA Directive, as derived from the 1985 Directive, was adopted by the EU legislator well before the GHG Protocol was drafted and does not refer to the concepts set out in that protocol. Moreover, the concepts in the GHG Protocol have been developed for a different purpose from the purposes pursued by the 1985 Directive and the EIA Directive: in the former case to provide a standardised approach to accounting for and reporting on the activities of corporate entities; in the latter, to ensure consideration of the effects of particular projects for which planning permission is sought. The 1985 Directive and the EIA Directive which replaced it have their own scheme and conditions of application and I do not consider that one can infer any intention on the part of the EU legislator that the indirect effects of a project to which the Directives refer should be taken to include the full ambit of scope 3 emissions as referred to in the GHG Protocol.

The EIA Directive

214. The 1985 Directive was amended several times. The EIA Directive was enacted "in the interests of clarity and rationality" to codify the 1985 Directive as amended: recital (1) to the EIA Directive. It was intended to harmonise "the principles of the assessment of environmental effects", including the main obligations of developers and the content of the assessment: recital (3) (which also notes that Member States could lay down stricter rules to protect the environment). Recital (6) states that general principles for the assessment of environmental effects should be laid down with a view to supplementing and coordinating development consent procedures. Other relevant provisions of the EIA Directive are as follows.

215. Recital (7) provides:

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer,

> which may be supplemented by the authorities and by the public likely to be concerned by the project in question."

Recital (8) states that projects of certain types "have significant effects on the environment" and so should generally be subject to an EIA (ie Annex I projects), while recital (9) says that projects of other types may not have such effects in every case but should be subject to an EIA where Member States "consider that they are likely to have significant effects on the environment" (ie Annex II projects, which are to be screened to determine whether they should be subject to an EIA). Recital (10) states that Member States may set thresholds or criteria for screening purposes.

216. Recitals (22) and (24) provide:

> "(22) However, this Directive should not be applied to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.
>
> …
>
> (24) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that article, this Directive does not go beyond what is necessary in order to achieve those objectives."

217. The EIA Directive post-dates the GHG Protocol but the recitals make no reference to it. The EIA Directive does not refer to or seek to employ the scope 1, scope 2 and scope 3 concepts set out in the protocol. Instead, it is made clear that the EIA Directive re-enacts the scheme of the 1985 Directive and uses the same basic concepts and terms as had been employed in that Directive.

218. Article 1(1) of the EIA Directive provides that the Directive "shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."

219. Article 1(2) sets out certain definitions. “Project” is defined in sub-para (a) to mean “the execution of construction works or of other installations or schemes” and “other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources”. “Public concerned” is defined in sub-para (e) to mean “the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in article 2(2)”, with an extension to deem certain non-governmental organisations promoting environmental protection as having an interest. EIA is defined in sub-para (g) to mean:

> “a process consisting of:
>
> (i) the preparation of an environmental impact assessment report by the developer, as referred to in article 5(1) and (2);
>
> (ii) the carrying out of consultations as referred to in article 6 and, where relevant, article 7;
>
> (iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with article 5(3), and any relevant information received through the consultations under articles 6 and 7;
>
> (iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and
>
> (v) the integration of the competent authority’s reasoned conclusion into any of the decisions referred to in article 8a.”

220. Article 2(1) stipulates that Member States shall adopt measures to ensure that before development consent is given “projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location” are made subject to a requirement for such consent and “an assessment with regard to their effects on the environment”, such projects being defined in article 4. As in the 1985 Directive, article 2(2) provides that the EIA “may be integrated into the existing procedures for development consent to projects in the Members States”, which in the UK means the existing planning system in which decisions on planning permission are usually taken

by local planning authorities. Throughout the EU the implementation of the EIA Directive tends to be decentralised, as it is often the case that regional and local authorities are responsible for its application: see para 235 below.

221. Following the equivalent provision in the 1985 Directive, article 3(1) provides in relevant part as follows:

> "The [EIA] shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:
>
> …
>
> (c) land, soil, water, air and climate …"

222. Article 4(1) provides that projects listed in Annex I shall be subject to an EIA. Article 4(2)-(4) provides that projects listed in Annex II should be screened to determine whether an EIA is required according to selection criteria set out in Annex III, and on the basis of information provided by the developer as specified in Annex IIA. As set out in Annex IIA, this information comprises a description of the project (point 1), "a description of the aspects of the environment likely to be significantly affected by the project" (point 2) and "a description of any likely significant effects … of the project on the environment resulting from: (a) the expected residues and emissions and the production of waste, where relevant; (b) the use of natural resources, in particular soil, land, water and biodiversity" (point 3).

223. Annex III sets out the selection criteria applicable under article 4(3). These include the "characteristics of projects" (point 1), "with particular regard to", among other things, "cumulation with other existing and/or approved projects" (para (b)), "the use of natural resources, in particular land, soil, water and biodiversity" (para (c)), "the production of waste" (para (d)), "pollution and nuisances" (para (e)) and "the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change …" (para (f)). They also include the "location of projects", meaning that "the environmental sensitivity of geographical areas likely to be affected by projects must be considered" (point 2); and the "type and characteristics of the potential impact" (point 3), meaning that "the likely significant effects of projects on the environment must be considered in relation to criteria set out in points 1 and 2 [of Annex III], with regard to the impact of the project on the factors specified in Article 3(1), taking into account" various matters including "the magnitude and spatial extent of the impact (for example geographical area and size of the population likely to be affected)" (para (a)), "the transboundary nature of the impact" (para (c)) and "the

cumulation of the impact with the impact of other existing and/or approved projects" (para (g)).

224. Article 5(1) provides that where an EIA is required the developer shall prepare an EIA report (that is, in the present case, the Environmental Statement) which shall include:

> "(a) a description of the project comprising information on the site, design, size and other relevant features of the project;
>
> (b) a description of the likely significant effects of the project on the environment;
>
> (c) a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
>
> (d) a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment;
>
> (e) a non-technical summary of the information referred to in points (a) to (d); and
>
> (f) any additional information specified in Annex IV relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected.
>
> Where an opinion is issued pursuant to paragraph 2, the [EIA] report shall be based on that opinion, and include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment …"

Article 5(2) provides for the developer to be able to request an opinion from the authority which is competent to issue a development consent on the scope and level of detail of the information to be provided for the EIA. This was the procedure followed in

this case: see paras 189-190 above. Article 5(3) provides that where necessary the authority should seek supplementary information from the developer "in accordance with Annex IV, which is directly relevant to reaching the reasoned conclusion on the significant effects of the project on the environment."

225. Annex IV sets out the information required for the EIA report (it reflects points previously set out in less detail in Annex III to the 1985 Directive). The information includes the following listed items:

(1) Point 1 is "Description of the project", including "a description of the main characteristics of the operational phase of the project … for instance, energy demand and energy used, nature and quantity of the materials and natural resources (including water, land, soil and biodiversity) used" (para (c)) and "an estimate, by type and quantity, of expected residues and emissions (such as water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation) and quantities and types of waste produced …" (para (d)).

(2) Point 2 is "a description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) studied by the developer … and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects".

(3) Point 3 is "a description of the relevant aspects of the current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the project as far as natural changes from the baseline scenario can be assessed …".

(4) Point 4 is "a description of the factors specified in Article 3(1) likely to be significantly affected by the project: population, human health, biodiversity …, soil …, water …, air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage … and landscape".

(5) Point 5 is "a description of the likely significant effects of the project on the environment resulting from, inter alia: (a) the construction and existence of the project …; (b) the use of natural resources, in particular land, soil, water and biodiversity …; (c) the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances, and the disposal and recovery of waste; (d) the risks to … the environment (for example due to accidents or disasters): (e) the cumulation of effects with other existing and/or approved projects …; (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change; …". It continues:

> "The description of the likely significant effects on the factors specified in article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project."

(6) Point 7 is "a description of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment and, where appropriate, of any proposed monitoring arrangements …".

(7) Point 8 is "a description of the expected significant adverse effects of the project on the environment deriving from the vulnerability of the project to risks of major accidents and/or disasters which are relevant to the project concerned …".

226. Recitals (16) and (17) refer to public participation in the taking of decisions. Recitals (18) to (21) refer to the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"), to which the European Community was a party. These recitals introduce article 6. Article 6(1) provides in relevant part that "Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent …". Article 6(2) provides in relevant part that "[i]n order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means, of [various matters relating to EIA of the project] early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided." Article 6(4) provides that "[t]he public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) …".

227. Recital (15) refers to EIA in a transboundary context. This introduces article 7. The relevant part of article 7 provides that "[w]here a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests", the first Member State shall send a description of the project and give the affected Member State an opportunity to participate in the decision-making procedures referred to in article

2(2). In addition, information should be provided to the public concerned in the territory of the affected Member State so that they have an opportunity to participate in the consultation process. Article 7(4) provides that the Member States concerned "shall enter into consultations regarding … the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable time-frame for the duration of the consultation period. …".

228. Article 8 provides that the results of the consultations and information gathered pursuant to articles 5 to 7 "shall be duly taken into account in the development consent procedure". Article 8a(1) provides that the decision to grant development consent shall incorporate (a) the authority's reasoned conclusion referred to in article 1(2)(g)(iv) and (b) "any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures." Member States shall ensure that any such features of the project and measures "are implemented by the developer" and shall determine monitoring procedures; and "[t]he type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the project and the significance of its effects on the environment": article 8a(4). The main reasons for a refusal of development consent should be stated: article 8a(2).

229. Article 11(1) requires Member States to ensure that "members of the public concerned: (a) having a sufficient interest, or alternatively; (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition" have access to a review procedure before a court of law or equivalent body "to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive".

230. Annex I sets out the projects referred to in article 4(1) for which an EIA is mandatory. These include "crude-oil refineries … and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day" (point 1); "thermal power stations and other combustion installations with a heat output of 300 megawatts or more" and nuclear power stations and reactors "except research installations" whose output is below a certain level (point 2); "integrated works for the initial smelting of cast iron and steel" and certain "installations for the production of non-ferrous crude metals from ore, concentrates or secondary raw materials" (point 4); installations for extraction and processing of asbestos and products containing asbestos, and "for asbestos-cement products, with an annual production of more than 20,000 tonnes of finished products, for friction material, with an annual production of more than 50 tonnes of finished products …" (point 5); construction of "airports with a basic runway length of 2,100 m or more" and of roads of four or more lanes which are 10 km or more in length (point 7); waterways and ports for vessels of over 1,350 tonnes (point 8); waste disposal installations for the incineration of non-hazardous waste with a capacity exceeding 100 tonnes per day (point 10); certain projects for the extraction of

petroleum and natural gas (point 14, set out at para 210 above); industrial plants for the production of paper and board with a production capacity exceeding 200 tonnes per day" (point 18); "Quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares" (point 19); and "installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tonnes or more" (point 21). Points 1, 2, 4, 5, 7 and 8 replicated in whole, or in substantial part, items listed in Annex I to the 1985 Directive as requiring an EIA.

231. Annex II sets out the projects referred to in article 4(2) for which a screening opinion is required. These include under point 2, "Extractive Industry", "quarries, open-cast mining and peat extraction" so far as not covered by Annex I (para (a)); "underground mining" (para (b)); "deep drillings", "with the exception of drillings for investigating the stability of the soil" (para (d)); and "surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale" (para (e)). They also include under point 3, "Energy Industry", "industrial installations for the production of electricity, steam and hot water", so far as not covered by Annex I (para (a)); and under point 4, "Production and Processing of Metals", the "manufacture and assembly of motor vehicles and manufacture of motor-vehicle engines" (para (f)); "shipyards" (para (g)); "installations for the construction and repair of aircraft" (para (h)); and "manufacture of railway equipment" (para (i)). Other projects are listed in relation to the mineral industry (point 5), the chemical industry (point 6), the food industry (point 7), infrastructure projects (point 10) and so forth. In large part these repeat items in Annex II to the 1985 Directive. Certain items listed there were omitted from Annex II to the current EIA Directive, including under point 2 (extractive industry) "extraction of petroleum" (para (f)) and "extraction of natural gas" (para (g)).

The 2014 Directive

232. The text of the EIA Directive in its current form had been amended by the 2014 Directive. Among other changes, this introduced references to "climate change" and to "greenhouse gases". The highpoint of the appellant's case focuses upon this language and these changes, so it is appropriate to consider the object and purpose of the 2014 Directive in amending the EIA Directive. Again, although the 2014 Directive post-dates the GHG Protocol it does not refer to the protocol; nor does it seek to make use of the concepts of scope 1, scope 2 and scope 3 emissions set out in the protocol.

233. The 2014 Directive originated in a proposal by the European Commission ("the Commission") dated 26 October 2012 ("the 2012 Proposal"). The 2012 Proposal was accompanied by a lengthy Impact Assessment ("the 2012 Impact Assessment") which identified certain shortcomings in relation to the implementation of the EIA regime regarding the screening procedure, the quality and analysis of the EIA and risks of inconsistencies within the process itself. The 2012 Impact Assessment noted that "[a]t

present [ie in 2012], EIA reports do not look at the contributions from projects to the causes of global climate change (in terms of directly and indirectly inducing GHG [greenhouse gas] emissions)" (p 83). The shortcomings identified by the Commission did not relate to the absence of consideration of downstream or scope 3 greenhouse gas emissions from EIA of proposed projects. In the section of the 2012 Impact Assessment headed "Detailed description of the environmental impacts", the Commission proposed the integration of a "climate assessment" in EIA reports, for which the focus was on the direct and indirect emissions associated with a project subject to an EIA:

> "As part of the climate assessment, depending on the character of the project, in some cases not only direct greenhouse gas emissions (eg from on-site combustion of fossil fuels) would have to be assessed, but also indirect impacts of the projects on climate change. For example, for transport infrastructure this could include increased or avoided carbon emissions associated with energy use for the operation of the project …; for a commercial development this could include carbon emissions due consumer trips. Member States have legally binding greenhouse gas reduction targets and many Member States have also defined greenhouse gas reduction targets at the local level (main cities, regions etc), so the EIA could assess to what extent projects contribute to the achievement of these targets and could identify relevant mitigation and/or offsetting measures that would need to be implemented" (pp 138-139).

The Commission noted (p 9) that incorporation of climate change issues in EIA reports "could be a good opportunity to integrate environmental impacts into the project's design thereby ensuring a more complete assessment of environmental and climate change impacts of projects and foreseeing appropriate mitigation measures". The relevant problem identified with the existing EIA regime was that "potential (environmental) impacts of projects to new environmental issues (eg climate, biodiversity) are not sufficiently covered by the EIA Directive"; the solution proposed was to "specify the content of the EIA report and of the final decision", "streamline environmental assessments" and "adjust the Directive to the new environmental issues" (p 21). The changes proposed in the 2012 Proposal and introduced by the 2014 Directive did not specify that downstream or scope 3 greenhouse gas emissions should be covered by the EIA report and the final decision.

234. In a summary review of issues identified in a consultation exercise in relation to the EIA regime, the 2012 Impact Assessment had earlier noted (p 79) that although article 3 of the EIA Directive refers to both direct and indirect effects of a project, "in practice the environmental impacts described in EIAs are mostly related to direct impacts …, while indirect impacts and life-cycle impacts are rarely covered in detail (eg

depletion of natural resources due to the use of certain products and materials, greenhouse gas emissions from transportation activities induced by the project, environmental impacts of products manufactured or services provided)". In so far as this item refers to greenhouse gas emissions in terms, the focus is on those from transportation activities in relation to the project itself. This is the only reference in the 2012 Impact Assessment to the environmental impacts of products which have been manufactured, and in that regard it is imprecise, in that a distinction is drawn between indirect impacts and life-cycle impacts. It was not reflected in the Commission's own assessment in the 2012 Impact Assessment of the problems then existing with the EIA regime nor in its proposed solution. This is a significant omission, since the proposed solution involved specifying in more detail what should be included in EIA reports and final decisions in order to ensure greater uniformity of approach across Member States. If the aim of the proposed changes to the EIA Directive had been to require competent authorities to assess all downstream or scope 3 greenhouse gas emissions, one would have expected this to be specified clearly.

235. The 2012 Proposal recommended that the first area of shortcomings referred to above should be addressed by clarifying the screening procedure by modifying the criteria in Annex III and specifying the content and justification of screening decisions; the second area by quality control of EIA information, specification of the EIA report (mandatory assessment of reasonable alternatives etc) and adaptation of the EIA to challenges (ie biodiversity, climate change, disaster risks, availability of natural resources); and the third area by specifying time-frames for the stages of EIA and coordination with other environmental assessments required under other EU legislation. The Commission noted that further guidance was necessary because "the implementation of the Directive is often highly decentralised, as the regional and local authorities are responsible for its application …". There was a review of the additional costs for developers and public authorities associated with the proposed changes and it was stated that the proposal for amendment complied with the proportionality principle.

236. In 2013, in advance of amendment of the legislation, the Commission published *Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment* ("the 2013 Guidance"). In the section entitled "Understanding key climate mitigation concerns" the Commission set out a table of "examples of key questions that could be asked when identifying key climate change mitigation concerns", comprising questions relating to direct greenhouse gas emissions, "indirect GHG [greenhouse gas emissions] due to an increased demand for energy" ("will the proposed project significantly influence demand for energy? Is it possible to use renewable energy sources?") and "indirect GHG caused by any supporting activities or infrastructure that is directly linked to the implementation of the proposed project (eg transport …)" ("Will the proposed project significantly increase or decrease personal travel? Will the proposed project significantly increase or decrease freight transport?"): see p 30. The focus of the proposed questions was an increase in greenhouse gases closely associated with the project itself, as would be involved in increased energy use or vehicular transportation to which the project would give rise.

237. The text of the amendment Directive as proposed by the Commission in the 2012 Proposal was slightly modified in the 2014 Directive, as adopted. However, it clearly continued to reflect the policy objectives specified in the 2012 Proposal and the 2012 Impact Assessment. Recital (7) referred to the greater prominence of certain environmental issues, including climate change, which had become more important in policy making and should constitute "important elements in assessment and decision-making processes". Recital (13) stated: "Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change". Neither the recitals to the 2014 Directive nor the text it introduced into the EIA Directive indicate that it was intended that all downstream or scope 3 greenhouse gas emissions should be included within the concept of "indirect effects" of projects for the purposes of the EIA Directive. As the 2012 Impact Assessment explained, authorities across Member States had not previously regarded them as "indirect effects" of projects "on … climate" within article 3(1) of the EIA Directive (according to the then version of the text of that provision, before the addition of the word "significant" by amendment by the 2014 Directive). The 2013 Guidance only referred to a limited class of emissions as "indirect effects" of projects. If it had been intended that the entirety of the very wide class of scope 3 emissions should also be so regarded, the amendments effected by the 2014 Directive would have made that clear. That would have been necessary in order to ensure a uniform and harmonised approach across Member States in relation to such a fundamental point. It would have constituted a major change of direction and focus for the EIA regime. Instead, as explained further below, the text of the EIA Directive as so amended focused on greenhouse gas emissions arising from the construction and operation of a project itself, together with possible measures for minimising and mitigating such emissions.

238. In 2017 the Commission issued new guidance entitled "Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU)". Under the heading "Legislative requirements and key considerations" the guidance states (p 38) that under Annex IV to the EIA Directive "the emphasis is placed on two distinct aspects of the climate change issue - climate change mitigation: this considers the impact the Project will have on climate change, through greenhouse gas emissions primarily, [and] climate change adaptation: this considers the vulnerability of the Project to future changes in the climate, and its capacity to adapt to the impacts of climate change, which may be uncertain". So far as the former is concerned, therefore, the emphasis is on what can be done in the course of the planning consent procedure to modify the project to mitigate its effects in terms of greenhouse gas emissions. In relation to this, under the heading "Climate change mitigation: project impacts on climate change", the guidance states (p 39) that the EIA should include an assessment of the direct greenhouse gas emissions of the project over its lifetime, "eg from on-site combustion of fossil fuels or energy use", and of emissions "generated or avoided as a result of other activities encouraged by the Project (indirect impacts) eg transport

infrastructure: increased or avoided carbon emissions associated with energy use for the operation of the Project; [and] commercial development: carbon emissions due to consumer trips to the commercial zone where the Project is located." This confirms the Commission's understanding that the relevant "indirect effects" of a project in relation to greenhouse gas emissions are those relating to the operation of the project itself. There is no reference to all downstream or scope 3 emissions, as one would have expected in this guidance if the Commission regarded these as falling within the scope of the EIA Directive. Instead, at p 38, the guidance referred back to the 2013 Guidance, which as noted above only referred to far more limited aspects of greenhouse gas emissions.

The Aarhus Convention

239. The Aarhus Convention, referred to in the recitals to the EIA Directive, is concerned, among other things, with promoting access to information and public participation in decision-making in environmental matters. This was followed by Directive 2003/35/EC which amended the previous version of the EIA Directive to align it with the provisions on public participation in the Convention (that is, well before the 2014 Directive). In fact, the relevant part of the Aarhus Convention followed the basic framework for EIA set out in the 1985 Directive. Article 6 of the Convention makes provision for participation by "the public concerned" in decisions on specific activities, which corresponds to an EIA in relation to the grant of planning consent for particular projects. "The public concerned" is defined in article 2(5) in terms similar to the definition of that term in article 1(2)(e) of the EIA Directive (para 219 above). The right to involvement pursuant to article 6 is for the public affected by a specific decision, not for anyone who might be affected by global warming. Article 6(6) of the Convention requires that the public concerned should be provided with, among other things, "a description of the significant effects of the proposed activity on the environment" (sub-para (b)). No further definition is provided. It is not stated that the significant effects "of the proposed activity" include all downstream or scope 3 greenhouse gas emissions and the practice of EU Member States in the period before the 2014 Directive referred to above indicates that they did not regard these as covered by that provision. In like manner, *The Aarhus Convention: An Implementation Guide*, 2nd ed (2014) published by the United Nations Economic Commission for Europe does not suggest that all such emissions fall within article 6(6)(b) of the Convention (see, in particular, p 151).

National policies on climate change and planning

240. The UK's national climate objectives are set out in the Climate Change Act 2008. Under that Act the national government must account at the national level for all the UK's greenhouse gas emissions, including scope 3 type emissions within UK territory. Among other things, the Act sets a national carbon target (section 1) and requires the Government to establish carbon budgets for the UK (section 4). It contains

mechanisms to adjust the national target and carbon budgets (in sections 2 and 5, respectively) in the light of new information. The national target is for reduction of greenhouse gas emissions by 2050 and the national system of periodic carbon budgets is directed to achieving that reduction. The statutory carbon budgets are not sub-divided by sector, but are expressed as a total number of tonnes of carbon dioxide equivalent. Under section 14(1), the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting carbon budgets for the current and future budget periods. In December 2011 the Government presented to Parliament a report pursuant to this provision on how it proposed to meet the first four carbon budgets covering the period 2008 to 2027: "The Carbon Plan: Delivering our low carbon future". This policy document sub-divides greenhouse gas emissions by sector, by reference both to sources and end users, notably power stations, industry, buildings, transport, agricultural and land use, waste and exports. Pursuant to section 16(2), the Secretary of State must submit to Parliament an annual statement of emissions in respect of each greenhouse gas, setting out the steps taken to calculate the net carbon account for the UK. The statement includes scope 3 type emissions (such as from road traffic) and shows whether the national carbon budgets are being met.

241. Emissions of greenhouse gases from road transport are the subject of national policy which is designed to reduce usage of vehicles using combustible carbon fuel as part of the steps taken to achieve the 2050 net zero target, including in particular the Government's "The Road to Zero" strategy published in 2018 for transition to zero emission road transport.

242. At a conference held pursuant to the United Nations Framework Convention on Climate Change (1992), on 12 December 2015 the text of the Paris Agreement on climate change was agreed and adopted ("the Paris Agreement"). The Paris Agreement set out certain obligations to reduce emissions of greenhouse gases with the object of seeking to reduce the rate of increase in global warming and to contain such increase to well below 2^{o}C above, and if possible to 1.5^{o}C, above pre-industrial levels. On 17 November 2016 the UK ratified the Paris Agreement. The obligations arising from the Paris Agreement directed to reduction of greenhouse gas emissions operate at a national level by reference to "nationally determined contributions": see the summary in *R (Friends of the Earth) v Secretary of State for Transport* [2020] UKSC 52; [2021] PTSR 190 ("*Friends of the Earth*"), paras 70-71. It is through the national target and budgeting mechanisms set out in the Climate Change Act 2008 that the UK seeks to comply with its obligations under the Paris Agreement: see *Friends of the Earth*, paras 71 and 122-124.

243. In the EU, the Effort Sharing Regulation (EU) 2018/842 adopted in 2018 and revised in 2023 established for each Member State a national target for the reduction of greenhouse gas emissions by 2030 in specified sectors, including domestic transport. The same approach based on national targets had been adopted prior to the promulgation of the 2014 Directive and was referred to in the 2013 Guidance (p 20). On

13 February 2009 the EU Council issued a set of conclusions (17271/1/08) from a Council meeting in December 2008, Part III of which addressed an agreement reached in relation to "energy and climate change" regarding national reduction targets. Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 laid down the minimum contributions of Member States to meeting those commitments "and rules on making these contributions and for the evaluation thereof" (article 1). The Decision provided for annual national emission allocations (see recitals (8)-(9) and article 3). The package of measures introduced at this time, and in place when the 2014 Directive was promulgated, set out what were known as "the 20-20-20 targets", including by 2020 to reduce by 20% the emissions of greenhouse gases compared to 1990 levels.

244. The Petroleum Act 1998 is the primary legislation under which oil and gas extraction is regulated in the UK through the grant of licences by the Oil and Gas Authority (now called the North Sea Transition Authority). The revised Oil and Gas Authority Strategy (2021), issued pursuant to the 1998 Act, imposes a "central obligation" on relevant persons in the exercise of licensed activities to take the steps necessary to "(a) secure that the maximum value of economically recoverable petroleum is recovered from the strata beneath relevant UK waters; and, in doing so, (b) take appropriate steps to assist the Secretary of State in meeting the net zero target, including by reducing as far as reasonable in the circumstances greenhouse gas emissions from sources such as flaring and venting and power generation, and supporting carbon capture and storage projects". There is no reference to responsibility in relation to scope 3 emissions.

245. In addition to these regimes, the Secretary of State operates the non-statutory Climate Compatibility Checkpoint ("the CC Checkpoint"), introduced in 2022 with the aim of ensuring the compatibility of future oil and gas licensing with the UK's climate objectives and energy requirements. The CC Checkpoint includes tests regarding reduction of operational greenhouse gas emissions from the UK oil and gas production sector against targets agreed as part of the North Sea Transition Deal in 2021, benchmarking of such emissions from the sector against international benchmarks and assessment of the UK's energy requirements. The Government consulted on the CC Checkpoint and the tests to be included and issued a response. The question of the inclusion of scope 3 greenhouse gas emissions in the CC Checkpoint tests was debated by consultees. In its response the Government explained why it decided against this:

> "The inclusion of Scope 3 emissions was mentioned throughout the consultation questionnaire by stakeholders. Many stakeholders opposed the measurement of international Scope 3 emissions as part of the checkpoint, given the difficulties and complexities associated with accurate

> measurement, existing consideration in the Carbon Budgets and Nationally Determined Contributions of consumers of UK-produced fuels, and the coverage of Scope 1 and Scope 2 emission reductions in other tests, which many responses suggested may be more relevant and controllable.
>
> …
>
> The government acknowledges that there are a range of methods for estimating scope 3 emissions and has reviewed the methods proposed. It is acknowledged that it would be possible to calculate an estimate, or range of estimates for UK scope 3 emissions. One approach would be to pick a calculation methodology that is already employed by the industry, another approach would be to produce a range of scope 3 estimates based on using a number of different approaches. However, given this information, it is not clear what action Ministers would take, as there is no agreed target for the reduction of scope 3 emissions.
>
> …
>
> … the government's view is that scope 3 emissions are not directly relevant to the decision on whether to endorse further licensing round[s]. Including any estimate of scope 3 emissions in the checkpoint would add little value, and it is not clear how Ministers would take such a number into account."

A key argument presented by some consultees why scope 3 emissions should not be included in the CC Checkpoint was that they "are covered by consuming nations' carbon accounts and therefore at a global level scope 3 emissions will be reduced through widespread demand reduction as sources of alternative energy come online"; the Government agreed with this submission (Designing a Climate Compatibility Checpoint for Future Oil and Gas Licensing in the UK Continental Shelf: Government Response to the consultation (2022), pp 27-28).

246. Chapter 17 of the NPPF published in February 2019 is entitled "Facilitating the sustainable use of minerals". Para 205 provides that when determining planning applications, "great weight should be given to the benefits of mineral extraction, including to the economy", and planning authorities should, among other things, "ensure that there are no unacceptable adverse impacts on the natural and historic environment, human health or aviation safety, and take into account the cumulative

effect of multiple impacts from individual sites and/or from a number of sites in a locality".

247. Chapter 14 of the NPPF addresses "the challenge of climate change". It states in general terms that the planning system should support the transition to a low carbon future. It should help to shape places in ways that contribute to radical reductions in greenhouse gas emissions and support renewable and low carbon energy infrastructure: para 148. New development should be planned for in ways that "can help to reduce greenhouse gas emissions, such as through its location, orientation and design": para 150.

248. Para 183 of the NPPF provides:

> "The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

249. Para 12 of the Minerals section of the nPPG states that the planning and other regulatory regimes are "separate but complementary", with the former focusing on whether new development would be appropriate for the location proposed. It concludes:

> "… the focus of the planning system should be on whether the development itself is an acceptable use of the land, and the impacts of those uses, rather than any control processes, health and safety issues or emissions themselves where these are subject to approval under regimes. Mineral planning authorities should assume that these non-planning regimes will operate effectively."

250. Para 112 of the Minerals section of the nPPG addresses the issue of what hydrocarbon issues can be left by mineral planning authorities to other regulatory regimes. In relevant part it states:

> "Some issues may be covered by other regulatory regimes but may be relevant to mineral planning authorities in specific

> circumstances. For example, the Environment Agency has responsibility for ensuring that risk to groundwater is appropriately identified and mitigated. Where an Environmental Statement is required, mineral planning authorities can and do play a role in preventing pollution of the water environment from hydrocarbon extraction, principally through controlling the methods of site construction and operation, robustness of storage facilities, and in tackling surface water drainage issues.
>
> There exist a number of issues which are covered by other regulatory regimes and mineral planning authorities should assume that these regimes will operate effectively. Whilst these issues may be put before mineral planning authorities, they should not need to carry out their own assessment as they can rely on the assessment of other regulatory bodies. However, before granting planning permission they will need to be satisfied that these issues can or will be adequately addressed by taking the advice from the relevant regulatory body…"

Analysis

(1) The purpose and scheme of the EIA Directive (as amended by the 2014 Directive)

251. The basic purpose of the EIA Directive is to ensure that relevant environmental issues in respect of a project are identified and taken into account in the procedure for the grant of planning consent for the project, in particular with a view to examining whether environmental impacts can be avoided or mitigated by measures taken in designing the project or by the imposition and then monitoring of conditions attached to such consent. The EIA Directive lays down harmonised rules and procedures with a view to ensuring that a common approach is adopted across all Member States.

252. The EIA Directive contemplates that decisions on the grant of planning consent will often be taken by local or regional authorities, rather than national authorities: see article 2(2) and the review in the 2012 Impact Assessment (paras 234-235 above). The procedures and rules laid down in the Directive are intended to be appropriate for decision-making at local or regional level by such authorities.

253. This is an important point. As explained above, scope 3 or downstream greenhouse gas emissions are addressed by central governments at the level of national

policy. That is the general position for all Member States, and the UK. Decisions regarding the distribution of greenhouse gas emissions between different sectors of the economy, the striking of a balance between promotion of national economic objectives and reduction of greenhouse gas emissions in various sectors and the rate of transition sector by sector towards the achievement of the 2050 net zero target are all matters of national policy to be determined by central Government.

254. The same is true for debates with other states regarding the methodology for accounting for scope 3 greenhouse gas emissions, where these emissions may well occur in states other than the state where emissions which are closely associated with an originator activity arise (such as scope 1 and, typically, scope 2 emissions). For example, oil extracted at the Site may be transported to be refined in another state, and the fuel so produced may be transported to be used by motor vehicles in other states. Which states should have responsibility pursuant to the Paris Agreement and other international initiatives for accounting in terms of their national carbon figures for greenhouse gas emissions arising from the production chain running from extraction of minerals through refinement (in this case) or the manufacture of products, to the end use of the refined fuel or manufactured products, and the methodology to be used to identify and allocate such emissions, are matters for international discussion and agreement between states.

255. These are all "big picture" issues which a local planning authority such as the Council is simply not in a position to address in any sensible way.

256. Further, it would be constitutionally inappropriate for a local planning authority to assume practical decision-making authority based on its own views regarding scope 3 or downstream emissions and how these should be addressed in a manner which would potentially be in conflict with central Government decision-making and its ability to set national policy. This is true in relation to the UK and in relation to EU Member States as a whole, especially in light of the international and EU frameworks set out above according to which carbon budgets and carbon reduction policies are set at the national level. The EIA Directive as amended by the 2014 Directive was not intended to cut across this basic decision-making architecture in relation to meeting the challenge of climate change.

257. The information to be provided in the EIA process pursuant to the EIA Directive is intended to inform the decision whether to grant development consent for a project, and if so on what conditions, in a way that enables the decision-making authority - typically a local authority - to engage in practical decision-making within the remit of its own competence under existing procedures for development consent (see article 2(2) of the EIA Directive, para 220 above). In doing that it should decide whether a particular project is in accordance with national policy (for which purpose the NPPF and nPPG have been promulgated by the central Government) and consider whether

there are appropriate adjustments which can be made to the project to mitigate its environmental impacts, including to reduce the direct and indirect greenhouse gas emissions associated with it. The EIA process is intended to furnish information to enable the planning authority to exercise its judgment about such matters, not to create some general databank about possible downstream or scope 3 effects which could not bear on what the planning authority has to do. As was observed in the judgment of the CJEU in *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* (Case C-275/09) [2011] Env LR 26 ("*Brussels Airport*") at para 25, article 2(1) of the 1985 Directive (now in the EIA Directive) "does not … require that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that Directive, but only those referred to in Annexes I and II to that Directive".

258. The fact that the EIA Directive is directed towards regulating practical decision-making in this way is generally apparent from the scheme of the Directive and the exercise of judgment by a planning authority which it contemplates, and is also clear from recital (22) (para 216 above) which explains that the Directive does not apply in relation to specific acts of national legislation because the objective of supplying information relevant to the decision is "achieved through the legislative process". It is no part of the object of the EIA Directive to generate information which does not have a direct and practical bearing on the matters to be decided by the decision-making authority. It is difficult to see what, in practical terms, a local planning authority is supposed to do with general information about downstream or scope 3 emissions other than to say that in its opinion they are so great that the project ought not to proceed at all and to refuse planning consent on that basis. But that would constitute unjustified disruption of the proper decision-making hierarchy contemplated by the EIA Directive, since in effect it would involve the local planning authority second guessing or supplanting the decision-making authority of the national Government regarding the appropriate reaction to the existence of downstream or scope 3 greenhouse gas emissions.

259. Further, in promulgating the EIA Directive the EU institutions were obliged to comply with the principle of proportionality. Proportionality is a general principle of EU law: see T Tridimas, *The General Principles of EU Law*, 2nd ed (2006), chapters 3-5. As Tridimas points out (p 137) the principle permeates the whole of the EU legal system; and see Geiger, Khan and Kotzur (eds), *European Union Treaties: A Commentary* (2015), p 40: "The principle of proportionality is one of the general principles of Community law". Article 5(1) of the Treaty on European Union provides (among other things) that the use of EU competences is governed by the principle of proportionality and article 5(4) states that under that principle the content and form of Union action shall not exceed what is necessary to achieve the objectives of the EU Treaties. The EIA Directive falls to be interpreted in the light of this principle. Also, recital (24) to the EIA Directive (para 216 above) states that, in accordance with the principle of proportionality set out in article 5 of the Treaty on European Union, the Directive does not go beyond what is necessary to achieve its objectives, that is, including in relation to the supply of information to assist in decision-making (see

recital (22), para 216 above). It would clearly impose disproportionate costs and burdens on both developers and national authorities if information about all downstream or scope 3 greenhouse gas emissions had to be gathered and presented by developers and had to be assessed by planning authorities (in particular, at the local level) in circumstances where such information could not inform in any helpful or appropriate way the decisions to be taken by those authorities.

260. Accordingly, application of the principle of proportionality indicates that the appellant's proposed interpretation of the EIA Directive, arguing that all downstream or scope 3 emissions are to be regarded as "indirect effects of a project", is not correct. In fact, quite apart from the existence of the background principle of proportionality, in putting forward its 2012 Proposal for the amendment of the EIA Directive to take account of climate change issues the Commission positively asserted that the proposed amendments complied with the principle of proportionality, taking account of the burdens on developers and planning authorities: para 235 above. That statement was made in the context of amendments to the EIA process intended to ensure that greenhouse gas emissions closely associated with a project were taken into account in order to enable planning authorities to require mitigating measures to be taken in relation to matters such as the design of the project. It indicates that there was no intention for all downstream or scope 3 emissions to be taken into account in the EIA process, since information about that could have no proper bearing on actions to be taken by local planning authorities.

261. In addition to this, the general scheme of the EIA Directive indicates that the entirety of scope 3 or downstream greenhouse gas emissions do not qualify as "indirect effects of a project" within the meaning of the Directive. Oil extracted from the Site will have to be refined before it is used. Construction of a refinery would constitute a project listed within Annex I to the EIA Directive (at point 1: para 230 above) for which an EIA would be required. Greenhouse gas emissions from the construction and operation of such a refinery would have to be assessed in the context of an EIA for that project. It would be disproportionate for them to have to be assessed twice, once in the context of an EIA for that project and also in the context of an EIA for the Site.

262. Also, to construe the EIA Directive as requiring this would lead to incoherence. The decision-making processes by authorities deciding on each separate project are not integrated, and so would have a tendency to cut across each other on a potentially determinative issue as is alleged to arise here if each authority made its own assessment of the extent and significance of the same set of greenhouse gas emissions for the project on which it had to decide; all the more so where the projects might be in different Member States. The authority carrying out an EIA in relation to the refinery project, which clearly has the authority under the EIA Directive to determine such matters, might decide that the direct and indirect greenhouse gas emissions of the refinery could be limited or mitigated in an acceptable way (including by having regard to whatever national policy was applicable in that Member State). But the authority

carrying out an EIA in relation to the oil well might reach different conclusions about that (and might not give weight to the national policy of the different Member State of the refinery). The EIA Directive has no mechanism for resolving this sort of difference of view, nor for allocating decision-making authority in relation to such matters, other than by maintaining a focus on the particular project in question and greenhouse gas emissions associated with that project.

263. On the other hand, the relevant refinery might already exist, so that no EIA obligation arises in relation to it under the EIA Directive. In such a case it is difficult to see why the EIA in relation to the oil well should extend to cover the greenhouse gas emissions associated with the operation of a refinery which is not subject to the EIA regime. It would be odd to construe the Directive as imposing indirectly, by the back door, an obligation on the authority considering an EIA for the oil well project (ie a different project, possibly in a different Member State) to assess the greenhouse gas emissions of a refinery outside the regime altogether as part of that authority's EIA responsibilities in respect of the oil well project.

264. Further, if the refinery in this example were located outside the EU, to construe the EIA Directive as requiring the local authority carrying out an EIA in relation to the oil well to assess the downstream greenhouse gas emissions of the refinery in a third state with a view to (possibly) reaching a decision which would prevent the construction of the oil well and so, to that extent, prevent the supply of oil to that refinery, would be to give the Directive exorbitant jurisdictional effect. That would potentially cut across the conduct of relations between the UK and the EU and its Member States with such third state at an international level in a way which cannot have been intended (at any rate without that being clearly indicated in the drafting of the EIA Directive, which is not the case). There is no indication of what methodology should be used in such an assessment exercise, which one would have expected to see spelled out in a harmonising instrument like the EIA Directive if this had been intended.

265. The international regime in place before the promulgation of the 2014 Directive relied on a different mechanism for addressing cross-border effects in terms of greenhouse gas emissions, namely a scheme of national emissions targets designed to encourage policies for reductions in emissions at the place of use of carbon-based products (that is, to effect a reduction in demand), rather than by producing restrictions of output on the supply side. If it had been intended that the EIA Directive should promote a different mechanism of control, one would have expected that to be explained in the various documents setting out the policy underlying the EIA Directive and to be imposed by express drafting in the EIA Directive itself, which is not the case. These points apply with equal force in relation to control of greenhouse gas emissions from motor vehicles and so forth in other Member States and in third states, which are still more remote from the production of crude oil at the oil well at the Site and the decision-making responsibility of the Council. They are the same reasons why the CC

Checkpoint was not drafted to include reference to scope 3 greenhouse gas emissions (see para 245 above).

266. In fact, the EIA Directive does include provisions regarding its cross-border operation. These are far more limited in their effect than the interpretation proposed by the appellant would suggest. This provides a further indication that such an interpretation is incorrect.

267. Recital (15) of the EIA Directive (para 227 above) refers to the desirability of strengthening EIA in a transboundary context, having regard to the UN Convention on Environmental Impact Assessment in a Transboundary Context (1991) (also called the Espoo Convention). Article 1(vii) of that Convention defines "impact" to mean "any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures …" and article 1(viii) defines "transboundary impact" to mean "any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party". This excludes the impact of global warming (an impact of an exclusively global nature) and refers to effects caused by a proposed activity, and so does not cover downstream or scope 3 greenhouse gas emissions caused by other activities. Article 3 requires notification of a proposed activity "that is likely to cause a significant adverse transboundary impact" to the state which is affected, to allow consultation involving that state pursuant to article 5.

268. Article 7 of the EIA Directive (para 227 above) reflects the policy explained in recital (15). There is no adjustment in the EIA Directive in the definition of relevant effects of a project for the purposes of this provision. The inference is that none was required in order to align the operation of this part of the EIA Directive and the Espoo Convention because the full range of downstream or scope 3 greenhouse gas emissions is not covered by the concept of "indirect effects of a project" on which the EIA Directive is based. The information to be provided under article 7(1)(a) by way of notification to another Member State ("a description of the project, together with any available information on its possible transboundary impact") is intended to be aligned with the requirements under the Espoo Convention, as is the provision pursuant to article 7(2) and (3) of the further information available for the purposes of public consultation under article 6 of the EIA Directive. Its focus is the effects of the project itself, not downstream effects. It is by virtue of that focus that a Member State subject to the obligation in article 7 is able to know which other Member States it is required to involve in its domestic consultation and decision-making procedure under article 2(2).

269. In addition, the appellant's interpretation of the EIA Directive would again produce disproportionate effects in terms of the operation of that decision-making procedure, by requiring the involvement of every other Member State in relation to

projects associated with significant downstream greenhouse gas emissions. There is nothing in the practice of Member States of which the court has been made aware which suggests that any of them have done this. Nor is there any indication that the Commission, in its supervisory role under article 12 of the EIA Directive, has suggested that their failure to do so is in contravention of the requirements of the Directive.

270. The Commission's concern regarding the operation of the EIA Directive in relation to matters affecting climate change was directed elsewhere. As explained in the 2012 Impact Assessment (paras 233-234 above), prior to the promulgation of the 2014 Directive the general practice across all Member States was that there was no assessment at all of greenhouse gas emissions of projects, including those closely associated with a project. In the 2012 Impact Assessment and the 2013 Guidance, the Commission indicated that the indirect effects of a project should be taken to include greenhouse gas emissions such as those associated with increased power consumption at the project and increased motor vehicle transportation to and from the project (paras 235-236 above). The object of the 2014 Directive was to tighten up procedures across the EU to produce a harmonised approach which ensured that both "direct effects" of projects in terms of their own generation of greenhouse gas emissions and "indirect effects" in terms of greenhouse gas emissions associated with the project such as from any increased power consumption and motor transportation it would involve were taken into account in the EIA for a project, whereas they had been omitted previously (para 237 above).

271. As explained above, neither the 2012 Proposal nor the 2012 Impact Assessment proposed that the EIA Directive should be changed so that, for the first time, in contrast to existing Member State practice, all scope 3 or downstream greenhouse gas emissions should be included within the concept of "indirect effects of a project" and brought within the EIA regime. This would have been a major change in the operation of the EIA regime and, if it had been intended, this would have been stipulated in clear terms in the amendments to the EIA Directive brought about by the 2014 Directive. As Holgate J rightly pointed out (paras 5 and 6), the effects of the interpretation urged by the appellant would be profound across many areas, not limited to the extraction of oil, since, for instance, the production of aircraft would involve the manufacture of components in a number of factories, leading to the construction of an aircraft in another, and its eventual use for transportation, with greenhouse gas emissions produced at each stage. If it had been intended that the EIA for a factory project to produce components should include all the downstream emissions, this would have been set out clearly in the EIA Directive.

272. Further, if that had been intended, the 2014 amendments of the EIA Directive would have given clear guidance regarding the approach and methodology to be adopted in relation to the assessment of scope 3 or downstream impacts of a project. In the absence of such guidance, there would have been an obvious risk of capricious and arbitrary differences in approach and methodology arising as between local authorities

within a particular Member State and also across Member States on a basic point of principle. This would have undermined a fundamental objective of the EIA Directive, which was to promote a harmonised and consistent approach to the conduct of EIA for projects.

(2) The text of the EIA Directive

273. Against the background of this discussion of the purpose and scheme of the EIA Directive, the points in relation to its text can be made quite shortly. In my view, they indicate clearly that the "indirect effects of a project" do not extend to the downstream or scope 3 greenhouse gas emissions of the kind which are in issue in this case. The relevant provisions are set out at paras 211-231 above.

274. "Project" is defined in article 1(2)(a) to mean "execution of construction works …" or "other interventions in the natural surroundings …". This definition focuses on a specific set of physical works. As the CJEU observed in *Abraham* at para 23, "[i]t is apparent from the very wording of [what was then article 1(2) of the 1985 Directive] that the term 'project' refers to works or physical interventions"; see also *Brussels Airport*, paras 20-24.

275. The relevant environmental effects, both direct and indirect, of a project for EIA purposes are those "of the project". This is the formula used throughout the EIA Directive: see, for example, the Directive's title, recital (7), article 1(1), article 1(2)(g)(iv), article 3(1), article 5(1)(b) and the tailpiece of article 5(1), article 5(3)(c), para 3 of Annex IIA, para 3 of Annex III, and the introduction and tailpiece of para 5 of Annex IV. Article 3(1) (para 221 above) is of particular importance, because this sets out the basic obligation regarding what the EIA of a project should achieve.

276. Holgate J and Sir Keith Lindblom rightly emphasised the importance of this formula. It is difficult to read it as based on an expansive "but for" approach to causation of effects, ie that it is sufficient to say that but for the production of crude oil at the Site, greenhouse gas emissions would be lower. Very few legal rules to do with causation of effects operate according to a pure "but for" principle, and there is no reason to interpret the EIA Directive in this way. On the contrary, the formula used in the Directive indicates that, even in relation to "indirect" environmental effects, they still have to be effects "of the project". This imports the idea that the effects have to be relatively closely connected with the project and do not qualify if they are remote from it. On a natural reading of this phrase, downstream or scope 3 greenhouse gas emissions of the kind in issue in this case could not be said to be "of the project". If it had been intended that they should be covered by the obligation in article 3(1), some wider formula would have been used. Furthermore, this interpretation allows for the coherent accommodation of the EIA regime under the EIA Directive and the general background

approach to combating climate change based on policies and targets established at the national level.

277. An EIA is required before development consent is given for projects "likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location": article 2(1). The focus is on the impact of the project itself. An EIA is to be made part of existing development consent procedures, which are usually conducted by local authorities: article 2(2) and paras 220 and 235 above. There is to be consultation involving the public before development consent is given (article 6). The obligation under article 6 is to consult "the public concerned", which is defined in article 1(2)(e) to mean "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in article 2(2) …". The focus is again on the impacts which the project itself has on the environment which may affect people in the locality, who should be given the opportunity to participate in the local decision-making procedure. There is no suggestion that the population of the whole world, who are affected by global climate change, qualify as "the public concerned" for these purposes.

278. An EIA of a project is required to take account of possible environmental effects deriving from the vulnerability "of the project" to risks of major accidents or disasters "that are relevant to the project concerned": article 3(2). The focus is on the effects which may be produced by the project itself, if affected by an accident or environmental disaster.

279. An EIA may be integrated into existing procedures for development consent: article 2(2) and recital (6). As explained above, the EIA Directive contemplates that an EIA will be carried out by local authorities which have responsibility for granting development consent, and an EIA is directed to furnishing such bodies with information relevant to their own decision-making functions and in relation to matters over which they have practical control. Such local bodies are not responsible for national climate policy, do not have the legitimacy or authority to second-guess assessments of national bodies in relation to it, do not have powers to impose their own judgments regarding national or global climate change policy, are not equipped to make the relevant judgments about how the national or global economy should adjust to climate change, and are not provided with coherent criteria to make assessments regarding downstream effects of projects (whether in relation to climate change, or in relation to other environmental impacts of other projects likely to follow on from adoption of a particular project).

280. The scheme of the EIA Directive is that some projects are taken to have significant effects on the environment and so are automatically subject to an EIA (Annex I projects) and others (Annex II projects) may be subject to an EIA when screened: recitals (7)-(9) and article 4(1) and (2). In the case of both Annex I and Annex

II, the focus is on the specific project. The basis for inclusion in Annex I is the size of the project and its likely physical impacts on the local area, not its likely emissions of greenhouse gases. The fact that fossil fuel refining and burning projects (eg points 1, 2(a) and 4(a)) are listed separately from fossil fuel extraction projects (points 14 and 19) reinforces the project-focused nature of the Directive. The same point applies in relation to the projects listed in Annex II as potentially requiring a screening opinion.

281. Article 4(3) introduces Annex III, which sets out the criteria to determine whether an Annex II project should be selected for an EIA. These criteria are the "characteristics of projects" (point 1), the "location of projects" (point 2) and the "type and characteristics of the potential impact [sc of projects]" (point 3). See also recitals (9)-(11). In setting out guidance for the selection for projects to be subject to an EIA, Annex III provides an indication as to the purpose and focus of the EIA Directive.

282. In Annex III, point 1, para (b) ("cumulation with other existing and/or approved projects") is directed to identifying specific projects with a view to assessing their effects; it is not directed to identifying the cumulation of downstream greenhouse gas emissions from distinct projects or activities, such as motor transport, which do not constitute projects at all. Para (d) ("the production of waste") and para (e) ("pollution and nuisances") are listed as characteristics of the project itself. They are project-focused and do not refer to wider climate change effects. Para (f) ("risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change …") refers to climate change in the context of its contribution to environmental risk posed by the project itself. Annex III, point 2, focuses specifically on the sensitivity of the immediate location of the project ("the environmental sensitivity of geographical areas likely to be affected by projects … with particular regard to" specific environmental features), not on general areas around the world affected by global climate change. Annex III, point 3, refers to "the likely significant effects *of projects* on the environment" in relation to the criteria in points 1 and 2, having "regard to the impact *of the project* on the factors specified in article 3(1), taking into account" a series of impacts referable to the project itself (emphasis added). These include "the transboundary nature of the impact" (para (c), which marries up with the point on transboundary effects under article 7 discussed above) and "the cumulation of the impact with the impact of other existing and/or approved projects" (para (g), which is focused on the cumulative effect of the project with specific existing and approved projects, and does not refer to cumulative effects of greenhouse gas emissions as a contributor to general climate change).

283. Article 4(4) introduces Annex IIA, which specifies the information a developer has to provide for screening of Annex II projects. This is all specific to the project itself and its immediate environment: a description of the project including the physical characteristics of the whole project and "a description of the location of the project, with particular regard to the environmental sensitivity of geographical areas likely to be affected" (not the impact on the whole planet from climate change) (point 1); "a

description of the aspects of the environment likely to be significantly affected by the project" (point 2); and "a description of any likely significant effects … of the project on the environment resulting from" use of natural resources and "the expected residues and emissions and the production of waste" (point 3), meaning residues, emissions and waste from the project, not from other projects or activities.

284. Article 1(2)(g) defines what is meant by an EIA. Article 5 specifies how the first stage of it is to be conducted (corresponding to recitals (12)-(14)), and introduces Annex IV, which specifies the information to be set out in the developer's EIA report (the "environmental statement", as it is called in the EIA Regulations). Article 5(1) sets out a series of matters all focused on the project itself. As well as a description "of the project" (sub-para (a)) and "of the likely significant effects of the project on the environment" (sub-para (b)), these include "a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce … likely significant adverse effects on the environment" (sub-para (c)), that is, to inform the relevant authority of steps taken in relation to the design of the project to reduce its effects; "a description of the reasonable alternatives studied by the developer" and an indication of the reasons for selecting the particular option chosen "taking into account the effects of the project on the environment" (sub-para (d)), that is, to inform the relevant authority of the reasoning process in relation to siting, design and so forth of the project to keep its effects on the environment to a minimum; and any additional information specified in Annex IV "relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected" (sub-para (f)), meaning by that particular project or type of project.

285. The significance of sub-paras (c) and (d), in particular, is that they refer to information which will allow the relevant authority to test in a practical way and in light of its own power of assessment for the purposes of giving development consent for the particular project or attaching conditions thereto, whether the project has been developed with a view to minimising its environmental impact and whether more could be done in terms of its siting or design to achieve that.

286. The purpose of the EIA process is to enable the relevant authority to make this assessment, to facilitate consultation relevant to that (articles 6 to 8), to enable the authority to give a reasoned conclusion to explain its actions (article 1(2)(g)(iv)) and then integrate that reasoned conclusion into the grant of development consent (article 1(2)(g)(v), read with article 8a), and to ensure enforcement of any minimisation measures (article 8a(1)(b) and (4)). The information required to be provided and assessed in an EIA is that directed to fulfilling that purpose.

287. Article 5(2) provides for a mechanism for the relevant authority to give guidance to the developer, taking into account the project-focused information already provided by it "on the specific characteristics of the project, including its location and technical

capacity, and its likely impact on the environment", regarding any further detail required. The purpose of this part of the procedure is to enable the authority to ensure it is equipped with sufficient information to enable it to exercise its powers in relation to the grant of development consent in a practical way, not to acquire general information about the effect of greenhouse gas emissions on climate change, nor about downstream or scope 3 effects generally. Article 5(3)(c) stipulates that where necessary the authority shall seek supplementary information in accordance with Annex IV "which is directly relevant to reaching the reasoned conclusion on the significant effects of the project on the environment" ("the reasoned conclusion" is that required by article 1(2)(g)(iv) and article 8a(1)(a)). The object of this is so that the authority can seek information relevant to the exercise of its own powers in relation to granting development consent.

288. Annex IV, referred to in article 5(1), specifies the information to be provided by the developer. Its focus is the project itself. Point 1 requires a "description of the project, including in particular" various project-focused information including a description of its location (para (a)), the physical characteristics of the whole project (para (b)), a description of "the main characteristics of the operational phase of the project" including energy demand and natural resources used (para (c)), and "an estimate … of expected residues and emissions (such as water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation) and quantities and types of waste produced during the construction and operation phases" (para (d)), which refers to emissions of various types physically associated with the project itself, not to downstream or scope 3 greenhouse gas emissions.

289. Annex IV, point 2, requires a "description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) … relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects". This information is directed to informing the planning authority about matters relevant to steps it can practically take in exercise of its own powers in relation to the grant of development consent in order to minimise the environmental impact of the project itself, eg by requiring improvement of its design to limit emissions (including its own greenhouse gas emissions) by filters, carbon capture and so on.

290. Annex IV, point 3, requires a description of "the relevant aspects of the current state of the environment" and how it is likely to evolve "without implementation of the project", to provide a "baseline scenario". The object of this is to allow the planning authority to make an assessment of the impact of the implementation of the project on the environment in which it is located, with a view to enabling it to exercise its own powers in relation to the grant of development consent.

291. Annex IV, point 4, requires a description of the factors specified in article 3(1) likely to be significantly affected by the project. Article 3(1) refers to "climate", and has

done so since the 1985 Directive. The predecessor of point 4 in the 1985 Directive listed "climatic factors" among a range of other factors. This was somewhat expanded by amendment pursuant to the 2014 Directive to refer to "climate (for example greenhouse gas emissions, impacts relevant to adaptation)", but this effect and the long list of other effects set out are project-focused and are only relevant if significantly affected "by the project".

292. Annex IV, point 5, requires a description "of the likely significant effects of the project on the environment resulting from, inter alia" a list of project-focused matters: construction and existence of the project (para (a)); use of natural resources (that is, by the project) (para (b)); emission of pollutants, noise etc, the creation of nuisances, and the disposal and recovery of waste (para (c)), which does not include reference to downstream effects, for example on the climate; risks to human health, cultural heritage "or the environment (for example due to accidents or disasters)", that is, from accidents or disasters affecting the project itself which lead to impacts on the environment (para (d)), which does not include reference to downstream effects; "the cumulation of effects with other existing and/or approved projects …" (para (e)), which, like Annex III, point 3(g), is focused on the cumulative effect of the project with specific existing and approved projects, and does not refer to cumulative effects of greenhouse gases in relation to general climate change; "the impact *of the project* on climate (for example the nature and magnitude of greenhouse gas emissions [sc from the project]) and the vulnerability *of the project* to climate change' (para (f), emphasis added); and "the technologies and the substances used [sc in the project]" (para (g)). The tailpiece of point 5 (para 225 above) refers to the effects "of the project".

293. Annex IV, point 7, requires a description "of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment and, where appropriate, of any proposed monitoring arrangements …". The object of this is to equip the planning authority with information relevant to the exercise of its powers, so as to ensure that the effects of the project itself on the environment are minimised.

294. Article 7(1) provides for enhanced, cross-border consultation where a Member State "is aware that a project is likely to have significant effects on the environment in another Member State", as explained above. The focus is on the environmental effects of the project itself, not downstream effects.

295. Articles 12 and 13 of the EIA Directive make provision for oversight of the EIA regime by the Commission. Their predecessors were articles 11 and 12 of the 1985 Directive. There is no indication in the materials before the court that the Commission has at any stage regarded the absence of assessment by planning authorities in Member States of downstream or scope 3 greenhouse gas emissions in relation to the grant of development consent for projects as involving infraction of the 1985 Directive or the

EIA Directive. Nor is there any jurisprudence of the CJEU which indicates that the "indirect effects of a project" include downstream or scope 3 greenhouse gas emissions. Given the long period of time involved since the promulgation of the 1985 Directive, the EIA Directive and the 2014 Directive, the absence of such indications seems to me to be significant.

(3) Relevant case law

296. There is limited assistance to be derived from the jurisprudence of the CJEU and domestic caselaw. No judgment of the CJEU addresses the question whether scope 3 or downstream greenhouse gas emissions of the kind at issue in the present case qualify as "indirect effects of a project" within the meaning of the EIA Directive. The question has to be addressed primarily by analysis of the purpose, scheme and text of the EIA Directive itself, as set out above.

297. In England and Wales, the leading decisions on this issue are those of Holgate J and the Court of Appeal in the present proceedings. In Scotland, the Court of Session (Inner House) in *Greenpeace Ltd v Advocate General* [2021] CSIH 53; 2021 SLT 1303 ("*Greenpeace*") followed and applied the analysis of Holgate J in the present case. Little assistance can be derived from other domestic authorities.

298. In *An Taisce – The National Trust for Ireland v An Bord Pleanála (Kilkenny Cheese Ltd, Notice Party)* [2022] IESC 8; [2022] 2 IR 173 ("*Kilkenny Cheese*") the Supreme Court of Ireland examined in detail the issue whether an EIA pursuant to the EIA Directive of a project involving the construction and operation of a large cheese factory should include assessment of upstream greenhouse gas emissions in relation to the project. Upstream emissions to which an activity gives rise qualify as scope 3 emissions within the scheme of the GHG Protocol. The Supreme Court endorsed the reasoning of Holgate J in the present case and concluded that assessment of those emissions was not required by the EIA Directive. The Council, the Secretary of State and HHDL seek to rely on *Kilkenny Cheese* as persuasive authority on the proper interpretation of the EIA Directive. The appellant seeks to rely on certain other authorities.

(a) EU caselaw

299. The appellant relies in particular on *Abraham*, para 210 above, which concerned the application of the 1985 Directive in the context of a project to expand an airport for commercial use. The claimants, who lived nearby, objected to the development on grounds of noise pollution. In the relevant part of its judgment (paras 41-46), the CJEU held that the competent authorities had "to take account of the projected increase in the activity of an airport when examining the environmental effect of modifications made to

its infrastructure with a view to accommodating that increase in activity" when screening the project to see whether an EIA was required. The CJEU observed (para 42) that the scope of the 1985 Directive "is wide and its purpose very broad", and held (para 43) that it would be contrary to that approach to take account only of the direct effects of the works themselves, "and not of the environmental impact liable to result from the use and exploitation of the end product of those works" (that is, the increased infrastructure of the airport).

300. At point 31 of the opinion of Advocate General Kokott, she said "[t]he rules on the information to be provided by the developer under article 5(1) of the [1985] Directive show that the notion of indirect effects is to be construed broadly and in particular includes the effects of the operation of a project". At point 33 she said that "[i]n the case of an airport, the type and extent of the proposed air traffic and the resulting effects on the environment are relevant. The developer can also as a rule be expected to provide that information."

301. Therefore, the indirect environmental effects of the increase in activity which the CJEU and the Advocate General identified as relevant in this case were closely connected to the project in issue. The judgment does not support the appellant's claim in the present case that downstream or scope 3 greenhouse gas emissions which are remote from the operation of the project itself are properly to be regarded as "indirect … effects of the project" within the meaning of article 3(1) of the EIA Directive. It is consistent with the interpretation of the EIA Directive set out above that the indirect environmental effects of a project include increased greenhouse gas emissions in connection with the activities carried out in association with it after its construction as an addition to the direct environmental effects of the project itself. The careful language used by the CJEU in the judgment is not compatible with adoption of a simple "but for" test in relation to any environmental effects of a project however far removed downstream or upstream they might be. See also the judgment in *Ecologistas*, para 210 above, at paras 39-42.

302. Reference should also be made to *Brussels Airport*, para 257 above, in which *Abraham* was considered. The focus of *Abraham* was again taken to be on the indirect environmental effects closely associated with the operation of the airport. Advocate General Mengozzi said (point 30) that in the case of an airport project "the obligation to carry out an impact assessment will be triggered, and not only the immediate effects of the construction works, but also the indirect effects which may be caused to the environment due to the subsequent activity carried on at the airport, will have to be examined". He also observed (point 28) that "[even] though it is settled case law that the scope of [the 1985 Directive] is rather broad, a purposive interpretation of [the word 'construction' in Annex I] cannot disregard the clearly expressed intention of the legislator". At para 29 of the judgment the CJEU expressly approved point 28 of the Advocate General's opinion.

(b) UK caselaw

303. The principal domestic authority relied on by the appellant in this court is *Squire*, para 210 above. That concerned an application for planning permission to erect extensive buildings for rearing poultry, for which an EIA was required. A neighbour objected to this development on the grounds that the storage and spreading of manure from it would result in odour and dust. The environmental statement submitted by the developer simply relied on the fact that a permit for these operations would be required in due course from the Environment Agency, and did not include an assessment of the direct and indirect effects of the development in this regard. The grant of planning permission on the basis of this limited form of environmental statement was quashed by the Court of Appeal. The EIA by the local planning authority was deficient because it did not examine the environmental impacts of the storage and spreading of manure both on-site and off-site as an indirect effect of the proposed development. Lindblom LJ, giving the lead judgment for the court, referred in particular to *Abraham*. The environmental statement indicated that manure would be produced in such quantity that off-site disposal would be required (paras 64-65). It did not set out any meaningful assessment of the effects of odour and dust from its disposal on-site and off-site (para 66); nor assess the measures by which those harmful effects might be reduced (para 67). There had been no proper EIA in relation to the effects of the poultry manure which would be generated by the operation of the development (para 73).

304. In my view, *Squire* does not assist the appellant in her argument in the present proceedings. As in *Abraham*, the indirect environmental effects from the disposal of manure were closely connected with the operation of the project in issue. Like *Abraham*, *Squire* does not support the appellant's claim in the present case that downstream or scope 3 greenhouse gas emissions which are remote from the operation of the project itself are properly to be regarded as "indirect effects of the project" within the meaning of article 3(1) of the EIA Directive. Holgate J was right to distinguish it (paras 119-120), as was Sir Keith Lindblom, the Senior President of Tribunals (as Lindblom LJ had become), in the Court of Appeal (paras 48-49). As Sir Keith Lindblom pointed out (para 48), "[t]he production of manure and its storage and spreading, with the concomitant impacts of odour and dust, was clearly an outcome of the proposed development itself and its use"; and "[t]he Court of Appeal [that is, in his own lead judgment in *Squire*] did not take itself to be explicating the general meaning of the term 'indirect significant effects'".

(c) *Kilkenny Cheese*

305. In *Kilkenny Cheese,* in the judgment of Hogan J with which the other members of the court agreed, the Supreme Court of Ireland addressed the interpretation of the EIA Directive, among other issues. The relevant question under the EIA Directive was whether the obligation on the respondent Board to assess the indirect environmental

impacts of the proposed cheese factory under article 2(1) of the EIA Directive included an assessment of the indirect environmental impact of the off-site production of milk which would be needed to supply the factory (para 17(a) of the judgment). This issue related to environmental effects upstream from the project subject to an EIA, in that the factory was so large that it was assessed that, by reason of the substantial increase in demand for milk which it would create, it would lead to a significant increase in the number of cattle kept on farms in Ireland. Those cattle would have a detrimental impact on the environment, including by substantial production of greenhouse gases.

306. A preliminary question for the court was whether there was in fact a causal relationship between the factory and enhanced milk production (para 53). While the court accepted that "the factory will not *in and of itself* create a demand for milk" (para 75, emphasis in original), because it could absorb existing production levels of milk, the court concluded on the evidence that "the existence of the factory is likely to reinforce and strengthen overall demand for milk" well above the demand which would exist if the factory were not constructed (paras 77-78). Accordingly, the court's analysis proceeded on the footing that there would be a significant increase in the number of cattle upstream from the project in order to meet the enhanced demand for milk associated with the project.

307. It was necessary first to determine the scope of the "project" which was required to be subject to the EIA, by reference to the definition of a "project" in article 1(2)(a) of the EIA Directive (para 81). It was accepted that off-site milk production was not part of the project itself, so the Supreme Court had to ask what the words "direct and indirect significant effects of a project" in article 3(1) of the Directive meant, since they determined what was required to be assessed in the context of the project involving the operation of the cheese factory (para 86). There were two possibilities: that the phrase had an open-ended meaning in relation to indirect effects of a project to cover any effects associated with the project, or that the indirect effects must be those which the development itself has on the environment. After an extended discussion, the court concluded that the latter interpretation was correct. Therefore, the EIA in relation to the factory project was not required to assess the upstream environmental impacts associated with the increased off-site production of milk.

308. The Supreme Court reasoned that the difficulty with an open-ended interpretation of article 3(1) is that it places no limits on the range of indirect effects that would have to be assessed for EIA purposes (para 93). This cannot have been intended. The court cited with approval (paras 94-100) Holgate J's analysis on this issue in the present case and endorsed (paras 96 and 100) the "legal test" set out by him, namely that the indirect effects of a project must be effects which the project itself has on the environment (paras 101 and 112 of Holgate J's judgment). The Supreme Court entered one caveat (para 102), namely that there may "be special and unusual cases where the causal connection between certain off-site activities and the operation and construction of the

project itself is demonstrably strong and unbreakable" such that the significant indirect environmental effects of those activities would be required to be subject to an EIA.

309. By this qualification, the Supreme Court was able to integrate into its analysis the decisions in the previous Irish cases of *An Taisce – National Trust for Ireland v An Bord Pleanála (Edenderry Power Ltd, Notice Party)* [2015] IEHC 633 (the environmental effects of extraction of peat for use in a thermal power plant had to be assessed in the EIA for the power plant project as indirect effects of that project within the meaning of article 3(1) of the EIA Directive) and *O Grianna v An Bord Pleanála* [2014] IEHC 632 (the connection of a wind turbine development with the national grid was fundamental to the project so that the cumulative effect of both should be assessed). In the *Edenderry* case, the judge held (para 66) that what could count as an indirect effect of a project was subject to a remoteness test, which was satisfied on the particular facts of the case, and the Supreme Court endorsed this analysis: paras 88-91. (I interpose that this indirect effect could be regarded as analogous to the inclusion of greenhouse gas emissions "caused by any supporting activities or infrastructure that is directly linked to the implementation of the proposed project" within the concept of "indirect effects of a project" as indicated by the Commission in the 2013 Guidance: para 236 above). By contrast, the environmental effects of an increase in cattle population were too remote from the cheese factory project to qualify as "indirect effects" of that project.

310. The Supreme Court justified its conclusion as follows: (i) the alternative open-ended interpretation of article 3(1) would mean that there were "hardly any limits but the sky" regarding the extent of indirect effects of a project which had to be brought into account in the EIA for that project (paras 100 and 104-105), which would be incompatible with coherent decision-making by the relevant planning authorities by reference to determinate factors; (ii) the language of article 5(1) and in Annex IV, point 1, para (c) "strongly suggest[s] that the information to be supplied must be firmly tethered to the project itself, so that the indirect significant effects to be assessed must be intrinsic to the construction and operation of the project" (para 106); and (iii) the EIA Directive "was ultimately designed to assist in identifying and assessing the direct and indirect significant environmental effects of a specific project, including (post-2014) the climate change effects of such a project", and its scope "should not be artificially expanded beyond this remit" and it should not "be conscripted into the general fight against climate change by being made to do the work of other legislative measures …" (para 107).

311. Those measures included the Irish Climate Action and Low Carbon Development (Amendment) Act 2021 which, like the UK's Climate Change Act 2008, sets out the Irish Government's commitment at a national level to achieve the goal of carbon-neutrality by 2050. The Supreme Court pointed out that the wider indirect environmental consequences of milk production and the activities of the dairy sector should be the subject of national or sectoral measures, rather than being considered at the local level in relation to a decision on planning permission (para 107).

312. The Supreme Court's analysis regarding the interpretation of the EIA Directive is closely aligned with that set out above. I agree with it. The Supreme Court considered that its interpretation of the EIA Directive was acte clair and therefore no reference to the CJEU was required: paras 155-157. The Commission has not brought infraction proceedings against Ireland for adopting that interpretation, which indicates that the EU institutions do not consider the Supreme Court was wrong.

(d) Other authorities

313. The appellant referred to several cases in other jurisdictions which concerned projects for extraction of hydrocarbons: *Vereniging Milieudefensie v Royal Dutch Shell Plc* (Case No C/09/571932) 26 May 2021 (decision of the Hague District Court); *Nature and Youth Norway v The State of Norway (represented by the Ministry of Petroleum and Energy)*, decision of the Norwegian Supreme Court, 22 December 2020, HR-2020-2472-P (Case No 20-051052SIV-HRET); *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258 (decision of the New South Wales Land and Environment Court); *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7; (2019) 234 LGERA 257 (decision of the New South Wales Land and Environment Court); and, from the USA, *WildEarth Guardians v Zinke* 368 F Supp 3d 41, 73 (DDC 2019) (decision of the Federal District Court for the District of Columbia). The legal regimes applicable in these cases were different from the EIA Directive. As Sir Keith Lindblom pointed out in the Court of Appeal (paras 72-78), none of these authorities has any direct bearing on the legal issues in the present case, which are primarily concerned with the proper interpretation of the EIA Directive. It is not necessary to lengthen this judgment by referring to them in detail.

314. After the hearing, the appellant sent to the court a first instance authority from Norway: *Greenpeace Nordic v The State of Norway (represented by the Ministry of Petroleum and Energy)* (Case No 23-099330TVI-TOSL/05), judgment of the Oslo District Court of 18 January 2024. A similar comment applies. That case considered challenges to the grant of oil production licences for North Sea oil fields where there had not been an assessment of the downstream greenhouse gas emissions which would be produced by combustion of the oil extracted from those fields. The challenges were based on a number of legal regimes, including Norwegian statute law, the EIA Directive as applied in Norwegian law pursuant to the European Free Trade Agreement to which Norway is party, the European Convention on Human Rights and the Norwegian Constitution. The District Court held that the grant of the licences was invalid by reason of the omission of an assessment of the downstream emissions, relying primarily on Norwegian statute law as interpreted in light of the Norwegian Constitution. It then turned to consider the EIA Directive. As an addition, in part of its reasoning which was not critical for its decision, the District Court held that there had been a breach of the EIA Directive. The District Court was referred to the judgment of the Court of Appeal in the present case but declined to analyse it because "a comparative analysis of other countries' domestic law … has limited significance" (p 50 of the official translation).

We have been informed that the District Court's decision is now under appeal to the Norwegian Supreme Court.

315. With all due respect, I do not consider that the judgment of the District Court can be regarded as a persuasive authority. The reasoning is relatively short. The judge did not attempt to face up to the analysis set out by Holgate J and the Court of Appeal. She did not refer at all to the judgment of the Irish Supreme Court in *Kilkenny Cheese*, nor to the judgment of the Inner House of the Court of Session in *Greenpeace*. In my view the judge placed undue weight on the words "indirect significant effects" in article 3(1) read outside the context of the scheme of the EIA Directive and without regard to its drafting history. She seems to have assumed that simply by use of the word "indirect" the downstream emissions at issue were within the ambit of that provision, without considering the purpose and scheme of the EIA Directive in the detail in which they have been examined in these proceedings and in those other cases. The judge wrongly considered that *Abraham* supported her view (pp 49-50 of the official translation; contrast paras 299-301 above); she did not refer to *Brussels Airport*, which provides guidance regarding the proper interpretation of *Abraham* (see para 302 above); and she misquoted the judgment in *Abraham* at para 43 as referring to possible effects "from the use and exploitation of the end product" (which, in a case involving a project to extract oil, suggests a reference to the oil). In fact, in that passage the CJEU said only that it would be contrary to the purpose and scope of the 1985 Directive "to take account, when assessing the environmental impact of a project or its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation *of the end product of those works*" (emphasis added), meaning the physical works involved in the project itself (in that case, the building of an extended airport runway).

(4) The approach of Moylan LJ in the Court of Appeal

316. As noted above, Moylan LJ in his dissenting judgment in the Court of Appeal placed particular emphasis on point 14 in Annex I (para 210 above). With respect, I do not consider that this provision can bear the weight he places on it.

317. The provision was not included in Annex I to the 1985 Directive. It first appeared in Directive 97/11, which was the first Directive amending the 1985 Directive, in part to bring it into line with the Espoo Convention. In fact the Espoo Convention, in its original version, did not include this text. Instead, point 15 of Appendix I to the Convention referred to "Offshore hydrocarbon production". Directive 97/11 introduced significant revisions to Annex I to the 1985 Directive, including Annex I, point 14. Recital (6) of Directive 97/11 introduced the revisions in very broad terms, simply stating that "… it is appropriate to make additions to the list of projects which have significant effects on the environment and which must on that account as a rule be made subject to systematic assessment".

318. The Aarhus Convention was adopted in June 1998, after the promulgation of Directive 97/11. The Annex to the Aarhus Convention copied the revised form of Annex I to the 1985 Directive, including the text at point 14. Later, with effect from 2017, the Espoo Convention copied that Annex as well.

319. This history is significant. There was no indication when the text of Annex I, point 14 was adopted that it was intended to extend the concept of "indirect … effects of a project" in article 3(1) of the 1985 Directive to cover scope 3 or downstream greenhouse gas emissions. Neither the Commission nor any Member State considered that it had that effect: see the discussion in the 2012 Impact Assessment and the 2013 Guidance (paras 233-236 above). Nor was it considered to have that effect in the Aarhus Convention (para 239 above). It was not a revision brought in by the 2014 Directive to address the issue of climate change.

320. Further, when one looks at Annex I, point 14 in the context of Annex I and the EIA Directive as a whole, there is no good reason to interpret it as being concerned with scope 3 or downstream greenhouse gas emissions. No other item in the list of Annex I projects for which an EIA is mandatory are singled out for such treatment on the basis of their downstream environmental effects, even though several of them are likely to be associated with such effects (eg point 1, crude-oil refineries; point 6, chemicals production; points 7 and 8, construction of certain roads, railways, waterways and ports; point 19, quarries and open-cast mining). Rather, where in Annex I projects are identified by reference to the volume of production, as in point 14, the reason is that this indicates that they are construction projects of such a substantial size as to warrant a mandatory EIA without the need for a screening opinion. The reference in point 14 to the relevant volume of production being for commercial purposes seems to me to be included simply in order to emphasise this, as that is likely to affect the extent of the construction involved by comparison to, say, a project for experimental drilling which might meet that volume level but only for a short period.

(5) The approach of the majority in the Court of Appeal

321. As noted above, the majority in the Court of Appeal considered that Holgate J was wrong to conclude that the answer to the question of the proper application of the EIA Directive could be determined as a matter of law by reference to the terms of the Directive. Instead, in their view, it was a matter for the evaluative assessment of the Council as local planning authority, subject to the requirement of *Wednesbury* rationality, whether the downstream environmental effects from the combustion of refined hydrocarbon fuel produced from the crude oil extracted from the Site should be brought into account in the EIA as indirect effects of the project or not.

322. In that regard, at paras 57-60, Sir Keith Lindblom cited a number of authorities, including *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env LR 29; *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321; [2012] Env LR 22; and *Friends of the Earth*, paras 126-144 in the judgment of Lord Hodge and Lord Sales. Sir Keith Lindblom and Lewison LJ considered that the Council's assessment that the downstream greenhouse gas emissions from eventual use of the refined fuel were not indirect effects of the project within the meaning of article 3(1) of the EIA Directive could not be said to be irrational, and therefore was a lawful assessment according to this standard.

323. In my respectful opinion, however, that is not a satisfactory way of examining the issue regarding the application of the EIA Directive which arises in this case. If correct, it would mean that one local authority conducting an EIA for a project to drill for oil could lawfully regard the downstream greenhouse gas emissions following on from that project as "indirect significant effects of the project" within the meaning of article 3(1) of the Directive, while another local authority conducting an EIA for the same kind of project could lawfully conclude that such emissions were not "indirect significant effects" of that project within the meaning of that provision. This would lead to inconsistent and unprincipled differences in result depending on the political and policy approach of the relevant decision-maker.

324. That cannot have been intended to be the effect of the EIA Directive in relation to such a fundamental issue of its interpretation which is common across a range of equivalent cases. The EIA Directive is intended to harmonise the approach to be adopted on common issues, not to authorise radically different approaches to identical common fundamental issues of this kind.

325. Accordingly, I consider that there is considerable merit in the approach of Holgate J at first instance in this case. The answer to be given on such a fundamental question affecting the application of the EIA Directive ought to be the same and should be taken to be determined one way or the other as a matter of principle according to the terms of the Directive, read in the light of the purpose and the scheme of the Directive.

326. This is not to doubt the guidance in the authorities referred to in para 322 above. In many cases, whether a particular environmental effect is sufficiently connected with a particular project so as to qualify as an "indirect effect of the project" will call for an evaluative assessment by the planning authority in the light of the scientific and other evidence in the specific circumstances of that case. Where the application of the general test set out in the EIA Directive turns on the specific circumstances of an individual case, it is the rationality standard which applies. However, in some circumstances an issue concerning the application of that test may be so fundamental to the operation of the EIA Directive and so clearly framed in a common way across a range of cases that

only one answer can lawfully and rationally be given regarding the application of that test. In my view, that is the position here.

(6) The approach of Holgate J: interpretation of the EIA Directive as a matter of law

327. It follows from the discussion above that I consider that Holgate J was right to approach the issue regarding the application of the EIA Directive in this case as a matter determined directly by a proper interpretation of the Directive as a matter of law, rather than as determined by an assessment of whether the Council was rational or not in deciding that the downstream greenhouse gas emissions relied on by the appellant were not "indirect effects" of the oil well project at the Site. If the Council had assessed, to the contrary, that they were "indirect effects" of that project, requiring consideration as part of the EIA, it would have erred in law. On a fundamental issue like this, there was only one proper answer that could lawfully and rationally be given when applying the EIA Directive according to its terms. This was the approach which Mr Richard Moules KC, for the Secretary of State, endorsed at the hearing in this court. I agree with his submission.

(7) The inconsistency point

328. The inconsistency point raised on the appeal is explained at para 198 above. In my judgment, in agreement with the Court of Appeal, there is no merit in it. In considering whether to grant planning permission, the Council was obliged to have regard to national policy promulgated by the Government regarding climate change and the extraction of oil. It did not err in doing so. National planning policy is a relevant material consideration when considering whether planning permission should be granted for a development. As I have explained above, the approach to be adopted when balancing the economic desirability of extraction of minerals, including oil, and security of energy supply against wider detrimental impacts from such activity, including their effect on climate change, is pre-eminently a matter for national policy, not local determination.

329. On the other hand, the application of the EIA Directive in relation to the proposed development was the responsibility of the Council, as local planning authority. The Council had to comply with its legal obligations under the EIA Directive. It did so.

330. There was no inconsistency involved in the Council's approach to these two matters. The EIA Directive leaves matters of general policy in relation to the extraction of oil and climate change open for determination at a national level, and the Council was right to take national policy on this point into account in the way it did.

Conclusion

331. For the reasons given above, which differ from those given by the majority in the Court of Appeal but accord with those given by Holgate J, by the Court of Session in *Greenpeace* and by the Supreme Court of Ireland in *Kilkenny Cheese*, I would dismiss this appeal.

332. In relation to the attempt in *Kilkenny Cheese* and in the present case to enlist the EIA Directive in the worthy cause of combating climate change, by seeking to press it into service in relation to requiring EIA in respect of downstream or scope 3 greenhouse gas emissions, it is relevant to bear in mind the cautionary words of Lord Bingham of Cornhill in *Brown v Stott* [2003] 1 AC 681, 703, quoting from *Hamlet* in relation to the European Convention on Human Rights:

> "The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from 'The heart-ache and the thousand natural shocks That flesh is heir to.'".

As Lord Bingham pointed out, that Convention had to be interpreted according to its terms, not in an effort to produce a remedy for every problem which might be identified in a particular situation. So, in the present context, the EIA Directive, interpreted according to its terms, has a valuable role to play in relation to mitigating greenhouse gas emissions associated with projects for which planning permission is sought, but it should not be given an artificially wide interpretation to bring all downstream and scope 3 emissions within its ambit as well. That has not been stipulated in the text of the EIA Directive, is not in line with its purpose and would distort its intended scheme.

333. In *Brussels Airport*, the CJEU observed (para 29) that "a purposive interpretation of the Directive [in that case the 1985 Directive, now the EIA Directive] cannot … disregard the clearly expressed intention of the legislature". In my view, in the present case both the clearly expressed intention in the text of the EIA Directive and a purposive interpretation of that Directive point to the same result.

Neutral Citation Number: [2024] EWHC 1253 (Admin)

Case No: AC-2023-LON-003033

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2024

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

THE KING on the application of CARRALYN PARKES — **Claimant**

- and -

DORSET COUNCIL — **Defendant**

- and –

(1) PORTLAND PORT LIMITED
(2) SECRETARY OF STATE FOR THE HOME DEPARMENT
(3) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Interested Parties

- -
- -

Alex Goodman KC, Penelope Nevill, Fiona Petersen and Alex Shattock (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Richard Wald KC and **Jake Thorold** (instructed by **Dorset Council**) for the **Defendant**
The **First Interested Party** did not appear and was not represented
Guy Williams KC and **Nina Pindham** (instructed by the **Government Legal Department**) for the **Second Interested Party**
Richard Honey KC and **Stephanie Bruce-Smith** (instructed by the **Government Legal Department**) for the **Third Interested Party**
Sasha Blackmore (instructed by and made submissions on behalf of the

Marine Management Organisation)

Hearing dates: 27-29 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MR JUSTICE HOLGATE

Mr. Justice Holgate:

1. The central question in this claim for judicial review is what is the geographical extent of planning control in England and Wales under the Town and Country Planning Act 1990 ("TCPA 1990") where the land meets the sea? It is well-established under the parallel legislation in Scotland that planning control does not extend below the mean low water mark ("LWM") (*Argyll and Bute District Council v Secretary of State for Scotland* (1976) S.C. 248). When the modern system of planning control was enacted in 1947 for both jurisdictions, or in their subsequent iterations, did Parliament intend that the English regime should differ from Scotland by extending beyond the LWM?

2. Both jurisdictions are concerned with regulating the "development" of "land", not water. Water flowing in a river or as the sea is not land or a corporeal hereditament (*Thames Heliport plc v London Borough of Tower Hamlets* (1997) 77 P & CR 164, 168). But does "land" in England and Wales include the sea bed beyond the LWM of the foreshore?

3. This issue arises in relation to the Bibby Stockholm, a barge which has been moored in Portland Harbour, Dorset to accommodate asylum-seekers. The duties of the SSHD to provide accommodation to destitute asylum seekers under ss.95 and 98 of the Immigration and Asylum Act 1999 and the requirements which they have generated have been summarised in *Braintree District Council v Secretary of State for the Home Department* by the High Court [2023] EWHC 1076 (KB) at [11] to [28] and by the Court of Appeal at [2023] 1 WLR 3087 at [10] to [17].

4. The barge is moored adjacent to a pier above a part of the sea bed which is never exposed during the ebb and flow of the tide. That area always lies below the LWM.

5. Ms. Carralyn Parkes is a town councillor and the mayor of Portland Town Council. She brings this claim in a personal capacity as a local resident. She contends that the area of the sea bed above which the Bibby Stockholm is stationed (a) forms part of the "land" which is subject to planning control under the TCPA 1990 and (b) constitutes a material change in the use of that land so as to constitute "development" requiring planning permission. On that basis she says that it is open to the local planning authority ("LPA"), the defendant Dorset Council ("DC"), to consider taking enforcement action for any breach of planning control in respect of that use under Part VII of the TCPA 1990. The claimant seeks a declaration that DC has erred in law in deciding that the area occupied by the Bibby Stockholm falls outside planning control.

6. DC, together with the Secretary of State for the Home Department ("SSHD"), the hirer of the barge and second interested party, and the Secretary of State for Levelling Up, Housing and Communities ("SSLUHC"), the third interested party, contend that planning control under the TCPA 1990 does not extend below the LWM. Portland Port Limited ("PPL"), the first interested party, is the harbour authority for Portland Harbour. It did not take part in the proceedings.

7. On 4 December 2023, I adjourned the application for permission to apply for judicial review to a rolled up hearing.

8. The court was informed that there is a good deal of opposition to the mooring of the Bibby Stockholm in the harbour and to its use for accommodating asylum seekers. The

court has no role to play in considering the rights and wrongs of those issues. The court is only concerned with the legal questions raised by this claim.

9. I am grateful to all counsel for their researches and very considerable assistance in both oral and written submissions.

10. The remainder of this judgment is set out under the following headings:

Factual Background

11. The parties helpfully agreed a statement of facts and a plan, upon which this section of the judgment is based. Portland Harbour is naturally enclosed on three sides (north, south and west) by Dorset and the Isle of Portland. On the east side, it is partially enclosed by inner and outer breakwaters that were constructed between 1849 and 1872.

12. The two inner breakwaters are connected to the mainland. Two outer breakwaters are located between the inner breakwaters. They support a number of buildings and structures, including a functioning lighthouse and a historic fort.

13. The fort and the breakwaters are Grade II listed buildings. There are three 'gaps' in the breakwaters that allow vessels to pass. The largest gap is located between the outer fort and lighthouse and is about 200m wide.

14. The port is accessed by a road off the A354. The A354 runs between Dorchester and Weymouth, through Wyke Regis and on to the Isle of Portland. There is no pedestrian access through the working port because it is a controlled area.

15. The Bibby Stockholm is an engineless barge, which is used as an accommodation vessel. The barge has three stories of accommodation comprising 222 rooms. It is moored in a dock within Portland Port. The vessel can only be moved by tug boats.

16. PPL has given its approval as the harbour authority to the mooring of the barge.

17. The barge is tied by multiple cables and chains at different connection points on two sides to a finger pier lying to the east. The first half of the finger pier is made of solid stone and extends outwards from the harbourside and upwards from the sea bed. The remaining half of the pier extends further into the harbour and is made of wood. The barge is connected to the stone section of the pier and the beginning of the wooden section. People enter and leave the barge by one of four gangways.

18. Because the Bibby Stockholm is located in a controlled area of the port, those living on the barge have to be transported to and from the barge via the port's gates by a regular shuttle service, which provides transport into local towns (Portland and Weymouth). Occupants use a dedicated safe area on the quayside some way back from the water, to embark and disembark from the mini-buses. This safe area is also used for residents to pass through security checks and as a smoking area. There is also a shelter here to protect those waiting from adverse weather.

19. No pre-existing onshore building is used for the purposes of the residents on board the barge, or solely in connection with the use of the barge to accommodate asylum seekers.

20. Multiple cables and pipes for electricity and sewage run from the pier to the barge. There are fuel tanks and generators onshore used in connection with the barge. Lighting and fencing have been extended in and around the security check/waiting area for safety reasons. The port contains a number of quaysides at which passengers may embark and disembark and historically these areas have been fenced and lit.

21. The barge is used to accommodate only single adult males aged 18-65 who are considered suitable to reside there and have been granted s.95 support, transferring from hotels. The barge includes multiple communal spaces, a canteen and a laundry facility. There are two onboard spaces for exercise and recreation and a multi-faith room.

22. The Home Office takes the view that the barge can accommodate up to 506 persons. All cabins have partially opening windows for light and air, newly installed air conditioning units and secure storage lockers. The barge is WiFi enabled. All rooms have en-suite bathroom facilities and there are additional toilets and showers. Several rooms have been converted into double rooms by the installation of bunkbeds. The average room size for these double rooms is 8.9 sqm, the average for four-person rooms is 15.6 sqm and for six-person rooms it is 22 sqm.

23. Continuous security is provided on the barge for the safety and security of its occupants. Security is also provided to check those entering the barge and there are regular patrols to prevent unauthorised access to the barge.

24. The use of the barge is under contract for 18 months. Any extension must be agreed by June 2024. The existing contract expires in December 2024.

25. On 13 July 2023 the Leader of DC stated at a meeting of the Council that Mr. Richard Wald KC (who together with Mr Jake Thorold appeared on behalf of DC in this claim) had advised that the use of the barge in the port was not subject to planning control because it was positioned below the LWM.

26. On 8 September 2023 the claimant issued a claim for judicial review ("JR1") against the SSHD, with DC named as an interested party. It alleged *inter alia* that in deciding to use the Bibby Stockholm to accommodate asylum seekers, the SSHD had erred in law by acting on the basis that the stationing and use of the barge was incapable of constituting development within the jurisdiction of DC as the LPA under the TCPA 1990. The claimant sought a declaration that the accommodation of asylum seekers on the barge was capable of constituting development within the TCPA 1990 and could be the subject of enforcement action by DC under that Act. On 11 October 2023, following an oral hearing, I refused permission to apply for judicial review ([2023] EWHC 2580

(Admin)). I decided that the carrying out by a public authority of development without any requisite planning permission does not in itself involve an unlawful use of power by that authority. Instead it was a matter for the LPA to decide whether any development subject to control under the TCPA 1990 had taken place and, if so, whether it was expedient to take enforcement action. The judgment went on to point out difficulties in the claimant's argument that the location of the Bibby Stockholm fell within planning control.

27. As a result, the claimant brought this second application for judicial review, but in this instance against DC as the defendant. In the claim she seeks:

> "1. A declaration that the Council erred in law in determining it cannot take planning enforcement action against the use and/or stationing of the Bibby Stockholm barge connected to a finger pier and access road in Portland Harbour.
>
> 2. The Claimant further seeks a mandatory order (absent an undertaking to do so) directing the Defendant to reconsider whether to take enforcement action in the light of the judgment of the Court."

Statutory Framework

Planning legislation

28. Section 55(1) of the TCPA 1990 provides the general definition of "development":

> "**Meaning of "development" and "new development"**
>
> (1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

29. By section 57(1) planning permission is required for development:

> "(1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land."

30. Planning permission is generally granted by a "development order", or by the relevant LPA on application made to that authority (ss.58 to 61). A development order is made in relation to all "land", or to such "land" or "descriptions of land" as may be specified in that order. So art.1(2) of the Town and Country Planning (General Permitted Development (England) Order 2015 (SI 2015 No. 596) ("the GPDO") provides that the Order generally applies to all "land" in England. So, for example, Class B of Part 4 in sched. 2 to the GPDO confers permitted development rights for certain temporary uses of land. "Land" has the same meaning as in the primary legislation (see s.11 of the Interpretation Act 1978 and s.336(1) of TCPA 1990 below).

31. Section 62 of the TCPA 1990 provides for the making of applications to a LPA for planning permission for the development of land. In 2019 DC was established as a unitary, or single tier, local authority. It is the LPA for its area for all purposes. In other parts of the country, the county council acts as a county planning authority and district councils within that county act as district planning authorities (s.1(1)). The role of determining planning applications generally belongs to district councils, save in relation to "county matters", notably mineral and waste development. But in each case the statutory functions of the LPA are limited to exercising planning control over "land" in its area.

32. A LPA may grant planning permission on an application made to them under s.70. Section 73 enables an application to be made for planning permission for the "development of land" without complying with conditions subject to which a previous permission was granted.

33. By s.75(1) any "grant of planning permission to develop land" shall "enure for the benefit of the land and of all persons for the time being interested in it," save in so far as the permission provides otherwise.

34. In some circumstances where planning permission is refused for the development of land and that land has become incapable of reasonably beneficial use in its existing state, the owner may be entitled to serve a purchase notice requiring the LPA to purchase his interest in the land (ss.137 to 148).

35. A LPA has a power to serve an order requiring the discontinuance of a use of land (s.102).

36. Essentially, the TCPA 1990 is a regime which imposes planning control and confers rights in relation to "land". Whether a consideration is relevant to development control, or in the preparation of statutory development plans, depends on whether it serves a planning purpose, that is whether it relates to the character of the use of land (*R (Wright) v Forest of Dean District Council* [2019] 1 WLR 6562 at [36]).

37. Under s.172 a LPA may issue an enforcement notice in respect of a breach of planning control. A breach of planning control includes the carrying out of development without any required planning permission (S.171A(1)). That goes back to the fundamental requirement in s.57(1) that planning permission is required for the "development" (as defined in s.55) of "land". So, for example, a LPA cannot take enforcement action in respect of breaches of planning control outside "land" in its area (see e.g. *Wealden District Council v Krushandal* [1999] JPL 174, 180).

38. Section 336(1) of the TCPA 1990 defines the meaning of a number of expressions used in the Act, "except in so far as the context otherwise requires." It provides an overall definition of "land" which is exhaustive:

> "'land' means any corporeal hereditament including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land."

Part IX empowers planning authorities *inter alia* to buy land compulsorily and by agreement for planning purposes. But in the case of planning control, land simply

means any "corporeal hereditament including a building." Section 336(1) also provides that a "building" includes:

> "any structure or erection, and any part of a building, so defined, but does not include plant or machinery comprised in a building."

39. Section 57(1A) of the TCPA 1990 excludes nationally significant infrastructure projects from the requirement in s.57 to obtain planning permission. Instead such projects require "development consent" under the regime established by the Planning Act 2008. For certain projects, such as airports and harbour facilities (see ss. 23 and 24 of the 2008 Act), the geographical extent is greater; it expressly extends beyond England[1] to include "waters adjacent to England" up to the seaward limits of the "territorial sea".[2]

40. A LPA is obliged to prepare and adopt local development documents, including development plan documents, which "set out the authority's policies … relating to the development and use of land in their area" (s.17(3) of the Planning and Compulsory Purchase Act 2004). The decision-maker determining a planning application (or appeal) must take into account relevant development plan documents (s.70(2) of the TCPA 1990 and s.38 of the 2004 Act). By virtue of s.117(1) of the 2004 Act, "land" has the same meaning in that Act as it does in s.336(1) of the TCPA 1990.

Marine and Coastal Access Act 2009

41. In March 2007 the Government laid before Parliament "A Sea Change – A Marine Bill White Paper" (Cm. 7047). Its objects included replacing a number of separate statutory schemes for licensing works and activities in the sea with a single, integrated marine licensing regime focused on sustainable development and a series of marine plans to guide decision-making. The new regime drew upon some of the concepts in the TCPA 1990, with adaptations for the marine environment. The new licensing body was to be the Marine Management Organisation ("the MMO"), acting on behalf of the Secretary of State for Environment, Food and Rural Affairs. The landward limit of the marine licensing and planning regime was defined as the mean high water springs level, so as to create a deliberate overlap along the foreshore with the terrestrial planning system under the TCPA 1990, which was understood to extend only as far as the mean LWM. This was to avoid the new system being restricted by an artificial boundary at the coast and to promote harmonisation of planning and effective co-operation between the different authorities (White Paper para. 4.45).

42. The White Paper resulted in the Marine and Coastal Access Act 2009 ("the 2009 Act"). The background to this legislation and the statutory scheme have been summarised in *R (Powell) v Marine Management Organisation* [2017] EWHC 1991 (Admin) at [42] to [66] and *R (Tarian Hafren Severn Shield CYF) v Marine Management Organisation* [2022] PTSR 1261 at [46] to [62].

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[1] In any Act "England" means the area of the counties established by s.1 of the Local Government Act 1972, unless any contrary intention appears (see s.5 of and sched. 1 to the Interpretation Act 1978 and see below).
[2] See [45] below.

43. Section 65 of the 2009 Act prohibits the carrying on of a "licensable marine activity" defined in s.66 without a marine licence granted under s.69 by the licensing authority (in this case the MMO). Section 66 contains a list of licensable activities expressed in broad terms. Paragraph 7 of that list refers to the following activity:

> "To construct, alter or improve any works within the UK marine licensing area either (a) in or over the sea or (b) on or under the sea bed."

44. For licensing purposes the "UK marine licensing area" comprises "the UK marine area", excluding the Scottish inshore region (s.66(4)).

45. In essence, the UK marine area comprises the sea, that is any area submerged at mean high water spring tide level and the waters of estuaries, rivers and channels up to that level, out to the seaward limits of "the territorial sea adjacent to the UK", the UK's exclusive economic zone and the UK's continental shelf. The UK marine area "includes the bed and subsoil of the sea within those area" (s.42). By s.1(5) of the Territorial Sea Act 1987, the expression "territorial sea adjacent to the UK" in any enactment is to be construed in accordance with s.1 of that Act. Section 1 extended the territorial sea to 12 nautical miles measured from "baselines" established by Order in Council (see below).

46. In their written submissions filed in JR1 dated 29 September 2023, the MMO stated that it had "marine licensing jurisdiction over the Bibby Stockholm." However, it was not clear how the mere stationing of the barge and its use as accommodation could constitute a marine licensable activity within s.66 of the 2009 Act. Ms. Sasha Blackmore appeared on behalf of the MMO at short notice to assist the court at the hearing of the second judicial review. She referred to a recent report of an inspection by the MMO of the Bibby Stockholm in relation to the port. The barge is not attached to the sea bed and does not involve any marine licensable activity, other than a minor matter of no significance to this litigation. The MMO has concluded that the positioning and use of the barge is not subject to control under the 2009 Act.

Local government legislation

47. County Councils were first established by the Local Government Act 1888 ("LGA 1888"). Section 1 established a county council in every "administrative county" to "be entrusted with the administrative and financial business of that county". The term "administrative county" meant the area for which a county council is elected under the Act (s.100).

48. Part III of the LGA 1888 dealt with the boundaries of an administrative county. Section 50(1) provided that the first council elected for an administrative county should be elected "for the county at large as bounded at the passing of this Act for the purposes of the election of members to serve in Parliament for the county". Section 50(2) provided that the administrative county as so defined should be the county of that county council for all purposes of the 1888 Act and the council should have authority throughout the administrative county for which it is elected.

49. Sections 3 to 19 of the LGA 1888 dealt with the powers of a county council. Section 3 transferred to a council the "administrative business of the justices of the county council

in quarter sessions assembled" and then listed that business in sub-paras. (i) to (xvi) (see below).

50. The Local Government Act 1933 ("LGA 1933") consolidated previous legislation relating to local government. Section 1 divided England and Wales into a hierarchy of administrative areas, comprising counties, county boroughs, non-county boroughs, urban districts, rural districts and parishes. Section 1(2) provided that the administrative counties should be those listed in schedule 1, which included the then administrative county of Dorset. Schedule 1 then went on to identify each county borough and non-county borough. Section 1(2) also provided that the urban and rural districts and parishes should be those in existence when the Act was passed. Section 2 established a county council for each administrative county, including Dorset.

51. Local government was reorganised by the Local Government Act 1972 ("LGA 1972") which repealed the 1933 Act. Section 1(1) provided that with effect from 1 April 1974 England (with certain exceptions) should be divided into local government areas know as counties and within those counties local government areas known as districts.

52. Section 1(2) of the LGA 1972, dealing with non-metropolitan counties, provided *inter alia* that the area of the county of Dorset should comprise the administrative areas of the county of Dorset, the county borough of Bournemouth and the borough of Christchurch (and small areas of Hampshire) as they were immediately before the passing of the Act. Section 1(4) and para. 1 of sched. 3 provided for the sub-division of each non-metropolitan county into districts specified in orders made by the Secretary of State. Under delegated legislation one such district was created as the borough of Weymouth and Portland.

53. Section 2 of the LGA 1972 established a council for the area of each non-metropolitan county and for each district. It is common ground that the statutory scheme provided for the transfer of functions, property, rights and liabilities from predecessor authorities to successor authorities created by the LGA 1972.

54. Paragraph 1 of sched. 3 provides that "the boundaries of the new local government areas shall be mered by Ordnance Survey". But the parties are in agreement that maps published by the Ordnance Survey (and produced in the bundles before the court) do not override the correct application of the law as to the geographical extent of the area of DC and its predecessor authorities. The mere fact that those maps do not show, for example, the breakwaters of Portland Harbour as lying within any local government administrative area is not conclusive on that point.

55. DC was established by the Bournemouth, Dorset and Poole (Structural Changes) Order 2018 (SI 2018 No. 648), made under ss.7 and 11 to 13 of the Local Government and Public Involvement in Health Act 2007 pursuant to a proposal made under s.2 of that Act. The Order established two new unitary authorities on 1 April 2019 to provide a single tier of local government within their respective areas.

56. First, art. 3 established a new non-metropolitan county and district, to be known as Bournemouth, Christchurch and Poole, comprising the areas of the districts of those three towns. Article 3 also created a new district council, known as Bournemouth, Christchurch and Poole Council as the sole "principal authority" for that district and provided that there should be no county council for that area. Immediately before 1

April 2019, Bournemouth and Poole had each been unitary authorities and Christchurch had been a borough or district authority falling within the area of Dorset County Council. Articles 4 to 6 abolished the former county boroughs of Bournemouth and Poole and the borough of Christchurch as local government areas and dissolved the respective councils.

57. Second, part 3 of the Order instituted a similar regime in relation to the County of Dorset other than Christchurch. Article 7 created a new non-metropolitan county and district, each to be known as "Dorset", comprising in each case the areas of the districts of East Dorset, West Dorset, North Dorset and Purbeck and the borough of Weymouth and Portland. Article 7 also provided that there should be a new district council for Dorset to be known as "Dorset Council", but no county council for that area. Articles 8 and 9 abolished the county of Dorset and its constituent districts and borough as local government areas and dissolved the former county and district councils.

58. The effect of regs. 2 and 5 of the Local Government (Structural Changes) (Transfer of Functions, Property, Rights and Liabilities) Regulations 2008 (SI 2008 No. 2176), in combination with SI 2018 No. 648, was to transfer to the defendant the functions of its predecessor authorities, Dorset County Council (excluding the area of Christchurch Borough) and the former District and Borough Councils referred to in [57] above. The parties agree that DC succeeded to the planning functions of the former Dorset County Council and of the former District and Borough Councils.

59. The borough of Weymouth and Portland had resulted from the merger in 1974 of the Borough of Weymouth and Melcombe Regis with Portland Urban District Councils. Both Councils had been created as urban district authorities by the Local Government Act 1894. Before that they had been urban sanitary districts under the Public Health Act 1875. Section 100 of the LGA 1888 had anticipated the creation of urban districts by subsequent legislation.

60. Part IV of the LGA 1972 deals with changes in local government areas. Section 72 deals with changes in boundaries occurring as the result of an accretion from the sea:

> "**72 Accretions from the sea, etc.**
>
> (1) Subject to subsection (3) below, every accretion from the sea, whether natural or artificial, and any part of the sea-shore to the low water-mark, which does not immediately before the passing of this Act form part of a parish shall be annexed to and incorporated with—
>
> (a) in England, the parish or parishes which the accretion or part of the sea-shore adjoins, and
>
> . . . . . .
>
> in proportion to the extent of the common boundary.
>
> (2) Every accretion from the sea or part of the sea-shore which is annexed to and incorporated with a parish . . . under this

> section shall be annexed to and incorporated with the district and county in which that parish . . . is situated.
>
> (2A). . . . . .
>
> (3) In England, in so far as the whole or part of any such accretion from the sea or part of the sea-shore as is mentioned in subsection (1) above does not adjoin a parish, it shall be annexed to and incorporated with the district which it adjoins or, if it adjoins more than one district, with those districts in proportion to the extent of the common boundary; and every such accretion or part of the sea-shore which is annexed to and incorporated with a district under this section shall be annexed to and incorporated with the county in which that district is situated."

The grounds of challenge

61. There is no dispute that the quayside, its access and the finger pier are all areas of "land" within the meaning of s.336(1) of the TCPA 1990 and lie within the area to which DC's powers as a LPA apply. The claimant submits that DC has erred in law by proceeding on the basis that the area of the harbour within which the Bibby Stockholm is moored falls outside its territorial jurisdiction as a LPA and for that reason falls outside planning control.

62. In summary, the claimant relies upon five alternative grounds:

(1) The boundaries of DC encompass Portland Harbour;

(2) By virtue of being stationed for an indefinite period of time in its current location, the Bibby Stockholm has become an "accretion from the sea" within the meaning of s.72 of the LGA 1972, and therefore forms part of the area of DC within which its planning control powers may be exercised;

(3) Even if the geographical extent of the administrative area of DC does not extend further into the harbour than the finger pier, DC's enforcement powers nevertheless apply to the Bibby Stockholm;

(4) DC has erred in failing to consider taking enforcement action in respect of any breach of planning control in the form of a material change in the use of, or operational development upon, the quayside, the finger pier and access road;

(5) If on an ordinary interpretation of the legislation, DC does not have power to take enforcement action in relation to the area in which the Bibby Stockholm is located, it does have such a power by interpreting the legislation in accordance with the *Marleasing* principle, so as to give effect to the requirement of the EIA Directive (Directive 2011/92/EU) that there be an assessment of the likely significant effects of relevant projects on the environment (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89); [1992] 1 CMLR 305).

A summary of the claimant's submissions

Ground (1)

63. The claimant submitted that DC's area includes the sea bed covered by the sea within Portland Harbour. But as DC, SSHD and SSLUHC pointed out, even if the claimant were to succeed on that point, she would also need to show that that area falls within the definition of "land" in s.336(1) of the TCPA 1990.

64. Ms. Nevill for the claimant referred to the Portland Harbour Revision Order 1997 (SI 1997 No. 2949) made by the Secretary of State for Transport under s.14 of the Harbours Act 1964, on the application of PPL. By art.4 PPL became the harbour authority in place of the Queen's Harbour Master. By art.2 of the 1997 Order, the harbour comprises the "inner harbour," meaning the breakwaters and the area they enclose, and the "outer harbour." The inner harbour is said to have an area of about 1000 ha and to be one of the largest man-made harbours in the world. The outer harbour includes a large area of sea to the east and north-east, defined by a series of lines drawn to specified co-ordinates. The harbour was used as a major base for the Royal Navy for much of the last century.

65. Initially the claimant contended that Dorset includes the whole of the area of the sea bed enclosed by the breakwaters, but not any part of the outer harbour. However, as we will see, when it came to her reply the claimant contended that a much larger area of the sea falls within the jurisdiction of the LPA.

66. DC is the successor to Dorset County Council and its constituent districts other than the Borough of Christchurch. The County Council was constituted by the LGA 1972 and thereby succeeded to the functions of the previous county council under the LGA 1933. That council succeeded to the county council established for Dorset by the LGA 1888.

67. Ms. Nevill relied upon Lord Hale's treatise "De Jure Maris." Chapter IV addressed "the king's interest in salt waters, the sea and its arms and the soil thereof." She relied upon the words italicised in the following passage:

> "We come now to consider the sea and its arms: and first, concerning the sea itself. The sea is either that which lies within the body of a county or without. *That arm or branch of the sea which lies within the fauces terrae [jaws of the land], where a man may reasonably discerne between shore and shore, is or at least may be within the body of a county, and therefore within the jurisdiction of the sheriff or coroner*. 8 E. 2, *Corone*, 399.
>
> The part of the sea which lies not within the body of a county, is called the main sea or ocean.
>
> The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the King of England, whether it lie within the body of any county or not."

Applying these principles, the claimant submitted that Portland Harbour fell within the body of the county of Dorset and therefore became part of the area of Dorset County Council when that authority was created by the LGA 1888.

68. In *R v Cunningham* (1859) Bell. C.C. 72 it was held that offences of wounding on board a ship in the Bristol Channel occurred within "the body of the county" of Glamorgan, so that the assize court for that county had jurisdiction to try the defendants. The sea belonged to the shores which bounded the Bristol Channel, Glamorgan on one side and Somerset on the other. The evidence before the court pointed to the location of the offence as having always been treated as part of the "parish of Cardiff."

69. In *R v Keyn* (1876) 2 Ex. D 63, the defendant was convicted at the Central Criminal Court of the manslaughter of a passenger who drowned when the ship on which she was travelling sank after colliding with the vessel under his command. The collision took place within three miles of the coast at Dover and therefore within English territorial waters as defined at that time. Cockburn CJ, with whom the majority agreed, stated that if an criminal offence is committed in a bay, gulf or estuary within "the jaws of the land" (*intra fauces terrae*), the common law could deal with it, because those parts of the sea fell within the body of the adjacent county or counties. However, along the coast facing "the external sea" the jurisdiction of the common law extended no further than the LWM (p.162). Accordingly, the Court had no jurisdiction to try the defendant. Ms. Nevill described the distinction drawn by Cockburn CJ as being between the "internal" seas or waters of the country, which formed part of the relevant county, and the "external" sea (sometimes referred to as the high seas), which did not.

70. Ms Nevill relied upon s.3 of the LGA 1888 which transferred to each newly established county council the "administrative business" previously carried out by the justices for that county in quarter sessions, such as the making, assessing and levying of all rates. She submitted that this provision should be read as treating the geographical extent of the area within which a new county council could exercise its functions as including "the body of the county", as previously established by the common law. Accordingly, she says that that area included any area falling within the jaws of the land, and, by the transfer of functions to successor authorities, that has continued to be the case down to the present day.

71. Ms Nevill submitted that the common law treated areas of ports and docks below the LWM as falling within the body of the relevant county (relying upon *The Zeta* [1892] P 285 and *The Goring* [1987] QB 687; [1988] AC 831). She pointed to a statement at first instance in *Denaby and Cadeby Main Collieries Limited v Anson* [1911] 1 KB 171, 178-9 that the area within the breakwaters of Portland Harbour lies within the "jaws of the land".

72. Ms Nevill also submitted that to treat the inner harbour of Portland as falling within the body of the county of Dorset, and now within the area of DC, accords with international law. Under the United Nations Convention on the Law of the Sea ("UNCLOS") the sovereignty of a coastal state extends beyond its "land territory" and "internal waters" to cover an adjacent belt of sea, referred to as "the territorial sea", including the airspace above and the sea bed below (art.2). The territorial sea may extend up to 12 nautical miles from baselines determined in accordance with UNCLOS (art.3).

73. Subject to Part IV of UNCLOS, waters on the landward side of the baseline of the territorial sea form part of the "internal waters" of a state (art.8). By art.5 the normal baseline for measuring the breadth of the territorial sea is the LWM along the coast. But where, for example, the coastline is deeply indented, a state may define a baseline by drawing a straight line joining "appropriate points," so long as the areas of sea lying within that line are "sufficiently closely linked to the land domain to be subject to the regime of internal waters" (art.7). Where a river flows directly into the sea, the baseline shall be a direct line across the mouth of the river between points at the LWM of its banks (art.9). Under art.10 a bay may also be treated as part of the "internal waters" of a state, and therefore outside its territorial sea, provided that *inter alia* it is a well-marked indentation constituting more than a "mere curvature of the coast" and the baseline drawn across the bay does not exceed 24 nautical miles, (drawn between the LWM of the natural entrance points of the bay or so as to enclose the maximum area compatible with a line of that length). Article 11 provides in relation to ports:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works."

74. The Territorial Sea (Baselines) Order 2014 (SI 2014 No.1353) establishes baselines from which the UK's territorial sea is to be measured, in accordance with UNCLOS ("the 2014 Order").

75. The claimant sought to extend her submissions considerably in reply, introducing new points. But it is only necessary for the court to summarise the line of argument:

(i) Contrary to the argument for DC, SSHD and SSLUHC, "land" in s.336(1) of the TCPA 1990 is not used in contradistinction to the "sea." For example, they accept that the area between the high water mark ("HWM") and LWM, which is covered by the sea for a period each day, qualifies as "land" for the purposes of s.336(1) of TCPA 1990 and therefore is subject to planning control. Similarly, land under rivers, including tidal rivers, is "land" for the purposes of the TCPA 1990. Land covered by water can fall within the definition of "land" for the purposes of TCPA 1990;

(ii) The TCPA 1990 does not exclude land under the sea, the sea bed, from the definition of "land." There is no binary distinction between "land" and the sea bed, whether in domestic legislation or in international law. For example, the juridical basis for a coastal state's rights over its continental shelf is that it represents a natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles, whichever is greater (art.76 of UNCLOS);

(iii) Section 90(2) and (6) of TCPA 1990 enables planning permission to be granted for certain generating stations and electric lines within the limits of the territorial sea, on the assumption that that involves development of "land";

(iv) The meaning of "land" in s.336(1) of the TCPA 1990 does not delimit the geographical extent of a LPA's powers of planning control. Instead, those powers are exercisable out to the baselines of the territorial sea, as defined in the 2014 Order;

(v) In legislation "England" means the area consisting of the counties established by s.1 of the LGA 1972 (plus Greater London and the Isles of Scilly) unless the contrary intention appears (s.5 and sched. 1 of the Interpretation Act 1978). The consequence of the argument advanced by DC, the SSHD and the SSLUHC is that there would be a geographical gap between England delimited by the LWM and the baselines from which the territorial sea is measured (i.e. where those baselines lie beyond the LWM). Where, for example, Parliament has created regulatory functions which apply to "England" and the territorial sea, there would be a gap between those two areas where the legislation could not apply (see e.g. the functions of the Environment Agency ("the EA") in relation to fisheries and flood defence). That could not have been intended by Parliament. The claimant also relies upon *Post Office v Estuary Radio Limited* [1968] 2 QB 740, 753-4 and *Van Elle v Keynvor Morlift* [2023] EWHC 3137 (TCC). Accordingly, England and the County of Dorset must be defined so as to extend to the baselines in the 2014 Order.

76. The claimant also submits that s.72 of the LGA 1972 should not be construed as restricting the boundaries of coastal local authorities to the LWM. Instead, the intention of that provision (and similar predecessor provisions in s.27 of the Poor Law Amendment Act 1868 and s.144 of the LGA 1933) was to extend the seaward boundaries of a local authority to the extent that they did not already encompass an accretion from the sea or the LWM.

Ground (2)

77. The expression "accretion from the sea" in s.72 of the LGA 1972 includes an accretion of land *into* the sea (*R v Easington District Council ex parte Seaham Harbour Dock Company Limited* (1999) 1 P.L.C.R. 225, 227-230). Accordingly, the construction of the finger pier is to be treated as an accretion within s.72 and therefore forming part of the area of Dorset.

78. The Bibby Stockholm itself should be treated as an accretion to the land within s.72 because it is moored to the finger pier and will be so located for up to 18 months, which is more than a temporary period. On that basis the barge forms part of "the land" for the purpose of s.336(1) of the TCPA 1990 and therefore falls within DC's planning control powers as the LPA for its area.

Ground (3)

79. If the inner harbour of Portland Harbour falls outside the boundaries of the county of Dorset and of DC, the claimant nevertheless submits that the defendant is empowered to take enforcement action within that area. Although there is a presumption that a statute only operates within the territory to which Parliament has said it extends, that is only a presumption. It follows that a statute may be expressed in sufficiently clear terms

so as to apply to a wider geographical area than the territory for which it is the law. For example, where a statute has been enacted to form part of the laws of England, it may nevertheless apply to conduct beyond that territory. Whether or not it does so is a matter of statutory interpretation (*R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153 at [11]).

80. A statute should be interpreted in accordance with its purpose, by reading the legislation as a whole (*R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594). The purpose of the TCPA 1990 is to control the use of land in the public interest, which includes activities in areas beyond the boundary of a LPA which have a significant impact on the community or environment of that authority's area. Since 2006 the Crown has been subject to statutory planning control (Part XIII of the TCPA 1990). The Crown owns the bed of the inner harbour at Portland.

Ground (4)

81. The claimant submits that DC has failed to consider taking enforcement action in respect of the use of the finger pier, quayside and access road in connection with the mooring of the Bibby Stockholm to accommodate asylum seekers. It is said that the impacts of the barge and its use are relevant to whether there has been a material change in the use of the finger pier, quayside and access road and, if so, whether it is expedient to take enforcement action in respect of that change. The claimant also submitted that the planning unit, by reference to which the materiality of any change of use would fall to be assessed, includes the area of the harbour in which the Bibby Stockholm is moored.

Ground (5)

82. Recital (7) of the EIA Directive states that development consent for public and private projects likely to have significant effects on the environment should be granted only after an assessment of those effects has been carried out. By art.1(2) a "project" means:

> " …
>
> - the execution of construction works or of other installations or schemes
>
> - other interventions in the natural surroundings and landscape … "

Article 2(1) requires member states to adopt "all measures necessary to ensure that before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects." The projects are defined in art.4 and in Annexes I and II. Mr. Goodman KC for the claimant relied upon the references in Annex II to "urban development projects" and to the construction of harbours and port installations. He submitted that the building of the Bibby Stockholm had involved "the execution of construction works", albeit in another part of the world and not in Portland Harbour.

83. In *Abraham v Wallonia* [2008] Case C-2/07; [2008] Env. L.R. 32 the CJEU decided that, in view of the wide scope and purpose of the EIA Directive, the term "project" included modifications to an existing airport which were intended to increase the activity and air traffic at the airport, but without extending the existing runway.

84. Irrespective of whether the use of the Bibby Stockholm qualifies as a project for the purposes of the EIA Directive, Mr. Goodman submits that the key issue is whether there is a lacuna in the TCPA 1990 because on the opposing case, an activity or operation below the LWM which does qualify as a project and is likely to have significant environmental effects is not subject under the TCPA 1990 to requirements for development consent and environmental assessment.

85. It is common ground between the parties that the *Marleasing* principle continues to be applicable for the purposes of the current application for judicial review. On that basis, the court's interpretive obligation is to construe planning legislation compatibly with EU law in so far as it is possible to do so. The techniques available include choosing an interpretation of the language used in the national measure which is compatible with EU law, or reading words into that measure or reading it down. But the court must not interpret domestic legislation incompatibly with any of its fundamental features, or so as to go against its grain (*Gilham v Ministry of Justice* [2019] 1 WLR 5905 at [39] and *Vidal-Hall v Google Inc. (Information Commissioner intervening*) [2016] 1 WLR 1003).

86. In an Appendix to the Amended Statement of Facts and Grounds the claimant put forward a range of interpretations to address the alleged lacuna. They focus on bringing a harbour, or land over which a barge floats, within the scope of planning control or s.72 of the LGA 1972, or on treating such a barge as a "building" and therefore "land."

87. Mr. Goodman submits that the type of activity involved in the case of the Bibby Stockholm is the sort of activity which is controlled as a use of land, for example, where it occurs on an inland river. Accordingly, he says that the submissions advanced for the claimant do not go against the grain of the legislation.

Grounds (1) and (2) – whether Portland Harbour forms part of Dorset

Introduction

88. Under the common law, the realm of England extended to the LWM. Broadly speaking, beyond the LWM lay the high seas. International law, governing the relationships between nation states, has allowed the UK and other countries to exercise sovereignty over a coastal belt of the sea, previously 3, and now 12, nautical miles broad ("the territorial sea"). However, that sea does not form part of the realm within which our domestic law applies, save and in so far as Parliament legislates to that effect (*Keyn* (1876) 2 Ex. D 63, 198-199 and 238-239). The foreshore is that portion of the realm which lies between the HWM and LWM. The foreshore forms part of the body of the adjoining county and therefore was always an area within the jurisdiction of this country's criminal courts. There is a presumption that the foreshore belongs to the Crown, but it could be alienated by grant, charter or prescription. (Coulson and Forbes on Waters and Land Drainage (6th edition) pp. 1, 5-8, 12, 14-17 and 22-26; Halsbury's Laws (5th edition) paras. 38-39 and 41-45).

The UN Convention on the Law of the Sea

89. The Preamble explains that UNCLOS is concerned to establish, with due regard to the sovereignty of nations, a legal order for the seas which will *inter alia* facilitate international communication, promote the peaceful use of seas and oceans, and the equitable and efficient use of their resources.

90. The Convention sets out principles of international law which apply as between different contracting states. Under international law "the high seas" refers to the seas lying beyond a state's internal waters, territorial sea and any exclusive economic zone (art. 86). Within the area of each state's sovereignty, it is a matter for that state to decide, subject to UNCLOS, what laws shall apply and their geographical coverage, including whether they shall extend as far as the outer limits of sovereignty.

91. The Convention establishes a distinction between a state's territorial sea and its "internal waters" in order to apply two different types of management or regulatory regime.

92. Within the territorial sea of a state, ships of all countries enjoy the right of "innocent passage" (art.17). "Passage" means navigation through the territorial sea for the purposes of (a) crossing that sea, without entering internal waters or calling at a roadstead or port facilities outside internal waters, or (b) proceeding to or from internal waters or such a port facility or roadstead (art.18). Article 19 defines how passage qualifies as "innocent." No charge may be levied upon a foreign ship by reason only of their exercising the right of innocent passage (art.26) and a state may not hamper the innocent passage of foreign ships through its territorial sea, save in accordance with UNCLOS (art.24). So, for example, art.21 allows a state to adopt laws, in conformity with UNCLOS and international law, relating to innocent passage through the territorial sea for *inter alia* the safety of navigation and the regulation of maritime traffic, the protection of cables and pipelines and the protection of the environment and fisheries. In addition, a state may require foreign ships exercising the right of innocent passage to use designated sea lanes (art.22).

93. Within the internal waters of a state, the right of innocent passage under UNCLOS does not apply. So the Convention does not prohibit a state from levying charges for the use of its internal waters, for example, a harbour or port. Article 27(1) restricts the circumstances in which a state can exercise its criminal jurisdiction on board a foreign ship passing through its territorial sea, but not where the ship is passing through that sea after leaving that state's internal waters (art.27(2)). Similarly, a state cannot arrest any person or investigate any crime committed before a foreign ship entered its territorial sea if the ship, coming from a foreign port, is only passing through that sea without entering internal waters (art.27(5)). Article 28(1) provides that a coastal state should not stop or divert a foreign ship passing through its territorial sea in order to exercise civil jurisdiction in relation to a person on the ship. By art. 28(2) and (3) a coastal state may not levy execution against or arrest that ship for the purpose of any civil proceedings, except *inter alia* where the ship is passing through the territorial sea after leaving internal waters.

94. Accordingly, the use of baselines under UNCLOS to distinguish the territorial sea of a state from its internal waters is for the purpose of giving effect to international rights of navigation or passage, and the rights and obligations applicable within internal waters

and the territorial sea respectively. The Convention itself has nothing to do with the geographical extent of the powers of a local administrative body in a coastal location, for example, to operate a terrestrial system of planning control.

95. But in reply the claimant submitted that if the TCPA 1990 is interpreted as treating "England" and its constituent LPAs as extending only to the LWM, and not to the baselines from which the territorial sea is measured, there will be unintended gaps in the geographical coverage of other regulatory regimes. This argument is misconceived for a number of reasons.

96. As art.5 of UNCLOS states, the normal baseline is the LWM along the coast. In those locations there is no gap. It is only where the baseline lies further out from the LWM that the alleged gap is said to arise.

97. The claimant emphasises that a port is treated as forming part of a state's internal waters (art.11), but ignores art.7, the effect of which is that very large bays will also form part of those internal waters. The present case illustrates the point. Here, the territorial sea does not begin on the seaward side of the breakwaters of Portland Harbour or even at the boundary of its outer harbour. Instead, Weymouth Bay forms part of the UK's "internal waters". It is a vast area defined by a line from a point on the eastern side of Portland Island (to the south of Portland Harbour) running north-eastwards across that bay to Lulworth.

98. There are many other internal waters shown on the UK's official map (produced by the claimant) which are even larger than Weymouth Bay, such as the sea separating the southern coast of England from the Isle of Wight (and further to the east and west of the Isle), the Wash, the Bristol Channel out to the Gower Peninsula and Ilfracombe, and the outer reaches of the Thames Estuary at least as far as the islands of Sheppey and Mersea. Thus, the claimant's argument in reply that "internal waters" within the meaning of UNCLOS and the 2014 Order must be treated as included in England and also Dorset, goes much further than the jaws of the land argument she initially advanced.

99. In opening her case, the claimant appeared to suggest that a "port" could form part of England and the relevant local authority area, but not a bay. But this was only a self-serving argument for the purposes of this claim. The claimant advanced no principled basis, and I can see none, upon which the court could be asked to accept her "internal waters" argument, derived from international law, but then "pick and choose", so as to include only some smaller internal waters within the meaning of "England", but not the larger areas. Perhaps that is why in reply Ms. Nevill submitted that "England" extends as far as *all* baselines from which the territorial sea is measured. However, the implications of this argument have been overlooked by the claimant's legal team.

100. As we shall see, the correct legal principle is that it is generally a matter for Parliament to determine whether *statutory* functions are exercisable as far as the outermost reaches of territorial sovereignty, or to some lesser extent such as the LWM (see e.g. *The Keyn* at [134] – [136] below). The legal materials which the parties have put before the court show that where Parliament intends that a statutory function is applicable beyond the LWM it says so expressly.

101. The claimant selected two examples to show that England, and its constituent local authority areas, must extend to the baselines of the territorial sea in order to avoid unintended gaps in the geographical coverage of other regulatory regimes and therefore, that approach must also apply to the TCPA 1990. The Environment Act 1995 requires the EA to discharge functions regarding fisheries and flood defence in England and "the territorial sea adjacent to England" (s.6(4), (5) and (7)). In my judgment it is obvious that Parliament has used the words "*adjacent* to England" as meaning contiguous with, and not neighbouring, England in order to avoid a gap in coverage. It therefore follows ineluctably that England in that context must extend to the baselines where the territorial sea begins. The definition of "England" in schedule 1 to the Interpretation Act 1978 must yield to this express provision in the 1995 Act, an interpretive step expressly contemplated by s.5 of the 1978 Act. There is no geographical gap in the coverage by the EA's functions because of the express language used by Parliament. Given the subject-matter of those two regulatory regimes, it comes as no surprise to find that Parliament has provided for the geographical scope of the regulator's powers to extend to internal waters as well as the territorial sea.

102. Plainly, by the Interpretation Act 1978 Parliament decided that "England" in legislation should mean the area of the counties established by the LGA 1972 (plus Greater London and the Isles of Scilly), unless a contrary intention appears. The meaning of "England" is not fixed for all enactments. So where legislation, such as the Environment Act 1995, confers or requires functions to be exercised over England and the "adjacent territorial sea", that it a clear indication that the definition of England in the 1978 Act does not apply. But where the wording of an enactment (such as the TCPA 1990) does not provide for functions to be exercisable within the territorial sea (or adjacent territorial sea) as well as England (or the area of a local authority), there is no reason to treat them as exercisable in "internal waters", unless the statutory language contains some other sufficiently clear indication that that was Parliament's intention. The same goes for any suggestion that those functions are exercisable over some, but not other, internal waters.

103. One of the flaws in the claimant's argument is that it suggests that England generally extends to the baselines marking the start of the territorial sea, even where the operation of the legislation only covers England, or "land" in England. That approach would render the definition of "England" in the Interpretation Act 1978 nugatory.

104. As is correctly stated in Bennion, Bailey and Norbury on Statutory Interpretation (8th edition) at section 6.24:

> "While the internal waters clearly form part of the national territory, it does not follow that their area will be included in some local government district. That depends on whether the boundary of the district was drawn with internal waters in mind."

I address the common law position in the following section on the jaws of the land concept.

105. Likewise, the authorities cited by Ms. Nevill do not assist the claimant's case. *Post Office v Estuary Radio Limited* was concerned with whether the Post Office was entitled to an injunction under s.14(7) of the Wireless Telegraphy Act 1949 to restrain broadcasting without a licence from a radio station in a disused fort in the mouth of the Thames estuary, in breach of s.1(1) of that Act. By s.6(1) that control applied to the UK

and "the territorial waters *adjacent thereto*." The Post Office contended that the fort was either within the UK's "internal waters," applying the definition of a "bay," or within its "territorial sea." At pp.752G and 754F Diplock LJ (as he then was) noted that it was common ground that "territorial waters" in the 1949 Act included the UK's "internal waters" and "territorial sea." The Court of Appeal held that because the fort lay within a bay, and therefore was within the UK's "internal waters", the Post Office was entitled to its injunction.

106. In the *Post Office* case the 1949 Act expressly applied to *adjacent* territorial waters as well as to the UK. Like the claimant's examples taken from the Environment Act 1995, the 1949 Act expressly displaced the standard concept of the "UK" based upon its constituent countries and local authority areas. The *Post Office* case cannot be treated as an authority on the extent of the UK or England (or a local authority area) whenever such terms are used in any enactment. The *Post Office* decision provides no help on the issue in the present case, namely whether "land" in the TCPA 1990 includes England's "internal waters" or its ports, or extends beyond the LWM.

107. *Van Elle Limited* concerned the territorial application of Part 2 of the Housing, Grants, Construction and Regeneration Act 1996 in relation to adjudications upon disputes under construction contracts. HHJ Davies (sitting as a High Court Judge) decided that the expression in the statute "construction operations in England…" was not limited to the area defined by sched. 1 of the Interpretation Act 1978, but also included land covered by internal waters up to the baselines laid down by the 2014 Order. The judge appears to have been influenced by the same passage which Ms. Nevill cited from the judgment of Diplock LJ in the *Post Office* case at p.754F (see [39], [41] and [70] to [71]), without noting that the 1949 Act expressly applied to the UK's "adjacent territorial waters". It does not appear that the 1996 Act contained any such language. At all events, the judge's decision turned on the language and purposes of the 1996 Act and affords no guidance on the geographical extent of statutory powers conferred on local authorities, specifically planning control under the TCPA 1990.

108. In the Planning Act 2008 Parliament has laid down a dedicated regime (which includes planning control) for nationally significant infrastructure projects. They require approval from a Secretary of State under a development consent procedure. As mentioned in [39] above, for airports and harbours Parliament has extended this jurisdiction to include territorial "waters adjacent to England", using similar language to that which we have seen in the Environment Act 1995 and the Wireless Telegraphy Act 1949.

109. Section 90(1) of the TCPA 1990 provides for the grant of deemed planning permission where the "authorisation" of a government department is required for a development carried out by a statutory undertaker or a local authority. Where the Secretary of State grants a consent under s.36 or s.37 of the Electricity Act 1989 for a generating station or electric line in "England or Wales", by s.90(2) he may direct the grant of a deemed planning permission. Section 90(6) provides that in this context "England or Wales" includes adjacent waters up to the seaward limit of the territorial sea. This by now familiar drafting formula is a clear indication of Parliament's intention to distinguish in the TCPA 1990 between the "land" of "England and Wales" and its "adjacent waters", so that activities in those waters do not fall within planning control in the absence of a dedicated provision to that effect. Parliament has used express language where it intends to confer jurisdiction extending beyond the LWM.

110. Planning control under the TCPA 1990 applies to "land" (as defined in s.336(1)) within the areas of LPAs. If Parliament had intended the geographical scope of that control to extend beyond the LWM to include the territorial sea and/or the intervening internal waters (or some part thereof) it is reasonable to expect that Parliament would have said so clearly, as it has done in other legislation. But it did not do so for general planning control under the TCPA 1990. That expectation is reinforced by the fact that the Scottish courts have decided authoritatively that the parallel planning system in that country does not extend beyond the LWM.

111. There is no rational basis for thinking that Parliament would have intended LPAs to exercise general planning control over large areas of the sea up to the baselines for the territorial sea and so far away from the coast. Marine construction works and activities raise very different regulatory issues from those which arise under the terrestrial planning system. Self-evidently LPAs, unlike the MMO, do not have the expertise and resources to exercise control over works and activities in such areas of the sea, or indeed the sea bed.

112. For completeness I note the claimant's additional argument that the area covered by "internal waters", the underlying sea bed, falls within the definition of "land" in the TCPA 1990. But, of course, the sea bed carries on beyond the internal waters. On the claimant's argument, the baselines set by the 2014 Order would not be a logical stopping point. If the sea bed underlying internal waters qualifies as "land", it is difficult to see why the sea bed under the territorial sea (and beyond) does not also qualify. The claimant did not identify any legal distinction between the two for the purposes of the definition of "land" in the TCPA 1990.

113. Although a substantial part of the claimant's oral case was devoted to UNCLOS and the implications of the definition of "internal waters", this does not help the court to resolve the issues of domestic law in this legal challenge. The claimant's argument based on UNCLOS and the 2014 Order is not a proper basis for determining the geographical extent of the functions of a local authority on the coast, whether for planning or for local government purposes more generally.

The "jaws of the land" and "the body of a county"

114. Ms. Nevill placed a great deal of emphasis upon the passage cited from Hale (see [67] above). Hale did not identify his sources in any detail or discuss them. Instead he said that the passage was based upon another treatise by Selden "Mare Clausam", to which the court was not referred. Moreover, the passage quoted from Hale appears in a chapter mainly dealing with the monarch's interest in salt waters, the sea, its arms and the soil.

115. Hale made the following points:

(i) The sea could lie either within the "body of a county" or without;

(ii) The jaws of the land was a term used to define an "arm of the sea", where a person might reasonably discern between one shore and another;

(iii) An arm of the sea, as so defined, *might* fall within the body of a county;

(iv) An arm of the sea which did fall within the body of a county fell within "the jurisdiction of the sheriff or coroner";

(v) The part of the sea falling outside the body of a county is the main sea or ocean;

(vi) The narrow sea adjoining the coast of England was part of the dominions of the King, whether it lay within the body of a county or not.

116. Hale went on to say that in "this sea," presumably referring to the "narrow sea", the King has a "double right": (a) a right of jurisdiction ordinarily exercised by his Admiral and (b) a right of property or ownership. He says "the latter is that which I shall meddle with." The remainder of the chapter does indeed focus on the monarch's property rights in relation to *inter alia* the foreshore and fishing. The "narrow sea" appears to refer to what we now call the territorial sea. The court was not shown any further discussion by Hale of the King's jurisdictional right exercised by his Admiral, or of the meaning and use of the term "body of a county".

117. As a legal source relied upon by the claimant to define the extent of the jurisdiction of the English planning system in coastal areas, the passage in Hale is subject to much uncertainty and, as we shall see, of no real assistance. The jaws of the land expression is used to describe an area of the sea, but the test is visibility from one shore to another. Visibility is a question of degree. Visibility of what? It is not a sensible test for deciding in the twenty first century whether a local authority's functions are exercisable over an area of the sea and, if so, to what extent.

118. Even then, Hale states that an arm of the sea which passes the jaws of the land test *may* fall within the body of a county. The implication is an area of the sea could not have been treated as part of the body of the county unless it passed that test. But if it did, it would not follow automatically that it would form part of the county. It is unclear how that issue was to be resolved, one way or the other. In what circumstances, or by reference to what factors, would an arm of the sea be treated as falling, or not falling, within the body of a county?

119. However, for those legal subjects with which Hale was concerned, two points are reasonably clear. First, the consequence of an area falling within the body of a county was that it fell within the jurisdiction of the sheriff or coroner. The sheriff was concerned with the execution of the King's justice, notably the orders, writs and warrants issued by his courts. Second, the King's jurisdiction over the territorial sea was exercised by his Admiral. But nothing has been shown to this court to indicate that the concept of "the body of a county" was concerned with the exercise of administrative functions of the kind for which local authorities in the nineteenth century were becoming responsible.

120. I will address the case law cited by the claimant. *The Goring* was concerned with a salvage dispute in non-tidal inland waters. Sir John Donaldson MR (as he then was) gave a helpful explanation of the background to the passage in Hale [1987] Q.B. 687, 701-4. The jurisdiction of the Lord High Admiral was of great antiquity, possibly even going back to Saxon times. Originally it extended to only criminal offences, but by the late 14th century it included all civil disputes connected with the sea. Gradually he asserted jurisdiction not only over matters occurring on the high sea, but also on the sea

within the body of a county. There were disputes as to the demarcation between the jurisdiction of the common law courts and that of the Lord High Admiral, with different legal principles being applied. In 1389 an Act was passed providing that the Admiral should not "meddle" with anything done upon the realm but only upon the sea. A further statute passed in 1391 reinforced the point: "all manner of contracts, pleas and quarrels and all other things arising within the bodies of the counties", whether on land or on water, and also "wreck of the sea" should be tried and determined by the laws of the land, that is in the common law courts, not by the Admiral. The Admiral's jurisdiction (which came to be known as the High Court of Admiralty) was restricted to the high seas until 1840.

121. When *The Goring* reached the House of Lords, Lord Brandon gave a similar account ([1988] AC 831, 846-7). He added that the geographical extent of the body of a county to define matters excluded from the jurisdiction of the High Court of Admiralty was not wholly clear. But it seems that over time the Admiral's jurisdiction did not apply to salvage of ships cast on the sea shore, or within a port or harbour, or a haven, channel or estuary, which was treated as falling within the body of a county and hence the common law courts (p.846E). Subsequently, the Admiralty Court Act 1840 removed the restriction on that court's salvage jurisdiction to the high seas and extended it to salvage within the body of a county. After a detailed review of much subsequent legislation, the House of Lords held that salvage law was never extended to cover wrecks in non-tidal waters. *The Goring* casts no light on whether the body of a county was ever relevant for determining the geographical extent of administrative functions.

122. The issue decided in *The Zeta* is of no relevance to the present case. The question was whether the claim could, and therefore should, have been brought in the County Court, exercising its Admiralty jurisdiction, rather than the High Court, so that the trial judge had been entitled to deprive the successful claimant of his costs. The ship owner sued in respect of damage to his ship, sustained when it was in the Liverpool docks, caused by the negligence of the harbour board. The majority of the Court of Appeal decided that whether on the high seas, or within the body of a county, Admiralty jurisdiction did not cover damage caused to a ship other than by another ship (see e.g. pp. 297 and 303). Although it was not drawn to the attention of this court, I note that the House of Lords reversed the Court of Appeal on that issue ([1893] AC 468).

123. So far as the present case is concerned, neither the Court of Appeal nor the House of Lords decided that the Liverpool docks fell within the body of a county. All that can be said is that Lord Esher MR described the Liverpool docks as not being either in the sea, nor in the River Mersey. The collision took place in an "inside basin of the system of the Liverpool dock, which basin is not upon any navigable waters at all." This was a basin situated on land, in the county of Lancaster and within the borough of Liverpool ([1892] P at 295). It seems that the Stanley Dock was built inland, so there was no need for the court to apply the "jaws of the land" principle, or to decide that the land fell within the body of a county. There was certainly no issue about that.

124. In *Denaby and Cadeby Main Collieries Limited* the claimant brought an action against the King's Harbour Master at Portland for an injunction to restrain him from removing their coal hulk which was being used for bunkering ships in the harbour. The claimant maintained that it was entitled to keep the hulk permanently moored in the harbour to the harbour bed. The injunction was refused. The judge at first instance decided that the permanent mooring of the hulk was not an incident of any right of navigation. The other

main point of decision was that harbour master was entitled to remove the hulk as a trespass. This was because the soil of the harbour was vested in the Crown. Although A.T. Lawrence J did also say that the harbour lay within the jaws of the land, he did not offer any explanation. In any event, the longstanding presumption was that the soil of a harbour belonged to the Crown and, in this instance, Acts of Parliament had recognised that the harbour was Crown property. It was a major naval dockyard.

125. The Court of Appeal upheld that decision relying upon the powers of the harbour master to remove the hulk. They did not mention the jaws of the land principle. In so far as that principle had been referred to at first instance, it simply formed a limited part of the court's reasoning to establish the Crown's ownership of the soil. *Denaby* did not address the use of that principle for any wider purpose.

126. There remain the criminal law cases, *Cunningham* and *Keyn*. They have been the subject of subsequent judicial analysis and, in the case of *Keyn*, Parliamentary intervention. I deal with *Cunningham* first (see [68] above).

127. *Cunningham* was discussed by the Privy Council in *The Direct United States Cable Company Limited v the Anglo-American Telegraph Company Limited* (1877) 2 App. Cas. 394. The issue was whether Conception Bay formed part of Newfoundland, so that the respondent could rely upon a statutory prohibition of any other person using any part of that Province for telegraphic communications to obtain an injunction against the appellant in relation to the laying of a telegraphic cable across the bay. The appellant's project avoided laying the cable within 3 miles of the shore.

128. Lord Blackburn described the English authorities as relating to the specific question as to where the boundary of a county ended and the exclusive common law jurisdiction of the Admiralty Court began, rather than the boundaries of a Dominion or nation state (p.416). He pointed out that Hale had not explained what is meant by seeing or discerning from shore to shore. If it means to see what another person is doing on the other shore, the size of the gap would be very limited. If it means to see the manoeuvres of ships the distance would be extensive (p.417). The Court did not indicate which approach should be taken.

129. Lord Blackburn stated that *Cunningham* did not decide that the whole of the Bristol channel fell within the body of each adjoining county; rather that a particular location in the Channel fell within Glamorganshire. He also explained that evidence on usage, and the manner in which that part of the Channel had been treated, were significant for the decision in *Cunningham.* Similarly, after pointing to the difficulties in identifying principles for determining whether a bay forms part of a state, the Privy Council relied upon the long period over which the British Government had exercised dominion over the bay with the acquiescence of other nations, amounting to exclusive occupation.

130. Both *Cunningham* and the *Cable Company* case make plain the uncertainty involved in the physical "jaws of the land" test, save perhaps in obvious cases. Not surprisingly, the courts have relied substantially upon other more objective evidence, such as the actual usage of an area, its treatment for tax purposes and, crucially in the *Cable Company* case, the exclusive occupation of the Bay by the British Government which had been recognised by other nation states.

131. In *The Fagernes* [1927] P 311 the judge at first instance had decided that a claim relating to a collision between two ships in the Bristol Channel did fall within the jaws of the land and therefore the jurisdiction of the High Court. He said that he had been guided by *Cunningham.*

132. In the Court of Appeal Bankes LJ stated that there was no clear authority for determining what inland waters, such as bays, gulfs and estuaries are contained within the jaws of the land, except where effective occupation or statutory recognition has been established, or the opening is so narrow as to admit of no doubt (p.321). That observation echoed the Privy Council's reasoning in the *Cable Company* case.

133. The Court of Appeal reiterated that *Cunningham* had not decided that the whole of the Bristol Channel lies within the jaws of the land. In *The Fagernes* the collision between two vessels had occurred much further down the Channel (about 20 miles east of Lundy Island) where its width was so much greater and there was no effective occupation by the state of that area. Bankes LJ pointed out that in *Cunningham* there was evidence that the relevant location had been treated as part of the parish of Cardiff and the County of Glamorgan. Lawrence LJ expressed similar views (p.329). It is worth recalling that in *Cunningham* the ship had been anchored in anchorage grounds, the Penarth Roads, used by ships going to and from Cardiff docks. The anchorage was a roadstead lying within the limits of the port of Cardiff, but not a part of a harbour. Taxes and local rates had been levied on the occupiers of an island nearby, which formed part of the parish of Cardiff. But in *The Fagernes*, ultimately the court acted upon a statement by the Attorney General that the Crown did not claim any jurisdiction over the location in question.

134. I return to the case of *Keyn* (see [69] above). The thirteen judges divided seven to six. As Lord Wilberforce said in *Pianka v The Queen* [1979] AC 107 at 118, there were a number of differing reasons given in support of each opinion which have proved difficult to analyse. But it was clear that if an offence was committed within the body of a county, the assize court for that county would have jurisdiction in respect of it (see Cockburn CJ at p.168). Conversely, the assize court would have no jurisdiction to try an offence committed outside the body of a county, because the commission from the monarch to the judge of assize applied only to the relevant county and juries were summonsed only to try cases within that county (Cockburn CJ at pp.162 and 167). The body of a county included land down to the LWM and areas of the sea (a bay, gulf, estuary or harbour) between the jaws of the land. But otherwise along the coast facing the "external sea", the jurisdiction of the common law courts extended no further than the LWM (p.162 and 166).

135. In *Keyn* the collision between the two ships had taken place where the coastline faced the external sea and so the jaws of the land principle was not in point. Given that the incident had taken place outside the body of the county of Kent, the issue was whether it fell within the jurisdiction of the Central Criminal Court as the statutory successor to the criminal jurisdiction of the Lord High Admiral. On that point, the majority held that the Admiral had had no jurisdiction to try offences by foreign nationals on board foreign ships, whether inside or outside the territorial limits of England.

136. The Court in *Keyn*, apart from two judges, agreed that by 1876 international law allowed coastal states to exercise powers over territorial waters, including the imposition of criminal liability. Most of the minority held that the sea within 3 miles of

the English coast already formed part of the territory of England and that English criminal law had extended over that area to include foreign ships, formerly under the jurisdiction of the Admiral, but then the Central Criminal Court. However, the majority held that the state's ability to confer jurisdiction on criminal courts depended upon Parliament enacting legislation to that effect (see also *Pianka* [1979] AC at 119-120).

137. Parliament passed the Territorial Waters Jurisdiction Act 1878 in order to overcome that jurisdictional issue. How this was done has been discussed in *Pianka* and *R v Kent Justices ex parte Lye* [1967] 2 QB 153. But in summary, section 2 provided that an indictable offence committed by a person, whether or not a UK citizen, on the open sea within 3 nautical miles of the coast measured from the LWM, even if committed on board or by means of a foreign ship, was an offence within the jurisdiction of the Admiral. The 1878 Act left untouched the jurisdiction of an assize court to try an offence occurring within the body of a county. In its current form the Act now applies to the territorial sea as defined by the Territorial Sea Act 1987 and the jurisdiction to try a case on indictment has been vested in the Crown Court (s.46(2) of the Senior Courts Act 1981).

138. To summarise, the general position was that the area of a county next to the sea extended as far as the LWM, together with, for certain purposes, additional areas falling within the jaws of the land (e.g. estuaries and bays). The application of the "jaws of the land" principle is subject to considerable uncertainty and in some cases has had to be supplemented by other factors to which substantially greater weight has been given. The principle has been used to determine for certain parts of the coast the extent of the monarch's property rights and potentially whether an area of sea fell within the body of a county. The concept of the body of a county was used to establish whether conduct in a coastal location could be tried as a crime under English law and also whether the common law courts or the Admiralty Court had jurisdiction to try such an offence or to entertain certain civil proceedings. The coroner of a coastal county had no jurisdiction over the high seas, but he did have jurisdiction within the body of that county, including an arm of the sea or a port or harbour (Halsbury's Laws of England (3rd edition) vol. 8 p. 468 and *R v Soleguard* (1738) Andr. 231).

139. The case law demonstrates the need to keep in mind the distinction between international law determining the area of this country's sovereignty as between nation states and domestic law determining the geographical extent of any functions exercisable within that area. The concept of the body of a county was used to resolve certain jurisdictional issues about the geographical extent of the powers of criminal and civil courts and of coroners. But although that concept originated in the common law, it has been for Parliament to determine how far within this country's area of sovereignty the powers and duties it creates extend.

140. It is not difficult to see why the judges decided that coroners and common law courts should have jurisdiction over deaths and crimes occurring within ports and harbours and potentially areas lying within the jaws of the land. But no authority has been cited showing that that case law has ever been applied to determine the geographical extent of administrative or local government functions.

141. Similarly, it comes as no surprise that ports and harbours have formed part of the realm or dominion, so that the monarch or the state could exercise control over navigation and activities within those areas and could levy tolls and duties. But it does not follow that

a harbour forms part of a local government area for the purposes of any of its statutory functions. Different considerations are likely to apply. In my judgment, these issues depend upon the language used by Parliament when enacting the relevant power or duty and not upon an ancient and somewhat uncertain concept used to determine the extent of the jurisdiction of the criminal and admiralty courts and of coroners.

142. For these reasons, the case law on the circumstances in which the historical term "the body of a county" may include coastal waters, does not provide any support for the claimant's argument that Portland Harbour forms part of the area of DC for the purposes of exercising its administrative functions, such as planning control under the TCPA 1990.

Local authority coastal boundaries and accretions from the sea

143. Section 3 of the LGA 1888 transferred to the council of each county the "administrative business" of the justices in county quarter sessions as set out in paras. (i) to (xvi). That included the making, assessing and levying of rates, the grant of entertainment licences, the provision of asylums for the mentally ill and certain types of school, responsibility for highways and the organisation of Parliamentary elections. No case law has been cited to show that any coastal waters below the LWM fell within the jurisdiction of county quarter sessions as regards "administrative business" as opposed to criminal matters.

144. In the nineteenth century, the parish was the administrative unit for rating purposes, even where rates were levied by, for example, county quarter sessions (see the County Rates Act 1852 and Amies Law of Rating (1967) pp.114-115). It was well-established at common law that the boundary of a parish did not extend below the LWM. But there was no presumption that the foreshore between the HWM and LWM formed part of the parish. Whether that was so in any particular case depended upon proof by evidence to that effect. Accordingly, in *R v Musson* (1858) 8 E. & Bl. 900 it was held that the occupier of a pier was only liable for rates in relation to that section of the pier erected on land above the HWM (see also *The Trustees of the Duke of Bridgewater's Estates v Bootle* (1866-67) L.R.2 Q.B.4 dealing with a dock).

145. This principle was altered by s.27 of the Poor Law Amendment Act 1868 which provided that every accretion from the sea, whether natural or artificial, and any part of the seashore to the LWM, which on 25 December 1869 did not form part of any parish, should be annexed to and incorporated within the adjoining parish.

146. In *Barwick v South Eastern and Chatham Railway Companies* [1921] 1 KB 187 Earl Reading CJ stated that because the statute applies to both natural and artificial accretions, any distinction between a slow and gradual accretion and a rapid or immediate one is to be disregarded (p.198). The Harbour Board at Dover had reclaimed 11 acres of land below the LWM in order to widen an existing pier and accommodate a railway station and sidings. The engineering of this solid structure excluded the sea which had previously flowed over the site. The bed of the sea had become dry land. Accordingly, the whole of the reclaimed area was held to be an accretion from the sea within s.27 of the 1868 Act and the occupier was rateable in respect of its occupation of that area.

147. By contrast, a pier comprising a wooden walkway supported by iron pillars around which the sea continued to flow was held not to be an accretion from the sea within s.27 (*Blackpool Pier Company v Fylde Union* (1877) 46 L.J. (M.C.) 189). The operator was only rateable in respect of that part of the pier which lay within the LWM. The same approach was applied to harbour infrastructure such as quays (Ryde on Rating (10th edition) p.533 et seq.)

148. In *Easington* the court decided that works for the creation of a dock amounted to an accretion from the sea, by analogy with *Barwick*.

149. Section 27 of the 1868 Act was repealed and replaced by s.144 of the LGA 1933. Section 144 added that a part of the foreshore or an accretion treated as annexed to a parish, should also be treated as annexed to and incorporated in the county district and county, or the county borough, in which that parish is situated. Section 144 was itself repealed and replaced by s.72 of the LGA 1972 which is to similar effect (see [60] above).

150. I agree with the claimant that s.72 of the LGA 1972 does not have the effect of restricting the area of a coastal local authority to the LWM (or to accretions from the sea). Instead, it declares that that area shall *include* the foreshore down to the LWM (as well as accretion from the sea). On the basis of the case law referred to above, an accretion from the sea will often be a structure above the LWM, around which the sea flows.

151. Applying *Barwick*, I agree that the inner breakwaters are accretions to the land within s.72 of the LGA 1972. They are solid structures constructed on an area of the seabed from which the sea had been excluded. They are connected to the land mass.

152. However, I am doubtful as to whether the outer breakwaters constitute accretions from or into the sea. They are separated from the inner breakwaters by substantial gaps for ships to pass. The outer breakwaters do not represent a building out of the land into the sea. Unlike the inner breakwaters, they are not connected to the main land. "Accretion" refers to a process of growth by enlargement (Oxford English Dictionary), in this context enlargement of the mainland (see e.g. Megarry & Wade: The Law of Real Property) (10th edition) p.40).

153. However, it is unnecessary for me to decide that point. Even if all of the breakwaters are to be treated as accretions from, or into, the sea, that would only mean that those *structures* form part of the area of Dorset. But the claimant needs to establish that the area of the sea bed above which the Bibby Stockholm is moored falls within s.72 of the LGA 1972. However, in this respect, that area of seabed is no different from any other part of the seabed inside the breakwaters of Portland Harbour. The claimant therefore needs to establish that the whole of the seabed inside the Inner Harbour falls within s.72. That is impossible. The whole of that area is below the LWM. It is never exposed and cannot be described as an accretion from the sea. It is simply part of the sea bed and not land formed from, or into, the sea.

154. It is common ground that the finger pier to which the Bibby Stockholm is moored is an accretion from the sea falling within s.72 of the LGA 1972 and so falls within DC's area. The claimant goes on to submit that because the barge is moored to that pier and will be so located for up to 18 months, which is more than a temporary period, the barge

itself should be treated as an accretion within s.72 of the LGA 1972 and therefore within DC's area. No authority has been cited to support this argument. It is unsound.

155. A barge or ship is a chattel. It can move or be towed to a different location. Even if a ship or barge be moored in one location for a sufficiently long period of time that its occupier is in rateable occupation of the underlying soil and so liable for business rates under the Local Government Finance Act 1988, the vessel does not cease to be a chattel (see e.g. *Rudd (Valuation Officer) v Cinderella Rockerfellas Limited* [2003] 1 WLR 2423). No one could say that a boat moored to a river bed, even for a lengthy period of time, becomes a fixture and therefore part of, and an addition to, the land. The boat remains a chattel (*Holland and Hodgson* (1872) L.R. 7 C.P. 328, 335; *Chelsea Yacht and Boat Company Limited v Pope* [2000] 1 WLR 1941, 1944).

156. Section 1 of the LGA 1972 divided England into local government areas, counties and then districts. Section 72 of that Act appears in Part IV which deals with changes in local government areas, including the role of the Local Government Boundary Commission. There is nothing in the legislation to suggest that the extent of a local government area could be influenced by the positioning of a chattel over land.

157. The claimant has not shown that the sea bed within the harbour formed part of the county for the purposes of local government administration or rating when the LGA 1888 was enacted or subsequently.

Conclusions on Grounds (1) and (2)

158. For the above reasons neither the area of the sea bed above which the Bibby Stockholm is moored, nor Portland inner harbour, nor the "inner waters" in Weymouth bay extending to the baselines of the territorial sea, form part of the area of DC.

159. In any event, even if the claimant had succeeded on that issue, I agree with DC, SSHD and SSLUHC that that would be insufficient to make the location of the Bibby Stockholm subject to planning control. It is not enough that a site should fall within the area of a LPA. It must also constitute "land" (see the definition in s.336(1) of the TCPA 1990 at [38] above), the subject to which I turn next.

The definition of land in the TCPA 1990

160. It is necessary to place the definition of "land" in s.336(1) of the TCPA 1990 into a broader statutory context.

161. By s.5 and sched. 1 of the Interpretation Act 1978, "'land' includes buildings and other structures, land covered with water, and any estate, interest, easement servitude or right in or over land" unless the statute in question shows a contrary intention. Plainly the TCPA 1990 does just that, because the definition of "land" in s.336(1) is limited to "any corporeal hereditament, including a building." Before we consider the significance of the reference to corporeal hereditaments, it is necessary to see how the concept of land has been treated in earlier planning legislation and in Scotland.

Definitions of land in English and Scottish planning legislation

162. The Town and Country Planning Act 1932 (which applied in England and Wales) was a forerunner of the modern system of planning control. It too applied to "land" but s.53 defined "land" as follows:

> "'Land' includes land covered with water and any right in or over land."

That should be read alongside s.3 of the Interpretation Act 1889 which defined land as including "messuages, tenements and hereditaments, houses and buildings of any tenure". The key points are that those definitions were not limited to corporeal hereditaments and the 1932 Act expressly included "land covered with water." Parliament passed a similar statute in 1932 introducing planning control in Scotland and employing the same definition of "land."

163. However, s.119(1) of the Town and Country Planning Act 1947 defined "land" in essentially the same language as we find in s.336(1) of the TCPA 1990.

164. By contrast, when in the same year Parliament introduced for Scotland a similar system of planning control, it enacted a different definition of "land" to that contained in the English statute of the same year. Section 113(1) of the Town and Country Planning (Scotland) Act 1947 provided:

> "'land' includes land covered with water and any buildings as defined by this section."

"Building" was defined in the same terms as in s.119(1) of the English statute of 1947 (and as set out in s.336(1) of TCPA 1990). When read with s.3 of the Interpretation Act 1889, the definition of land in the Scottish Act of 1947 was similar to that contained in the 1932 Act.

165. The definition of "land" in the Scottish planning statute of 1947 was carried forward into the consolidating statutes, the Town and Country Planning (Scotland) Act 1972 and the Town and Country Planning (Scotland) Act 1997.

166. In 1947 why did Parliament change the definition of "land" for planning control in England so as to differ from the 1932 Act and from the parallel legislation in Scotland? Why has that difference been maintained? Counsels' researches have not yielded any explanation in any authority or any *Pepper v Hart* material. Fortunately, however, the court's task in this case is greatly assisted by the decision of the Inner House of the Court of Session in *Argyll and Bute District Council.*

The decision in Argyll and Bute District Council

167. The LPA challenged the decision of the Secretary of State that the construction of concrete oil production platforms in two locations within Loch Fyne fell outside the geographical extent of "land" subject to planning control. Loch Fyne is a sea loch extending about 40 miles inland from the Sound of Bute. A concrete production complex was developed near the village of Portavadie, on the eastern side of the loch, just over half way along its length. One location lay about 500 yards west of the

mainland in 25 fathoms of water and the other 1 mile west of the mainland in 100 fathoms. The platforms were to be secured to moorings in the seabed and an island nearby. The LPA argued that planning control extended to development on, over, or under the sea bed between the jaws of the land and for at least 3 miles from the LWM. It was also argued that because the bed of the loch was vested in the Crown and so formed part of the realm and of the adjoining county, it fell within the planning control exercisable by the LPA. The Secretary of State submitted that planning control extended up to but not beyond the LWM.

168. Lord Wheatley, the Lord Justice-Clerk, stated that it was unnecessary for the court to decide whether the *general* jurisdiction of the local authority extended across the bed of the loch because, even if it did, the authority's jurisdiction for a particular statutory purpose depended on the "provisions and purpose" of that statute. A local authority's jurisdiction may not be coterminous for all purposes. It was therefore essential to ascertain whether the jurisdiction of a LPA was expressly or by necessary implication restricted to exclude the area and sea bed below the LWM (p.252).

169. The Court referred to ss.19 and 20 of the 1972 Scottish Act which imposes planning control on the development of land in terms not materially different from ss.55 and 57 of the TCPA 1990. The jurisdiction of the LPA related to the development of "land." The Court referred to two provisions. First, the Scottish definition of "land" included "land covered with water." Secondly, para.71 of Schedule 22 to the 1972 Scottish Act indicated that planning control applied to "tidal lands" below the HWM. That provision in sched. 22 to the 1972 Scottish Act referred to "tidal lands" below the HWM without expressly defining that term. Accordingly, the Court decided that the legislation did not *expressly* exclude the sea bed below the LWM (pp.252-3). It remained necessary to determine what was meant by "tidal lands".

170. The Court then decided that the sea bed below the LWM was excluded from planning control by *necessary implication* because:

(i) The history of planning legislation, its concept and purpose do not *prima facie* comprehend the sea bed below the LWM. That coverage had been extended by the 1932 Acts, before the enactment of the 1947 legislation, without including the sea bed (pp.253 and 255).

(ii) On the LPA's submission, planning control would extend to the then 3-mile limit of the territorial sea or to areas within the jaws of the land, which would be contrary to the concept of town and country planning as intended by Parliament (pp.255-6).

(iii) Legislation applicable in Great Britain (and not just Scotland) such as the Coast Protection Act 1949 and The Sea Fisheries (Shellfish) Act 1967, distinguish between the seashore (i.e. the area between HWM and LWM or foreshore) and the sea bed. There is a basic distinction between "land" and the sea. The definition of "land" in the Scottish Act of 1972 includes "land covered by water", whether sea or freshwater. That includes the foreshore which, according to the tides, may or may not be covered by water. But land covered by seawater, as opposed to fresh water, is confined to "tidal lands" (pp.254 and 256).

(iv) The provision relating to "tidal lands" in para. 71 of sched. 22 to the 1972 Act had a recognised meaning established by earlier usage in legislation applicable in Great Britain (and not just Scotland), such as the Railway Clauses Act 1863 and the Bridges Act 1929. "Tidal lands" means such part of the bed, shore or banks of a tidal water as are *covered and uncovered* by the ebb and flow of the tide. That definition clearly excludes from planning control the bed of the sea below the LWM. The expression "tidal lands" contrasts with the definition of "tidal waters" in the Acts of 1863 and 1929, which refers to "waters", in the sense of any part of the sea or any part of a river within the flow and ebb of the tide. Unlike "tidal lands", "tidal waters" are not confined to the area between HWM and LWM (*Ingram v Percival* [1969] QB 548, 554).

171. The effect of the analysis in *Argyll and Bute District Council* is that Parliament found it necessary to include a provision in the Scottish planning legislation which treated "tidal lands" (the area between the HWM and LWM) as being subject to planning control. That clearly indicated that the sea bed below the LWM was not subject to planning control.

172. In *Lerwick Port Authority v Scottish Ministers* [2007] SLT 74 Lord Reed, sitting in the Outer House, stated that *Argyll and Bute District Council* established that "land" as used in the definition sections in the 1972 and 1997 Scottish Planning Acts, does not include the seabed below the LWM.

173. There is no material difference between the nature of planning control in Scotland as compared to England and Wales. It imposes control over the development of land. "Development" has the same meaning in both regimes. The statutory purposes of planning legislation in both jurisdictions are the same. The "tidal lands" provision is not peculiar to Scotland. It was contained in both the English and Scottish versions of the 1932 Planning Acts - ss.44 and 43 respectively. It was also included in para.49 of schedule 11 to the English Act of 1947, para.51 of schedule 14 to the English Act of 1962 and para.84 of schedule 24 to the English Act of 1971. It does not seem to have been repeated in the English consolidation of 1990, but that cannot be taken to suggest that Parliament intended to alter the geographical scope of the planning system along the coast of England and Wales. If Parliament had intended to do this, departing from earlier English statutes and from the law in Scotland, it would have said so in clear and express terms. The principle that planning control does not extend beyond the LWM was, and remains, well-entrenched in our legislation. The claimant did not identify any proper basis on which the essential reasoning in *Argyll and Bute District Council* could be distinguished in relation to the meaning of "land" in the TCPA 1990.

174. The definition of "land" in s.336(1) of the TCPA 1990 is expressed in narrower terms than the Scottish definition, in that it does not include the words "land covered by water." There is no dispute that land covered by a lake or by a river within the area of a LPA is a corporeal hereditament and therefore falls within "land" in the English planning statute. But the narrower wording of the English definition lends no support to the claimant's argument that the English planning regime, unlike the Scottish regime, applies to the sea bed beyond the LWM.

The claimant's reliance upon permitted development rights for harbours

175. The claimant submitted that a harbour or port should be treated as "land" within the ambit of the TCPA 1990. Mr. Goodman relied upon permitted development rights conferred by part 18 class A in schedule 2 to the GPDO, for development authorised by a local or private Act, an order approved by Parliament or an order under ss.14 or 16 of the Harbours Act 1964, which designates specifically the nature of the development authorised and "the land" upon which it may be carried out. This does not assist the claimant's case. The primary authorisation for such a scheme comes from the Act of Parliament or the order. The permitted development right, where it applies, simply removes the need to obtain an express grant of planning permission where that would otherwise be required. The GPDO does not alter the definition of "land" in s.336(1) of the TCPA 1990.

176. Planning permission would only be necessary for, and permitted development rights would only authorise, that part of the scheme which would involve development of "land". Quays, docks and breakwaters, for example, may be "land" or may become part of the land as accretions. Planning control is exercisable in relation to such areas of land. But it is not exercisable in relation to areas which are below the LWM or to the underlying sea bed which is never uncovered.

177. In any event, delegated legislation is generally not an aid to the construction of primary legislation unless the former was promulgated at a time roughly contemporaneous with the latter. Secondary legislation may assist in resolving an ambiguity in primary legislation where it was introduced at about the same time as the latter, as part of a single scheme which could be reviewed by the same Parliament (*R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594 at [44] to [46]) but the claimant has not sought to show that that principle applies here. At all events, the permitted development right in Part 18 Class A is capable of being read compatibly with the interpretation adopted in *Argyll and Bute District Council*. It should not be treated as enlarging the meaning of "land" in s.336(1).

The potency of the term "land"

178. In *PACCAR* the Supreme Court also held that the potency of the term being defined may provide some guidance as to the meaning of that term as set out in the statutory definition. In the case of a statutory definition, the defined term may itself colour the meaning of the definition. This principle is not confined to cases where there is an ambiguity in the language used in the definition section. Instead, when the definition is read as a whole, the ordinary meaning of the word or phrase being defined forms part of the material which might potentially be used to throw light on the meaning of that definition. Whether and to what extent it does so depends on the circumstances and, in particular, on the terms of the legislation and the nature of the concept referred to by the word or phrase being defined ([48]).

179. I accept the submission of Mr. Honey KC for the SSLUHC that "land" in s.336(1) of the TCPA 1990 is such a potent term. It refers to the solid part of the earth's surface as opposed to the sea (Oxford English Dictionary). The sea must include the underlying sea bed. That was the approach adopted by the Inner House in *Argyll and Bute District Council*. Indeed, if land were to be treated as including the sea bed, there would be no logical stopping place before the limits of this country's territorial sovereignty are

reached. That approach would be inconsistent with the legislature's intention to enact a system of development control in relation to the land, not the sea. It is logical to include the foreshore within the area referred to as "land" because it is not always covered by the sea.

180. For the reasons set out above, I reject the claimant's contention that the sea bed above which the Bibby Stockholm is moored is "land" within s.336(1) of the TCPA 1990. Those reasons are sufficient to enable me to determine that issue without needing to go any further.

Why does s.336(1) refer to "any corporeal hereditament"?

181. However, Mr Honey assisted the court on the effect of the specific definition in s.336(1) that "land" means "any corporeal hereditament, including a building." In essence, I accept his analysis.

182. In the context of property law, "hereditament" refers to an estate in land which before 1926 was capable of being inherited. It concerns realty as opposed to personalty. A *corporeal* hereditament refers to lands, buildings, minerals and all other things which are part of, or are fixed to, land. A corporeal hereditament entitles its owner to possession of the land. An incorporeal hereditament refers to a right over land, such as an easement, and does not give a right to possess the land (see Halsbury's Laws (5th edition) Vol.87 para. 11; Megarry & Wade paras.1-013 and 22-001 et seq.).

183. Section 205(i)(ix) of the Law of Property Act 1925 defines "land" for the purposes of that statute as follows:

> "(ix) "*land*" includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also, a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land;
> and "*mines and minerals*" include ….. ;
> "*manor*" includes …. ; and
> "*hereditament*" means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir"

It will be noted that this definition of "land" includes incorporeal hereditaments. Similarly, the draftsman of s.336(1) of the TCPA 1990 (and its predecessors) found it necessary to include "any interest in or right over land" for the purposes of the provisions dealing with the acquisition of land under Part IX of the Act (likewise in the Scottish legislation). But for all other purposes in the TCPA 1990, including development control, interests in or rights over land are excluded from the concept of "land"; the definition of land is restricted to *corporeal* hereditaments.

184. Like a hereditament, the concept of a "fee" refers to real property capable of being held and inherited (Coke: First Part of the Institutes of the Laws of England). "Land held" is held by tenure from a superior title, the Crown, so that where the owner of a freehold

dies without any heirs, that estate escheats to the Crown (Halsbury's Laws (5th ed.) Vol. 29 paras. 119 and 134; Megarry & Wade paras 20-010, 20-020 to 2-025 and 3-001).

185. Land "held" is distinguished from allodial land. The latter refers to land of the monarch which is not subject to any superior title. It is not held under any form of tenure. The interest of the Crown in such land is referred to as its "radical title." It is not a fee. Crown land that has never been granted to a subject, or which has returned to the Crown because the tenure previously granted has ceased (e.g. by escheat), is allodial. However, the Crown may also hold the freehold of land in fee simple, for example, where the Crown purchases land by a conveyance or transfer. Often this happens where a Government Department acquires land. Accordingly, allodial land is said to comprise primarily the ancient possessions of the Crown, the foreshore and the sea bed below LWM extending to the seaward territorial limits (Halsbury's Laws (5th edition) Vol. 29 paras. 134 and 161 and Jessel: Crown and Government Land (2023)).

186. The Crown owns the foreshore and seabed by virtue of a prerogative right, an allodial right. Contrary to the claimant's assertion, this ownership is not attributable to the fee system of tenure (see *Shetland Salmon Farmers Association v Crown Estate Commissioners* [1991] SLT 166, 169-174, 185).

187. Although the Crown is one and indivisible (*Town Investments Limited v Department of Environment* [1978] AC 359), for some purposes it is necessary to identify the two bodies of the monarch, the "body personal" or natural and the "body politic". The body politic is eternal or perpetual. Land held in right of the Crown is vested in the Crown as the body politic. Upon the demise of the monarch the successor accedes to the Crown and all its prerogatives and property. The notion of "perpetual succession" applies to allodial land (Halsbury's Laws (5th edition) Vol 29 para.14; Jessel Appendix 1). Accordingly, allodial land has never been capable of inheritance. It is not a corporeal hereditament.

188. This division between corporeal hereditaments and allodial land is consistent with the conclusion I reached previously, that Parliament has never intended the sea bed beyond the LWM to be subject to planning control. However, I should make it clear that that conclusion does not depend upon this analysis.

189. Mr. Goodman says that there are two flaws in relying upon the distinction between corporeal hereditaments and the Crown's allodial land as informing the definition of "land" in the s.336(1) of the TCPA 1990. First, he says that it is inconsistent with the generally held view that the foreshore to the LWM lies within planning control. I observe that even if that were so, it would not assist the claimant's contention that the location of the Bibby Stockholm is subject to planning control.

190. But there is no such inconsistency. The "tidal lands" provisions contained in the 1932, 1947, 1962 and 1971 English planning statutes make it clear that Parliament intended the foreshore (but not the seabed beyond the LWM) to fall within planning control. From 1947 onwards those provisions sat alongside the statutory definition of land to mean "any corporeal hereditament." Therefore, in accordance with the opening words of s.119(1) of the 1947 Act (and now s.336(1) of the TCPA 1990), that definition of "land" had to give way, and still has to give way, to two matters: (i) the treatment in the statutory scheme of the foreshore as being subject to planning control (which was

unaltered by the 1990 consolidation); and (ii) the potency of the term "land" itself, which includes the foreshore between HWM and LWM.

191. By contrast, planning legislation has never contained a general provision, like the "tidal lands" clauses, which expressly treated the sea bed beyond the LWM as being subject to planning control. Accordingly, "land" in s.336(1) is limited to corporeal hereditaments and does not include the sea bed as allodial land. But even if the Crown should grant ownership of part of the sea bed to a subject, that area is still excluded from planning control by the potency of the term "land".

192. Second, Mr. Goodman submits that Mr Honey's analysis of the allodial nature of the Crown's ownership of the foreshore and the seabed below the LWM is inconsistent with the amendments of Part 13 of the TCPA 1990 made by the Planning and Compulsory Purchase Act 2004. He says that it would negate Parliament's intention to subject Crown land to planning control.

193. It is necessary to consider first the position before the 2004 Act amended TCPA 1990. The 1947 Act did not bind the Crown. But, in general terms, the legislation applied planning control to Crown land to the extent of any interest therein *held otherwise than by or on behalf of the Crown* (see e.g. s.296). That remained the position through successive Planning Acts, including the TCPA 1990 as originally enacted (see e.g. *Ministry of Agriculture, Fisheries and Food v Jenkins* [1963] 2 QB 317; *Lord Advocate v Dunbarton District Council* [1990] 2 AC 580). This statutory regime, which applied planning control to non-Crown interests in Crown land, was compatible with the distinction between allodial land and corporeal hereditaments. It was also compatible with planning control extending to the foreshore, but not to the area beyond the LWM.

194. Part 7, Chapter 1 of the Planning and Compulsory Purchase Act 2004 amended Part 13 of TCPA 1990. The new s.292A of the 1990 Act provides that that statute "binds the Crown", subject to any express provision in Part 13. It is s.292A which has the general effect of requiring the Crown to comply with planning control, just as any person, natural or legal, must comply with planning control. But neither s.292A nor any other provision of Part 13 alters the geographical scope of planning control or, in particular, the legal definition of "land" to which that control applies. Simply to say that the TCPA 1990 binds the Crown, does not alter the meaning of "land" in the Act or the legal distinction between allodial land and corporeal hereditaments. A corporeal hereditament which is owned by the Crown is subject to planning control. But because the 2004 Act did not alter the definition of "land" or the geographical extent of planning control, the analysis set out above of how that control applies to the foreshore, but not to the area beyond the LWM, still holds good.

195. Even if I am wrong about the distinction between allodial land and corporeal hereditaments in relation to the TCPA 1990, that does not alter the legal position that the seabed above which the Bibby Stockholm is moored, is not land subject to planning control, for the reasons given in [160]-[180] above.

Ground (3) – A broader purposive interpretation

196. The claimant submits that, even if the Bibby Stockholm falls outside the boundaries of Dorset, the defendant is nevertheless empowered by the TCPA 1990 to take enforcement action against the siting and use of the barge, because the statute may apply

outside the territory for which it is the law (*Al-Skeini*); on a purposive construction it should be read as if it does so apply, in particular to the area of the inner harbour at Portland.

197. I am not convinced that the principle in *Al-Skeini* (discussed in Bennion, Bailey and Norbury at sections 6.1 et. seq) is in point. There is no dispute that the TCPA 1990 represents the law of England and Wales. No issue is raised in this case as to whether the Act also controls activities outside the territorial sea of England and Wales, or in another country. The issue is what is the geographical area to which planning control applies *within* the territorial limits of England and Wales. The claimant has gone no further than to say that that control extends to the baselines established under the 2014 Order, alternatively the inner harbour at Portland.

198. So the issue is simply whether a purposive construction supports the claimant's reading of the TCPA 1990. Such a construction may involve a strained reading of the language used, but it must nevertheless be a proper reading of that language. The court cannot rewrite the legislation (Bennion, Bailey and Norbury at section 12.2).

199. The claimant submits that the purpose of the TCPA 1990 is to control the use of land in the public interest, which includes activities beyond the boundary of a LPA having a significant impact on the community or environment of that authority's area, or a part thereof. There are two flaws in this argument.

200. First, a LPA does not have power to serve an enforcement notice in relation to development outside its area, even if that development has an impact inside its area (see e.g. *Wealden* at [1999] JPL 174, 180; *R (North Wiltshire District Council) v Cotswold District Council* [2009] EWHC 3702 (Admin) at [116]; *Fenland District Council v CBPRP Limited* [2022] EWHC 3132 (KB) at [12]). The LPA which has the power to serve an enforcement notice is the district planning authority for the district (s.1(1) and sched. 1 para.11 of the TCPA 1990), that is the district in which the development has occurred. The claimant's suggestion that DC can issue an enforcement notice in relation to development in Portland Harbour depends upon the proposition that a LPA has a general power to take enforcement action against development outside its area in, for example, the area of an adjoining district. That is contrary to the statutory scheme and the authorities cited above. The purpose upon which the claimant relies cannot be found in the language used by Parliament. Indeed, the claimant made no attempt to do this.

201. Second, the claimant's reading is inconsistent with the language used by Parliament, which confines planning control to "land", including "tidal lands", but not the sea bed below the LWM. A purposive construction cannot involve rewriting the legislation.

202. Accordingly, ground (3) must be rejected.

Ground (4) – Enforcement action on the quayside

203. I see no merit in the complaint that DC has failed to consider taking enforcement action in respect of those areas of land at the port which are used in connection with the Bibby Stockholm, for example the finger pier and quayside. DC has stated that it is considering that issue. It is not refusing to do so.

204. An allegation that an authority has *failed* to take action depends upon a correlative obligation or duty to take that action. But the claimant has not identified any timescale within which DC was legally obliged to reach a decision on enforcement. Accordingly, she has not advanced any proper legal basis for saying that DC has acted unlawfully, and that the court is entitled to intervene, because the authority has not already reached a decision on enforcement action or issued an enforcement notice.

205. Furthermore, it is understandable that DC has preferred to await the outcome of the present litigation. Indeed, the claim form asks the court for an order directing DC to reconsider its decision that it cannot take enforcement action in the light of this court's judgment.

206. The claimant also suggested that, in considering enforcement action, DC has failed to take into account the whole of the planning unit occupied for the purposes of accommodating asylum seekers, including the area over which the barge is moored. But a planning unit is a tool for defining an area of land, or a building, by reference to which the issue of whether there has been a material change of use is determined (*Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207; *R (Ocado Retail Limited) v Islington Borough Council* [2021] PTSR 1833 at [175] to [177]). No authority has been cited to support the proposition that a planning unit can include an area outside the geographical scope of development control in order to decide whether a breach of planning control has taken place. I do not accept that proposition. It would involve the imposition of planning control over an area which is not within the scope of that regime.

207. Accordingly, ground (4) must be rejected.

Ground (5) – The *Marleasing* principle

208. The claimant submits that the *Marleasing* principle remains part of our domestic law for the purposes of this claim. Because there has been no argument to the contrary and ground (5) fails in any event, I will assume that the claimant is correct without deciding the point.

209. The focus of the claimant's pleaded case has been to obtain (a) a declaration that DC erred in law in deciding on 13 July 2023 that it has no power under the TCPA 1990 to take enforcement action in respect of the stationing and use of the Bibby Stockholm and that DC does have such a power and (b) a mandatory order requiring DC to reconsider whether to take enforcement action in respect of the barge in the light of the court's judgment. Although the *Marleasing* argument has only been raised in support of this site-specific claim, the implications of the claimant's submissions are much broader and should not be ignored in the submissions made to the court.

210. The claimant did not bring her claim in order to obtain wider relief, namely that the TCPA 1990 would be incompatible with the Directive if planning control were to be read as extending no further than the LWM. Nor did she ask for a declaration as to how the TCPA 1990 should be interpreted so as to be fully compatible with the EIA Directive, or for an order disapplying any language of that Act which could not be read compatibly with the Directive. Indeed, most of the interpretations put forward by the claimant in the Appendix to the Amended Statement of Facts and Grounds continue to focus on the Bibby Stockholm and Portland Harbour or harbours. It is as if the claimant is seeking to shy away from the implications of raising the *Marleasing* point.

211. The claimant submits that the TCPA 1990 fails to give effect to Article 2(1) of the EIA Directive because "projects" located beyond the LWM, which are likely to have significant effects on the environment, are not made subject to a requirement for development consent and an environmental impact assessment.

212. This contention gives rise to three issues:

(i) Is the mooring and use of the Bibby Stockholm in Portland Harbour a "project" within the meaning of the EIA Directive? If not, the *Marleasing* argument is wholly academic for the purposes of this claim. It would not support the relief sought by the claimant, which is focused on the taking of enforcement action under the TCPA 1990 in respect of the Bibby Stockholm;

(ii) The EIA Directive does not indicate the geographical extent of the obligation imposed on Member states by art. 2(1). For example, it is not limited to harbours or ports. If that obligation applies to those parts of a state which lie beyond the LWM, then potentially it applies throughout the territorial seas of that state;

(iii) On the court's reading of the TCPA 1990 and the Marine and Coastal Access Act 2009, neither regime requires a development consent or EIA in respect of the stationing and use of the Bibby Stockholm within Portland Harbour. There is therefore an important issue as to whether any lacuna which is demonstrated should be addressed in the TCPA 1990 or the 2009 Act, or possibly in some other way. The 2009 Act was enacted, and the MMO established, to deal with the licensing *inter alia* of marine projects. It could be said, therefore, that a *Marleasing* interpretation should be applied to the 2009 Act rather than the TCPA 1990. On 11 October 2023 the Court raised concerns in JR1 about the potentially wider implications of the claimant's argument (see [2023] EWHC 2580 (Admin) [33] to [35]).

213. The claimant has not considered issues (ii) and (iii), because the focus of the claim has been on the exercise of planning control in relation to the Bibby Stockholm. But it would be wholly unprincipled and improper for the court to deal with the relatively limited aspect in which this claimant is interested without submissions being made on these wider issues. They cannot properly be separated.

214. DC, SSHD and the SSLUHC suggested that any *Marleasing* argument should be directed at the 2009 Act rather than the TCPA 1990. But although the claimant had previously raised issues about the application of the marine licensing regime in correspondence with the MMO, she did not join the Secretary of State for the Environment, Food and Rural Affairs (who is responsible for the operation of the 2009 Act) as an Interested Party.

215. A *Marleasing* argument would require a careful examination of firstly, the regimes of the TCPA 1990, the 2009 Act and for the authorisation of port and harbour schemes[3], secondly, the types of project falling within the EIA Directive and thirdly any justification for the approach which has been taken in the drafting of our domestic legislation. These matters have not been addressed, which reinforces the view that the

[3] Pat I of sch.3 to the Harbours Act 1964 gives effect to the requirements of the EIA Directive as regards "projects" the subject of applications for harbour revision orders.

court should not entertain the claimant's *Marleasing* argument if it is academic in this case.

216. I agree with DC and the Interested Parties that the positioning of the Bibby Stockholm in Portland Harbour and its use to accommodate asylum seekers, even for 18 months or so, does not qualify as a project for the purposes of the EIA Directive.

217. It is not suggested by the claimant that the circumstances of this case fall within the second limb of the definition of a project in Art. 1(2)(a), that is an "other intervention in the natural surroundings and landscape." Rather Mr. Goodman submits that the first limb is engaged: "the execution of construction works or of other installations or schemes." He relies upon the onshore works on the quay and the connection of the barge to the shore. But in case they do not suffice, he also throws into the mix the construction of the barge, apparently in an overseas location in 1976 (and presumably its subsequent conversion into accommodation in 1992). However, it is also necessary to show that the project falls within one of the categories defined in art. 4 and Annexes I or II. The claimant relies upon the "urban development project."

218. The minimal works carried out on the quayside could not conceivably have amounted to an "urban development project" within Annex II, even on a broad purposive interpretation. The claimant has not provided any real information about the construction of the barge. But no doubt it was the sort of work which would typically be carried out in whichever shipyard was involved. Any environmental effect of that work would have been an effect of the use *of that shipyard* as part of the construction of any number of vessels. That effect would not be relevant to determining whether the mooring of the Bibby Stockholm in Portland Harbour involved the carrying out of a project there, any more than if some other vessel were to be moored and used in the Harbour for a substantial period of time. "Project" in the present context refers to alterations to the physical state of the site in question, Portland Harbour (see e.g. *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* [2011] Env. L.R. 26 at [20] to [30]; *Inter-Environmental Wallonie ASBL v Conseil des Ministres* [2020] Env.L.R. 9 at [62]).

219. Even if the court were to entertain the claimant's *Marleasing* argument, there is a further difficulty. *Marleasing* cannot be used to read words into legislation that are inconsistent with the scheme of the statute, or which go against its grain or fundamental or essential principles (*Ghaidan v Godin-Mendoza (FC)* [2004] 2 AC 557 at [33], [121]; *Vidal-Hall v Google* [2016] QB 1003 at [88]-[90]). Fundamentally planning control is only concerned with the carrying out of operations on, and the use of, "land".

220. For these reasons, ground (5) must be rejected.

Delay

221. For the reasons already given, this claim fails. It is therefore unnecessary for the court to address the submissions on delay made against the claim. It is sufficient for me to say at this stage that I am not impressed by those delay arguments. It seems to me that a decision by a LPA that a particular subject-matter falls outside planning control, and for that reason the powers to take enforcement action under the TCPA 1990 are not available, is not a decision "made *under* the Planning Acts" for the purposes of CPR 54.5. Accordingly, the time limit for filing the claim form was 3 months, rather than 6 weeks, after the grounds for making the claim form first arose. On that basis the claim

form was just inside that time limit. I would not have been inclined to say that it was out of time because of a lack of promptitude.

Conclusions

222. I consider ground (1) to have been arguable and I grant permission to apply for judicial review to that extent only. However, for the reasons set out above ground (1) must be rejected. In any event, the location of the Bibby Stockholm does not fall within the definition of "land" in the TCPA 1990 and for that further reason this part of the claim must fail.

223. For the reasons set out above, grounds (2) to (5) are unarguable and I refuse permission to apply for judicial review in relation to those matters.

224. The application for judicial review is dismissed.

ANNEX 2

Table of Non-Implemented DCOs

CAH2 – Item 3.2 and Action Point 32

CAH2 – Item 3.2: "Whether the non-delivery scenario should be assessed at all, as part of the environmental statement or otherwise, on the basis of the applicants' contention it is not a likely outcome. To inform this, the ExP would like to understand how many DCOs have been consented but never delivered. If there has been an appreciable number of DCOs where non-delivery has occurred, then would this mean that such a scenario could happen, and is therefore likely and should be assessed accordingly?"

Action Point 32 "To provide a short explanatory note, preferably in table format, identifying DCOs that have been granted but not subsequently delivered and to explain whether and how this evidence informs the assessment of whether the "non-delivery scenario" is likely. The note should also clarify whether this matter should be addressed within the Environmental Statement as a likely significant effect or by other means, if considered outside the scope of the EIA Regulations, but nonetheless deemed important and relevant to the Secretary of State's decision."

Key:

Green = Strategic Rail Freight Interchange ("**SRFI**") DCOs implemented

Grey = Not implemented (cancelled)

Source: Planning Inspectorate National Infrastructure Consenting website (as at May 2026).

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
1	A1 Birtley to Coal House Improvement Scheme	Highways England	Highways	19.01.21	Yes	https://nationalhighways.co.uk/our-roads/yorkshire-and-north-east/a1-birtley-to-coal-house/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
2	A1 in Northumberland - Morpeth to Ellingham	Highways England	Highways	24.05.24	No - cancelled	https://nationalhighways.co.uk/our-roads/yorkshire-and-north-east/a1-morpeth-to-ellingham-dualling-cancelled/
3	A12 Chelmsford to A120 Widening Scheme	National Highways	Highways	12.01.24	No - cancelled	https://nationalhighways.co.uk/our-roads/east/a12-chelmsford-to-a120-widening-scheme/
4	A14 Cambridge to Huntingdon Improvement Scheme	Highways England	Highways	11.05.16	Yes	https://nationalhighways.co.uk/our-roads/east/a14-cambridge-to-huntingdon/
5	A160 - A180 Port of Immingham Improvement	Highways Agency	Highways	4.02.15	Yes	https://nationalhighways.co.uk/media/undnnkzs/a160-port-of-immingham-one-year-post-opening-project-evaluation.pdf
6	A19 / A184 Testos Junction Improvement	Highways England	Highways	12.09.18	Yes	https://nationalhighways.co.uk/our-roads/yorkshire-and-north-east/a19-testo-s-junction/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
7	A19 Downhill Lane Junction Improvement	Highways England	Highways	16.07.20	Yes	https://nationalhighways.co.uk/our-roads/yorkshire-and-north-east/a19-downhill-lane-junction-improvement/
8	A19/A1058 Coast Road Junction Improvement	Highways Agency	Highways	28.01.16	Yes	https://nationalhighways.co.uk/media/opucww4y/a19-coast-road-three-year-post-opening-project-evaluation.pdf
9	A30 Chiverton to Carland Cross Scheme	Highways England	Highways	6.02.20	Yes	https://nationalhighways.co.uk/our-roads/south-west/a30-chiverton-to-carland-cross/
10	A30 Temple to Higher Carblake Improvement	Cornwall Council	Highways	5.02.15	Yes	https://nationalhighways.co.uk/media/1w1dqici/a30-temple-to-higher-carblake-one-year-post-opening-project-evaluation-report.pdf
11	A303 Sparkford to Ilchester Dualling	Highways England	Highways	29.01.21	Yes	https://nationalhighways.co.uk/our-roads/south-west/a303-sparkford-to-ilchester/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
12	A303 Stonehenge	Highways England	Highways	14.07.23	No - cancelled	https://www.newcivilengineer.com/latest/stonehenge-tunnel-dco-officially-revoked-as-it-no-longer-aligns-with-strategic-policy-objectives-18-03-2026/
13	A38 Derby Junctions	Highways England	Highways	17.08.23	No (delivery timetables TBC)	https://nationalhighways.co.uk/our-roads/east-midlands/a38-derby-junctions/
14	A417 Missing Link	Highways England	Highways	16.11.22	Yes	https://nationalhighways.co.uk/our-roads/south-west/a417-missing-link/
15	A428 Black Cat to Caxton Gibbet Road Improvement Scheme	Highways England	Highways	18.08.22	Yes	https://nationalhighways.co.uk/our-roads/a428-black-cat-to-caxton-gibbet/your-guide-to-construction/
16	A46 Coventry Junctions (Walsgrave)	National Highways	Highways	4.02.26	No (start date late 2026)	https://nationalhighways.co.uk/our-roads/west-midlands/a46-coventry-junctions-upgrade/#panel-id-88fd2f1b-1ca5-40f3-ab59-02dcb3890fcd
17	A46 Newark Bypass	National Highways	Highways	1.10.25	No (start date TBC)	https://nationalhighways.co.uk/our-roads/east-midlands/a46-newark-bypass/
18	A47 - A11 Thickthorn Junction	Highways England	Highways	14.10.22	Yes	https://nationalhighways.co.uk/our-roads/east/a47-thickthorn-junction-near-norwich/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
19	A47 Blofield to North Burlingham	Highways England	Highways	22.06.22	Yes	https://nationalhighways.co.uk/our-roads/east/a47-blofield-to-north-burlingham/
20	A47 North Tuddenham to Easton	Highways England	Highways	12.08.22	Yes	https://nationalhighways.co.uk/our-roads/east/a47-north-tuddenham-to-easton-improvements/
21	A47 Wansford to Sutton	Highways England	Highways	17.02.23	No - cancelled	https://nationalhighways.co.uk/our-roads/east/a47-wansford-to-sutton-dualling/
22	A556 Knutsford to Bowdon Scheme	Highways Agency	Highways	28.08.14	Yes	https://nationalhighways.co.uk/media/ct4jxsy4/a556-knutsford-to-bowdon-five-year-post-opening-project-evaluation.pdf
23	A57 Link Roads (previously known as Trans Pennine Upgrade Programme)	Highways England	Highways	16.11.22	Yes	https://nationalhighways.co.uk/our-roads/north-west/a57-link-roads/
24	A585 Windy Harbour to Skippool	Highways England	Highways	9.04.20	Yes	https://nationalhighways.co.uk/our-roads/north-west/a585-windy-harbour-to-skippool/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
	Improvement Scheme					
25	A63 Castle Street Improvement -Hull	Highways England	Highways	28.05.20	Yes	https://nationalhighways.co.uk/our-roads/yorkshire-and-north-east/a63-castle-street/
26	A66 Northern Trans-Pennine Project	National Highways	Highways	7.03.24	Yes	https://nationalhighways.co.uk/our-roads/a66-northern-trans-pennine/latest-updates/
27	Abergelli Power	Abergelli Power Limited	Energy Generation	19.09.19	Unclear	Developer's website no longer accessible and no other information found re status.
28	Able Marine Energy Park	Able Humber Ports Ltd	Ports	18.12.13	Yes	https://www.ableuk.com/able-energy-park
29	Able Marine Energy Park Material Change 2	Able Humber Ports Ltd	Ports	Not confirmed on PINS	Yes	Above.

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
30	Awel y Môr Offshore Wind Farm	Awel y Môr Offshore Wind Farm Limited	Energy Generation	20.09.23	No –final investment decision awaited.	https://awelymor.cymru/awel-y-mor-current-status/
31	Boston Alternative Energy Facility (BAEF)	Alternative Use Boston Projects Limited	Energy Generation	6.07.23	Unclear	https://www.baef.co.uk/our-vision
32	Bramford to Twinstead	National Grid Electricity Transmission	Electricity Transmission	12.09.24	Yes	https://www.nationalgrid.com/the-great-grid-upgrade/bramford-to-twinstead
33	Brechfa Forest Connection	Western Power Distribution (South Wales) plc	Electricity Transmission	6.10.16	Unclear	Developer's website no longer accessible and no other information found re status.
34	Brechfa Forest West Wind Farm	RWE Npower Renewables	Energy Generation	12.03.13	Yes	https://www.thewindpower.net/windfarm_en_24003_brechfa-forest-west.php
35	Burbo Bank Extension	DONG Energy Burbo	Energy Generation	26.09.14	Yes	https://orsted.co.uk/energy-solutions/offshore-wind/our-wind-farms

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
	offshore wind farm	Extension (UK) Ltd.				
36	Byers Gill Solar	RWE Renewables UK Solar and Storage Limited	Energy Generation	23.07.25	No – final investment decision awaited.	https://uk.rwe.com/project-proposals/byers-gill-solar-farm/
37	Cambridge Waste Water Treatment Plant Relocation	Anglian Water Services Limited	Waste Water	8.04.25	No – cancelled	https://www.cambridge.gov.uk/news/2025/08/15/government-decision-not-to-fund-cambridge-waste-water-treatment-plant-relocation
38	Cleve Hill Solar Park	Cleve Hill Solar Park Ltd	Energy Generation	28.05.20	Yes	https://www.clevehillsolar.com/
39	Clocaenog Forest Wind Farm	RWE npower renewables	Energy Generation	12.09.14	Yes	https://www.thewindpower.net/windfarm_en_30186_clocaenog-forest.php
40	Cory Decarbonisation Project	Cory Environmental Holdings Limited (CEHL)	Energy Generation	5.11.25	No – construction expected to begin 2026.	https://corydecarbonisation.co.uk/the-project/project-overview/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
41	Cottam Solar Project	Cottam Solar Project Limited	Energy Generation	5.09.24	Unclear	No update on project status since consent granted https://www.cottamsolar.co.uk/
42	Daventry International Rail Freight Terminal	Rugby Radio Station Ltd Partnership & Prologis UK	SRFI	3.07.14	Yes	https://www.rpsgroup.com/projects/dirft-iii-northamptonshire/
43	Dogger Bank Creyke Beck	Forewind	Energy Generation	17.02.15	Yes	https://doggerbank.com/construction/
44	Dogger Bank Teesside A / Sofia Offshore Wind Farm	Forewind Ltd	Energy Generation	5.08.15	Yes	https://doggerbank.com/construction/
45	Drax Bioenergy with Carbon Capture and Storage Project	Drax Power Limited	Energy Generation	16.01.24	Yes	https://www.drax.com/uk/what-we-do/drax-power-station/
46	Drax Re-power	Drax Power Limited	Energy Generation	4.10.19	Unclear	Developer's website no longer accessible and no other information found re status.

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
47	East Anglia ONE North Offshore Windfarm	East Anglia ONE North Limited	Energy Generation	31.03.22	No (survey works being undertaken)	https://www.scottishpowerrenewables.com/offshore/east-anglia/east-anglia-latest-updates
48	East Anglia ONE Offshore Windfarm	East Anglia One Ltd	Energy Generation	17.06.17	Yes	https://www.scottishpowerrenewables.com/offshore/east-anglia/east-anglia-latest-updates
49	East Anglia THREE Offshore Wind Farm	East Anglia THREE Limited	Energy Generation	7.08.17	Yes	https://www.scottishpowerrenewables.com/offshore/east-anglia/east-anglia-latest-updates
50	East Anglia TWO Offshore Windfarm	East Anglia TWO Limited	Energy Generation	31.03.22	Unclear	No update on project status since consent granted
51	East Midlands Gateway Rail Freight Interchange	Roxhill (Kegworth) Limited	SRFI	12.01.16	Yes	
52	East Northants Resource	Augean PLC	Waste	11.07.13	Yes	https://www.augean.co.uk/site/enrmf/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
	Management Facility					
53	East Northants Resource Management Facility Western Extension	Augean South Limited	Waste	23.01.23	Unclear	No update on project status since consent granted
54	East Yorkshire Solar Farm	East Yorkshire Solar Farm Limited	Energy Generation	9.05.25	Unclear	No update on project status since consent granted https://www.boom-power.co.uk/east-yorkshire/
55	Eggborough CCGT	Eggborough Power Limited	Energy Generation	20.09.18	Unclear	No update on project status since consent granted https://eggboroughccgt.co.uk/
56	Fenwick Solar Farm	Fenwick Solar Project Limited	Energy Generation	18.02.26	No (detailed design ongoing)	https://www.boom-power.co.uk/fenwick/
57	Ferrybridge Multifuel 2	Multifuel Energy Ltd	Energy Generation	28.10.15	Yes	https://www.ssethermal.com/news-and-views/2019/12/ferrybridge-multifuel-2-enters-commercial-operation/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
	(FM2) Power Station					
58	Five Estuaries Offshore Wind Farm	Five Estuaries Offshore Wind Farm Ltd	Energy Generation	17.09.25	No (construction anticipated in 2028)	https://fiveestuaries.co.uk/about/#timeline
59	Galloper Offshore Wind Farm	Galloper Wind Farm Ltd	Energy Generation	24.05.13	Yes	https://www.galloperwindfarm.com/
60	Gate Burton Energy Park	Gate Burton Energy Park Ltd	Energy Generation	12.07.24	Yes	Developer's website no longer accessible but news article states project under construction. https://www.solarpowerportal.co.uk/solar-projects/edf-acquires-gate-burton-solar-nsip-low-carbon
61	Gatwick Airport Northern Runway	Gatwick Airport Limited	Aviation	21.09.25	No	Decision the subject of High Court challenge https://www.bbc.co.uk/news/articles/c338mdznnkro
62	Glyn Rhonwy Pumped Storage	Snowdonia Pumped Hydro Limited	Energy Generation	8.03.17	No (detailed engineering design ongoing)	https://www.snowdoniapumpedhydro.com/project-status

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
63	Great Yarmouth Third River Crossing	Norfolk County Council	Highways	24.09.20	Yes	https://www.great-yarmouth.gov.uk/article/11188/Great-Yarmouth-Third-River-Crossing
64	Heckington Fen Solar Park	Ecotricity (Heck Fen Solar) Limited	Energy Generation	24.01.25	No (but moving towards build out)	https://www.ecotricity.co.uk/our-green-energy/heckington-fen-solar-park
65	Helios Renewable Energy Project	Enso Green Holdings D Limited	Energy Generation	3.12.25	Unclear	No update on project status since consent granted https://www.helios-renewable-energy-project.co.uk/
66	Heysham to M6 Link Road	Lancashire County Council	Highways	19.03.13	Yes	https://www.bbc.co.uk/news/uk-england-lancashire-37822609
67	Hinkley Point C Connection	National Grid	Electricity Transmission	9.01.16	Yes	https://www.theengineer.co.uk/content/news/hinkley-c-s-116-new-t-pylons-now-fully-connected
68	Hinkley Point C New Nuclear Power Station	NNB Generation Company Limited	Energy Generation	19.03.13	Yes	https://www.edfenergy.com/energy/nuclear-new-build-projects/hinkley-point-c

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
69	Hirwaun Power Station	Hirwaun Power Limited	Energy Generation	23.07.15	Yes	https://www.murphygroup.com/project/hirwaun-millbrook-progress-power-stations/
70	Hornsea Offshore Wind Farm (Zone 4) - Project One	SMart Wind Ltd	Energy Generation	10.12.14	Yes	https://hornseaprojects.co.uk/
71	Hornsea Offshore Wind Farm (Zone 4) - Project Two	SMart Wind Limited	Energy Generation	16.08.16	Yes	https://hornseaprojects.co.uk/
72	Hornsea Project Four Offshore Wind Farm	Orsted Hornsea Project Four Limited	Energy Generation	12.07.23	No (cancelled due to costs)	https://hornseaprojects.co.uk/hornsea-project-four/news/2025/05/orsted-to-discontinue-the-hornsea-4-offshore-wind-project-in-its-current-form
73	Hornsea Project Three Offshore Wind Farm	Orsted Hornsea Project Three (UK) Ltd	Energy Generation	31.12.20	Yes	https://hornseaprojects.co.uk/
74	HyNet Carbon	Liverpool Bay CCS Limited	CO2/CCS Pipeline	20.03.24	Unclear	No update on project status since consent granted

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
	Dioxide Pipeline					https://hynet.co.uk/
75	Immingham Eastern Ro-Ro Terminal	Associated British Ports	Ports	4.10.24	Yes	https://www.newcivilengineer.com/latest/work-begins-on-200m-immingham-freight-ferry-terminal-27-11-2025/
76	Immingham Green Energy Terminal	Associated British Ports	Ports	6.02.25	No (cancelled)	https://fuelcellsworks.com/2025/06/17/energy-policy/air-products-cancels-2bn-uk-hydrogen-terminal-over-government-s-lack-of-commitment
77	Internal Power Generation Enhancement for Port Talbot Steelworks	Tata Steel UK Limited	Energy Generation	8.12.15	Unclear	Developer's website no longer accessible and no other information found re status.
78	Ipswich Rail Chord	Network Rail	Rail	5.09.12	Yes	https://www.railengineer.co.uk/ipswich-chord-freight/
80	Keadby 3 Carbon Capture Power Station	Keadby Generation Limited	Energy Generation	7.12.22	Unclear	No update on project status since consent granted https://www.keadbycarboncapture.com/news

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
81	Kemsley Paper Mill (K4) CHP Plant	DS Smith Paper Ltd	Energy Generation	5.07.19	Yes	https://www.dssmith.com/media/our-stories/2023/5/ds-smith-and-e.on-unveil-combined-heat-and-power-plant
82	Kentish Flats Extension	Vattenfall	Energy Generation	19.02.13	Yes	https://powerplants.vattenfall.com/kentish-flats-extension/
83	Keuper Gas Storage Project	Keuper Gas Storage Limited	Gas Storage	15.03.17	No (seeking material change to DCO)	https://kgsp.co.uk/
84	Kings Lynn B Connection Project	National Grid	Electricity Transmission	18.12.13	Unclear	Developer's website no longer accessible and no other information found re status.
85	Knottingley Power Project	Knottingley Power Limited	Energy Generation	10.03.15	Yes	bbc.com/news/uk-england-leeds-41870096
86	Lake Lothing Third Crossing	Suffolk County Council	Highways	30.04.20	Yes	https://www.bbc.co.uk/news/uk-england-suffolk-67157956
87	Little Crow Solar Park	INRG SOLAR (Little Crow) Ltd	Energy Generation	5.04.22	Yes	Construction began March 2026 https://www.littlecrowsolarpark.co.uk/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
88	London Luton Airport Expansion	London Luton Airport Limited	Aviation	3.04.25	No	To be activated at a later date. No further information on timelines available. https://lutonrising.org.uk/grow-our-airport/
89	Longfield Solar Farm	Longfield Solar Energy Farm Limited	Energy Generation	26.04.23	Yes	https://www.longfieldsolarfarm.co.uk/category/surveys/
90	Lower Thames Crossing	National Highways	Highways	25.03.25	Yes	https://nationalhighways.co.uk/our-roads/lower-thames-crossing/news-and-media/early-work-begins-on-the-lower-thames-crossing/
91	M1 Junction 10a Grade Separation - Luton	Luton Borough Council	Highways	30.10.13	Yes	https://www.volkerfitzpatrick.co.uk/en/news/m1-junction-10a-officially-opened-minister-transport
92	M20 Junction 10A	Highways England	Highways	1.12.17	Yes	https://assets.highwaysengland.co.uk/roads/road-projects/m20-junction-10a/M20+J10a+April+Newsletter.pdf
93	M25 junction 10/A3 Wisley interchange improvement	Highways England	Highways	12.05.22	Yes	https://nationalhighways.co.uk/our-roads/m25-junction-10-project-profile/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
94	M25 junction 28 improvements	Highways England	Highways	16.05.22	Yes	https://nationalhighways.co.uk/our-roads/south-east/m25-junction-28-improvements/
95	M3 Junction 9 Improvement	National Highways	Highways	16.05.24	Yes	https://nationalhighways.co.uk/our-roads/south-east/m3-junction-9-improvements/
96	M4 Junctions 3 to 12 Smart Motorway	Highways Agency (now Highways England)	Highways	2.09.16	Yes	https://nationalhighways.co.uk/our-roads/south-east/m4-junctions-3-12/
97	M42 Junction 6 Improvement	Highways England	Highways	21.05.20	Yes	https://nationalhighways.co.uk/our-roads/west-midlands/m42-junction-6/
98	M5 Junction 10 Improvements Scheme	Gloucestershire County Council	Highways	4.06.25	No (additional funding recently obtained)	https://www.gloucestershire.gov.uk/highways/major-projects-list/m5-junction-10-improvements-scheme/latest-news/
99	M54 to M6 Link Road	Highways England	Highways	21.04.22	No (delivery timetables TBC)	https://nationalhighways.co.uk/our-roads/west-midlands/m54-to-m6-link-road/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
100	M60/M62/M6 6 Simister Island	National Highways	Highways	9.09.25	No (delivery timetables TBC)	https://nationalhighways.co.uk/our-roads/north-west/m60-junction-18-simister-island-interchange/
101	Mallard Pass Solar Project	Mallard Pass Solar Farm Limited	Energy Generation	12.07.24	Yes	Website states construction is scheduled to begin in first quarter of 2026 https://www.mallardpasssolar.co.uk/#latest-news
102	Manston Airport	RiverOak Strategic Partners Ltd	Aviation	18.08.22	No (consultation currently being undertaken to inform plans)	https://www.bbc.co.uk/news/articles/cy0dzk0e8y7o
103	Meaford Energy Centre	Meaford Energy Limited	Energy Generation	19.07.16	No	Planning committee report for local states it was never constructed https://www.staffordbc.gov.uk/sites/default/files/cme/DocMan1/Committee-Agenda-23-24/Planning/Special-Planning-Committee-22-June-2023-Agenda.pdf
104	Medworth Energy from Waste Combined Heat and	Medworth CHP Limited	Energy Generation	20.02.24	Yes	https://www.mvv-medworthchp.co.uk/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
	Power Facility					
105	Millbrook Power	Millbrook Power Limited	Energy Generation	13.03.19	Yes	https://www.drax.com/uk/what-we-do/millbrook-power/
106	Mona Offshore Wind Farm	Mona Offshore Wind Limited	Energy Generation	4.07.25	Unclear	Developer's website no longer accessible and no other information found re status.
107	Morecambe Offshore Windfarm Generation Assets	Morecambe Offshore Windfarm Ltd.	Energy Generation	1.12.25	No (awaiting final investment decision)	https://morecambeoffshorewind.com/
108	Morgan Offshore Wind Project: Generation Assets	Morgan Offshore Wind Limited	Energy Generation	29.08.25	No (ownership TBC)	https://morecambeandmorgan.com/
109	Morpeth Northern Bypass	Northumberland County Council	Highways	12.01.15	Yes	https://constructingexcellence.org.uk/morpeth-northern-bypass/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
110	Norfolk Boreas	Norfolk Boreas Limited	Energy Generation	10.12.21	Yes	https://norfolkzone.rwe.com/about-norfolk#project-timeline
111	Norfolk Vanguard	Norfolk Vanguard Limited	Energy Generation	11.02.22	Yes	https://norfolkzone.rwe.com/about-norfolk#project-timeline
112	North Doncaster Rail Chord (near Shaftholme)	Network Rail	Rail	16.10.12	Yes	https://aecom.com/projects/north-doncaster-chord/
113	North Killingholme Power Project	C.GEN Killingholme Ltd	Energy Generation	11.09.14	Unclear	Obtained non-material change to extend implementation deadline to October 2026 http://www.cgenpower.com/kgh/
114	North Lincolnshire Green Energy Park	North Lincolnshire Green Energy Park Limited	Energy Generation	13.03.25	Unclear	No update on project status since consent granted https://northlincolnshiregreenenergypark.co.uk/
115	North London (Electricity Line)	National Grid	Electricity Transmission	16.04.14	Yes	https://www.nationalgrid.com/electricity-transmission/network-and-infrastructure/infrastructure-projects/north-london-reinforcement

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
	Reinforcement					
116	North London Heat and Power Project	North London Waste Authority	Energy Generation	24.02.17	Yes	https://northlondonheatandpower.london/project/project-timeline
117	North Wales Wind Farms Connection	SP MANWEB	Electricity Transmission	28.07.16	Yes	https://www.gillespies.co.uk/projects/north-wales-wind-farms-connection-project
118	Northampton Gateway Rail Freight Interchange	Roxhill Developments Limited	SRFI	9.10.19	Yes	https://slp-northampton.com/
119	Norwich Northern Distributor Road (NDR)	Norfolk County Council	Highways	2.06.15	Yes	https://www.norfolk.gov.uk/article/39822/A1270-Broadland-Northway-Norwich-NDR
120	Oaklands Farm Solar Park	Oaklands Farm Solar Limited	Energy Generation	19.06.25	No (construction anticipated summer 2026)	https://www.baywa-re.co.uk/en/projects/solar/oaklands-farm-solar-park

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
121	Outer Dowsing Offshore Wind (Generating Station)	GT R4 Limited (trading as Outer Dowsing Offshore Wind)	Energy Generation	10.10.25	No (construction anticipated 2027)	https://www.outerdowsing.com/about/#project
122	Palm Paper 3 CCGT Power station Kings Lynn	Palm Paper Ltd	Energy Generation	11.02.16	Yes	https://www.palm.de/en/news/news-list/article/environmentally-friendly-energy-supply-at-palm-paper.html
123	Port Blyth New Biomass Plant	North Blyth Energy Ltd	Energy Generation	24.07.13	No (cancelled)	https://www.power-technology.com/projects/north-blyth-biomass-power-station/?cf-view
124	Portishead Branch Line - MetroWest Phase 1	North Somerset Council	Rail	14.11.22	Yes	https://www.newcivilengineer.com/latest/main-construction-on-portishead-line-restoration-to-start-in-april-25-02-2026/
125	Progress Power Station	Progress Power Limited	Energy Generation	23.07.15	Yes	https://www.sgs-industrial.com/en/references/assembly-progress-power-station/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
126	Rampion 2 Offshore Wind Farm	Rampion Extension Development Limited	Energy Generation	4.04.25	No (finalising scope and programme)	https://rampion2.com/development/
127	Rampion Offshore Wind Farm	E.ON Climate and Renewables	Energy Generation	16.07.14	Yes	https://www.rampionoffshore.com/
128	Redditch Branch Enhancement Scheme	Network Rail	Rail	31.10.13	Yes	https://www.redditchadvertiser.co.uk/news/12933884.redditch-project-competes-for-top-regional-civil-engineering-award/
129	Reinforcement to North Shropshire Electricity Distribution Network	SP Manweb	Electricity Transmission	20.03.20	Yes	https://www.shropshirelive.com/news/2022/12/16/sp-energy-networks-completes-18m-project-in-north-shropshire/
130	Richborough Connection Project	National Grid	Electricity Transmission	3.08.17	Yes	https://www.nationalgrid.com/national-grid-celebrates-final-milestone-its-richborough-connection-project
131	Rivenhall IWMF and	Indaver Rivenhall Ltd	Energy Generation	19.12.24	Unclear	No update on project status since consent granted https://indaver.com/nl/locaties/uk/essex-rivenhall

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
	Energy Centre					
132	River Humber Gas Pipeline Replacement Project	National Grid	Gas/Oil Pipeline	25.08.16	Yes	https://www.nationalgrid.com/world-record-breaking-pipeline-insertion-river-humber-gas-project-now-complete
133	Riverside Energy Park	Cory Riverside Energy	Energy Generation	9.04.20	Yes	https://www.corygroup.co.uk/future-growth/riverside-energy-park/
134	Rookery South Energy from Waste Generating Station	Covanta Rookery South Limited	Energy Generation	13.10.11	Yes	https://www.rookerysoutherf.co.uk/
135	Sheringham and Dudgeon Extension Projects	Equinor	Energy Generation	17.04.24	No (Financial investment decision awaited)	https://www.sheringhamshoal.co.uk/extensionproject/project-progress
136	Silvertown Tunnel	Transport for London	Highways	10.05.18	Yes	https://tfl.gov.uk/travel-information/improvements-and-projects/silvertown-tunnel

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
137	Slough Multifuel Extension Project	SSE Slough Multifuel Limited	Energy Generation	28.11.23	Unclear	No update on project status since consent granted https://www.ssethermal.com/energy-from-waste/slough-multifuel/
138	South Hook Combined Heat & Power Station	QPI Global Ventures Ltd	Energy Generation	23.10.14	Yes	https://naturalresources.wales/permits-and-permissions/permit-applications-consultations-and-decisions/final-permit-decisions-for-sites-under-industrial-emissions-directive/south-west-wales/south-hook-chp-plant/?lang=en
139	South Humber Bank Energy Centre	EP Waste Management Limited	Energy Generation	10.11.21	Yes	https://baldwinboxall.co.uk/portfolio/south-humber-bank-energy-centre/
140	Southampton to London Pipeline Project	Esso Petroleum Company, Limited	Gas/Oil Pipeline	7.10.20	Yes	https://slpproject.co.uk/
141	Springwell Solar Farm	Springwell Energy Farm Limited	Energy Generation	8.04.26	No (Decision the subject of High Court challenge)	https://www.northernfarmer.co.uk/news/26068066.legal-challenge-approval-springwell-solar-farm/
142	Stafford Area Improvements - Norton	Network Rail	Rail	31.03.14	Yes	https://www.volkerrail.co.uk/en/projects/stafford-area-improvement-programme

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
	Bridge Railway					
143	Stonestreet Green Solar	EPL 001 Limited	Energy Generation	23.10.25	Unclear	No update on project status since consent granted https://stonestreetgreensolar.co.uk/Home
144	Sunnica Energy Farm	Sunnica Ltd	Energy Generation	12.07.24	No (submitted a non-material change application)	https://sunnica.co.uk/
145	Tees CCPP	Sembcorp Utilities (UK) Limited	Energy Generation	5.04.19	Unclear	Developer's website no longer accessible and no other information found re status.
146	Thames Tideway Tunnel	Thames Water	Waste Water	12.09.14	Yes	https://www.jacobs.com/projects/delivering-uks-largest-ever-water-infrastructure-program
147	The Net Zero Teesside Project	Net Zero Teesside Power Limited / Net Zero North Sea Storage Limited	Energy Generation	16.02.24	Yes	https://www.netzeroteesside.co.uk/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
148	The Sizewell C Project	NNB Generation Company (SZC) Limited	Energy Generation	20.07.22	Yes	https://www.sizewellc.com/building-sizewell-c/
149	Thorpe Marsh Gas Pipeline	Thorpe Marsh Power Limited	Gas/Oil Pipeline	3.03.16	Unclear	Developer's website no longer accessible and no other information found re status.
150	Thurrock Flexible Generation Plant	Thurrock Power Ltd	Energy Generation	16.02.22	Yes	https://www.energy-storage.news/statera-brings-online-uks-biggest-battery-storage-project-to-date/
151	Tidal Lagoon Swansea Bay	Tidal Lagoon (Swansea Bay) PLC	Energy Generation	9.06.15	No (cancelled)	https://www.bbc.co.uk/news/uk-wales-south-west-wales-44589083
152	Tilbury2	Port of Tilbury London Limited	Ports	20.02.19	Yes	https://www.graham.co.uk/projects/tilbury2-port-expansion-london/
153	Tillbridge Solar Project	Tillbridge Solar Limited	Energy Generation	14.10.25	Unclear	No update on project status since consent granted https://tillbridgesolar.com/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
154	Triton Knoll Electrical System	Triton Knoll Offshore Wind Farm Limited	Electricity Transmission	3.09.16	Yes	https://uk.rwe.com/locations/triton-knoll/
155	Triton Knoll Offshore Wind Farm	Triton Knoll Offshore Wind Farm Limited	Energy Generation	11.07.13	Yes	https://uk.rwe.com/locations/triton-knoll/
156	Viking CCS Pipeline	Chrysaor Production (UK) Limited	CO2/CCS Pipeline	9.04.25	Unclear	No update on project status since consent granted https://www.vikingccs.co.uk/transportation/our-onshore-pipeline
157	VPI Immingham OCGT	VPI Immingham B Ltd	Energy Generation	7.08.20	Yes	https://vpi.energy/solutions/immingham/
158	Walney Extension Offshore Wind Farm	DONG Energy Walney Extension (UK) Ltd	Energy Generation	7.11.14	Yes	https://orsted.co.uk/energy-solutions/offshore-wind/our-wind-farms/walney-extension
159	West Burton C power station	EDF Energy (Thermal	Energy Generation	21.10.20	No (financial investment decision awaited)	https://fidraenergy.com/our-projects/

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
		Generation) Limited				
160	West Burton Solar Project	West Burton Solar Project Limited	Energy Generation	24.01.25	Unclear	No update on project status since consent granted https://www.westburtonsolar.co.uk/
161	West Midlands Interchange	Four Ashes Limited	SRFI	4.05.2020	Yes	https://www.westmidlandsinterchange.co.uk/
162	Wheelabrator Kemsley Generating Station (K3) and Wheelabrator Kemsley North (WKN) Waste to Energy Facility	WTI/EFW Holdings Ltd	Energy Generation	19.02.21	Unclear	Developer's website no longer accessible and no other information found re status.
163	Whitemoss Landfill Western Extension	Whitemoss Landfill Limited	Waste	21.05.15	Unclear	Developer's website no longer accessible and no other information found re status.

No.	Project Name	Applicant	Project Type	DCO Date	Implemented? (Yes/No/Unclear)	Notes/Source
164	Willington C Gas Pipeline	RWE npower	Gas/Oil Pipeline	17.12.14	Unclear	Developer's website no longer accessible and no other information found re status.
165	Woodside Link Houghton Regis Bedfordshire	Central Bedfordshire Council	Highways	30.09.14	Yes	https://www.centralbedfordshire.gov.uk/info/55/transport_roads_and_parking/598/woodside_link_road
166	Wrexham Energy Centre	Wrexham Power Limited	Energy Generation	18.07.17	Unclear	Developer's website no longer accessible and no other information found re status.
167	York Potash Harbour Facilities Order	York Potash Ltd	Ports	20.07.16	Yes	DCO is known to have been implemented but development is understood to not be progressing. Developer's website no longer accessible and no other information found re status.
168	Yorkshire GREEN	National Grid Electricity Transmission (NGET)	Electricity Transmission	14.03.24	Yes	https://www.nationalgrid.com/the-great-grid-upgrade/yorkshire-green