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Case No: CO/3380/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2019

Before :

MR JUSTICE DOVE

- -

Between :

Friends of the Earth Limited	**Claimant**
- and -	
Secretary of State for Housing, Communities and Local Government	**Defendant**

- -
- -

Richard Kimblin QC and Nina Pindham (instructed by **Will Rundle, Head of Legal, Friends of the Earth**) for the **Claimant**
Rupert Warren QC and Heather Sargent (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 18th-19th December 2018

- -

Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dove:

The facts

1. In March 2012 the Defendant published the first edition of the National Planning Policy Framework. By then planning policy issued by central government had been a feature of the planning system, and a material consideration in plan making and decision taking, for very many years. Initially published in the form of circulars, over the course of time National Planning Policy had been collated thematically into sequences of Planning Policy Guidance documents, and thereafter Planning Policy Statements on various topics ranging from general principles, through national planning policy concepts such as the Green Belt, to the consideration of issues concerning the historic built environment and nature conservation amongst others. One of the aims of the publication of the National Planning Policy Framework was identified in the Ministerial Foreword as follows:

> "In part, people have been put off from getting involved because planning policy itself has become so elaborate and forbidding – the preserve of specialists rather than people in communities.
>
> This National Planning Policy Framework changes that. By replacing over one thousand pages of national policy with around fifty, written simply and clearly, we are allowing people and communities back into planning."

2. For reasons which it is unnecessary to go into for the purposes of this judgment the Defendant determined over the course of time that it would be necessary for the National Planning Policy Framework to be reviewed and revised. A consultation draft of a revised National Planning Policy Framework was put out for consultation and on 24th July 2018 the revised version of the National Planning Policy Framework (hereafter "the Framework") was published on 24th July 2018.

3. In these proceedings, which proceeded as a "rolled-up" hearing pursuant to an order dated 9th October 2018 made by Holgate J, the Claimant contends that there is a legal flaw in the Defendant's decision to publish the Framework in that it has not been the subject of strategic environmental assessment ("SEA") pursuant to the EU Directive 2001/42/EC ("the Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 ("the Regulations") which transpose the Directive into domestic law. Whilst the detailed submissions of the parties will be explored below, for the purposes of introducing the issues the essence of the Defendant's case is that, in accordance with the provisions of the Directive, the Framework is neither "required by legislative, regulatory or administrative provisions" nor does it "set the framework for future development consent of projects" and therefore it is excluded from the requirement for SEA. By contrast, it is the Claimant's submission that on the proper construction of the Directive, bearing in mind the role that national policy plays in the statutory framework which is set out below, that both of these elements of the Directive are made out and that the Framework should properly have been the subject of SEA prior to its adoption.

4. In order to examine these competing contentions this judgment, firstly, sets out the provisions of the Directive and the jurisprudence of the Court of Justice of the European

Union ("CJEU"), then examines the position of national planning policy and the Framework in the statutory framework provided by domestic law for planning decisions, and finally concludes with an evaluation of the arguments presented in favour of the need for the Framework to undergo SEA.

The Directive and related case law

5. The Directive contains a sequence of recitals introducing its specific legislative provisions. The recitals relevant for present purposes are as follows:

> "(2) The Fifth Environment Action Programme: Towards sustainability — A European Community programme of policy and action in relation to the environment and sustainable development (5), supplemented by Council Decision No 2179/98/EC (6) on its review, affirms the importance of assessing the likely environmental effects of plans and programmes.
> …
>
> (4) Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.
>
> (5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions.
>
> (6) The different environmental assessment systems operating within Member States should contain a set of common procedural requirements necessary to contribute to a high level of protection of the environment.
> …
>
> (15) In order to contribute to more transparent decision making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable, it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion."

6. The specific legislative provisions which are in point in relation to the present case are set out at Articles 1, 2 and 3 of the Directive as follows:

> "Article 1
> Objectives

> The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.
>
> Article 2
> Definitions
> For the purposes of this Directive:
> (a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
> — which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
> — which are required by legislative, regulatory or administrative provisions;
>
> …
>
> Article 3
>
> …
>
> 2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC"

7. Further articles are of some relevance to the discussion, in particular Article 4 which requires the SEA under Article 3 to be carried out during the preparation of the plan or programme and prior to its adoption. Article 5, alongside Annex 1, addresses the question of the nature of the environmental information required in order to produce a legally competent environmental report. So far as relevant for current purposes these provisions provide as follows:

> "Article 5
>
> Environmental report
> 1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described

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

ANNEX I
Information referred to in Article 5(1)
The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:
(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;
(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;
(c) the environmental characteristics of areas likely to be significantly affected;
(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives
79/409/EEC and 92/43/EEC;
(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;
(f) the likely significant effects (1) on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;
(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;
(h) an outline of the reasons for selecting the alternatives deal with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information

(1) These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects."

8. It is, of course, important when considering the provisions of the Directive to read the Directive as a whole in order to arrive at its proper construction and application. It was

accepted on all sides that there is an inevitable interplay between Article 2(a) and a definition of "plans and programmes" and Article 3(2)(a) which sets out the character of plans and programmes for which SEA should be carried out. It should also be born in mind, as was observed by the CJEU in the case of Aannamaersbedrijf P.K. Kraaijveld & Others v. Gedeputeerde Staten Van Zuid-Holland (Case C-72/95), that the Directive has "a wide scope and a broad purpose" (see paragraph 31 of the judgment).

9. The question of whether or not a particular initiative falls within the definition of a "plan and programme" has come before the CJEU on a number of occasions in recent years. It is sensible to trace the development of the case law chronologically, starting with the case of Terre Wallonne and Inter-Environment Wallone (C-105/09 and C-110/09) [2010] ECR 1-5611; [2011] Env LR D83. This was a case which concerned an action plan under the Nitrates Directive in relation to controlling the disposal of manure generated by agricultural activity so as to ensure against over-fertilisation and the consequential pollution of water. The issue was whether or not that action plan required SEA. The fact that it was a piece of legislation did not mean that it was excluded from the potential requirement for SEA bearing in mind the objectives of the Directive. Advocate-General Kokott expressed her view as to the objective of the Directive in the following terms:

> "b) The objectives of the SEA Directive
>
> 29. The inclusion of legislative measures also corresponds to the aims of the SEA Directive. According to Article 1, the objective of the SEA Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.
>
> 30. The interpretation of the pair of terms 'plans' and 'projects' should consequently ensure that measures likely to have significant effects on the environment undergo an environmental assessment. It is therefore advisable, as with the EIA Directive, to focus primarily on whether the measures in question may have significant effects on the environment. Legislation may have such effects, especially if it permits damage to be done to the environment.
>
> 31. The specific objective pursued by the assessment of plans and programmes is evident from the legislative background: the SEA Directive complements the EIA Directive, which is more than ten years older and concerns the consideration of effects on the environment when development consent is granted for projects.
>
> 32. The application of the EIA Directive revealed that, at the time of the assessment of projects, major effects on the environment are already established on the basis of earlier planning measures. Whilst it is true that those effects can thus be examined during

> the environmental impact assessment, they cannot be taken fully into account when development consent is given for the project. It is therefore appropriate for such effects on the environment to be examined at the time of preparatory measures and taken into account in that context.
>
> 33. An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road-construction project. For this reason, it should be considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included.
>
> 34. Various kinds of requirements concerning the approval of projects may have a significant effect on the environment. Area-related plans may specify with varying degrees of accuracy where the implementation of certain projects is permissible. But measures which stipulate how projects are to be implemented may similarly have significant effects on the environment. Thus a (fictitious) set of rules permitting the discharge of untreated manure from intensive livestock installations directly into natural waters would have significant effects on the environment.
>
> 35. Significant effects on the environment can therefore be taken fully into account only if they are assessed in the case of all preparatory measures which may result in projects subsequently implemented having such effects. Accordingly, the interpretation of the terms 'plan' and 'programme' must be broad enough to include legislation."

10. Given that the action plan was required by the Nitrates Directive the provisions of Article 2(a) of the Directive applied to the action plan. More detailed investigation was required as to whether or not it could be said that the action plan "set the framework for future development consent of projects" in the terms of Article 3(2)(a). Advocate-General Kokott's conclusions in that respect were set out as follows:

> "81. In the context of such consideration, the framework set by the action programme has at least the effect that it must be possible for the installation to be operated in accordance with the provisions of the programme. At the same time, however, development consent can hardly be refused on grounds of the pollution of waters by nitrate from agriculture if the project complies with the rules of the programme. Certain alternatives, which are harmful to the environment as gauged by the objectives of the action programme, are thus excluded and others, which possibly afford water greater protection, do not have to be examined and taken into consideration. In practice,

> this not only concerns the operating conditions, but may also have implications for the location. Intensive livestock installations should receive consent only in locations where sufficient land is available for the application of manure.
>
> 82. The framework-setting effect of the action programmes in the case of certain intensive livestock installations is even reinforced by another directive, the IPPC Directive. This directive concerns the same types of installation as point 17 of Annex I to the EIA Directive but, as the threshold values are somewhat lower (see point 6.6 of Annex I to the IPPC Directive), more installations are covered. Pursuant to Article 9(1) and Article 3(a) and (b) of the IPPC Directive, the development consent of such installations must ensure that they are so operated that all the appropriate preventive measures are taken against pollution and no significant pollution is caused. The application of the manure arising is attributable to the operation of those installations. Consequently, the action programme must not only be taken into account in this context: compliance with it is mandatory.
>
> 83. Action programmes thus set a framework for the development consent of intensive livestock installations as referred to in point 6.6 of Annex I to the IPPC Directive, which fall under either point 17 of Annex I or point 1(e) of Annex II to the EIA Directive."

This conclusion was reached against the Advocate-General's earlier summation of the effect of the requirements that a panel programme set a Framework which she expressed in the following terms:

> "67. To summarise, it can therefore be said that a plan or programme sets a framework in so far as decisions are taken which influence any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or by allocating resources."

11. The conclusions of the Advocate-General were effectively adopted by the CJEU in their judgment, in which they reached similar conclusions for the same reasons.

12. The next occasion on which the CJEU had to consider these issues was in the case of Inter-environment Bruxelles ASBL & Others v Region De Bruxelles-Capitale (C-567/10); [2012] Env. L.R. 30 ("IEB 1"). This case was concerned with a repealing measure which had been adopted in relation to a planning code, albeit that the adoption of the measure was optional. Essentially two questions arose for the CJEU's consideration. Firstly, whether the definition of "plans and programmes" included or excluded from the scope of the Directive a procedure for total or partial repeal of a plan; and, secondly, whether the word "required" in Article 2(a) of the Directive excluded from the definition of "plans and programmes" plans which were provided for by legislative provisions for which the adoption was not compulsory. In her Opinion

Advocate-General Kokott tackled the second question first, on the basis that the answer to that question could have a bearing on the answer to the first question.

13. She set out her answer to this second question and her reasons for it in the following terms:

> "AG14 In order to answer the second question, it must be clarified whether the SEA Directive covers plans or programmes which are provided for in legislative provisions but the adoption of which is not compulsory, or whether that directive applies only where there is a legal obligation to draw up a plan.
>
> AG15 Almost all the language versions of the second indent of art.2(a) of the SEA Directive refer to plans or programmes which must be prepared or are required. Plans or programmes which are governed by law but which do not have to be adopted would not be covered. As the United Kingdom rightly points out, that was the basis of the Court's judgment in *Terre Wallonne ASBL v Region Wallonne* (C-105/09 & C-110/09) [2010] E.C.R. I-5611; [2011] Env. L.R. D83
>
> AG16 Only the Italian version is open to a different interpretation. That version refers to plans and programmes which are "provided for" ("*previsti*") by law. This might also include measures which are governed by law but which do not necessarily have to be adopted.
>
> AG17 The different language versions of a Community text must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must in principle be interpreted by reference to the general scheme and purpose of the rules of which it is part. However, a provision of which the language versions differ is also to be interpreted on the basis of the real intention of its author. It is apparent from the drafting history of the second indent of art.2(a) of the SEA Directive that, on the basis of the real intention of the legislature, the Italian version too is meant to include only plans and programmes that have to be prepared.
>
> AG18 Neither the original Commission proposal nor an amended version of it included the condition that the plans and programmes covered must be required by law. After the proposal proved unsuccessful in this regard, the Commission, supported by Belgium and Denmark, proposed that the directive should at least apply to plans and programmes "which are provided for in legislation or based on regulatory or administrative provisions". The legislature did not take up those proposals either, however.
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> AG19 Instead, the Council explained the rules that were eventually adopted, to which the Parliament did not object, in a common position which stated, including in the Italian version, that only plans and programmes that are required ("*prescritti*")9 are covered. Consequently,

the Italian version of the directive must also be construed as meaning that it covers only plans or projects which are based on a legal obligation.

AG20 In the light of the wording of the second indent of art.2(a) of the SEA Directive and its drafting history, neither the general objective of European environmental policy, that is to say a high level of protection (art.3(3) TEU, art.37 of the Charter of Fundamental Rights of the European Union and art.191(2) TFEU), nor the specific objective pursued by the SEA Directive, that is to say the environmental assessment of plans and programmes which are likely to have a significant effect on the environment (art.1), leads to any other interpretation. It is true that plans and programmes which are not based on a legal obligation may also have significant effects on the environment. Indeed, their effects may be even more significant than those of compulsory plans. Nonetheless, the legislature clearly did not intend such measures to require an environmental assessment.

…

AG26 The *Cour constitutionnelle* appears to assume that, in order for the SEA Directive to be applicable, an obligation under the second indent of art.2(a) of the SEA Directive must arise *every* time the plan or programme in question is drawn up. On that basis, plans or programmes the preparation of which is sometimes voluntary but sometimes compulsory never have to undergo an environmental assessment.

AG27 In [2010] E.C.R. I-5611, however, the Court has already held that the SEA Directive also covers programmes which have to be prepared only under certain conditions, *in casu* action programmes under the Nitrates Directive. They have to be prepared only in the event of the existence of vulnerable zones within the meaning of that directive. If the authorities of the Member States voluntarily adopt action programmes for other areas in accordance with the criteria laid down in the Nitrates Directive, the SEA Directive would not be applicable.

AG28 For the purposes of applying the SEA Directive, it must therefore be examined on a case-by-case basis whether the preparation of a plan or programme is compulsory or voluntary.

AG29 In the absence of provisions of EU law, the question whether in the present case the adoption of the relevant measures is compulsory is a matter of domestic law on which the *Cour constitutionnelle* alone can give a binding decision. That said, it is clear from art.40 of the CoBAT, for example, that the Government can set a time limit for the adoption of specific land use plans by the municipal authority. In such cases, a legal obligation to adopt the plan could exist. No such obligation appears to exist, on the other hand, where members of the public apply for the adoption of a plan. However, that provision too could be construed as meaning that, while the municipality has some discretion with respect to

> the time limit for adopting the plan, it must in principle draw up such a plan. Moreover, it is not inconceivable that the circumstances of the case may severely limit that margin of discretion.
>
> AG30 In short, the word "required" in art.2(a) of the SEA Directive must be construed as meaning that that definition does not include plans and programmes which are provided for by legislative provisions but the drawing up of which is not compulsory. Plans or programmes which may under certain conditions be prepared voluntarily are covered by that definition only in cases where there is an obligation to draw them up."

14. The CJEU took a different view in relation to the second question. The CJEU concluded that the Directive should not be construed so as to require SEA only in respect of measures where adoption was compulsory. They concluded that "plans and programmes" the adoption of which was regulated by national legislative or regulatory provisions which also determine the competent authorities for adopting them and the procedure for preparing them were to be regarded as "required" for the purposes of the Direction. Their reasons for reaching that conclusion were set out as follows:

> "28 It must be stated that an interpretation which would result in excluding from the scope of Directive 2001/42 all plans and programmes, inter alia those concerning the development of land, whose adoption is, in the various national legal systems, regulated by rules of law, solely because their adoption is not compulsory in all circumstances, cannot be upheld.
>
> 29 The interpretation of art.2(a) of Directive 2001/42 that is relied upon by the abovementioned governments would have the consequence of restricting considerably the scope of the scrutiny, established by the directive, of the environmental effects of plans and programmes concerning town and country
> planning of the Member States.
>
> 30 Consequently, such an interpretation of art.2(a) of Directive 2001/42, by appreciably restricting the directive's scope, would compromise, in part, the practical effect of the directive, having regard to its objective, which consists in providing for a high level of protection of the environment (see, to this effect, *Valčiukienė v Pakruojo rajono savivaldybe* (C-295/10) [2012] Env. L.R. 11 at [42]). That interpretation would thus run counter to the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment, which define the criteria and the detailed rules for the development of land and normally concern a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures.
>
> 31 It follows that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the

> competent authorities for adopting them and the procedure for preparing them, must be regarded as "required"
> within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down.
>
> 32 It follows from the foregoing that the answer to the second question is that the concept of plans and programmes "which are required by legislative, regulatory or administrative provisions", appearing in art.2(a) of Directive 2001/42, must be interpreted as also concerning specific land development plans, such as the one covered by the national legislation at issue in the main proceedings."

15. The CJEU returned to issues concerning the Directive in the case of Nomarchiaki Aftodioikisi Aitoloakarnanias & Others (C-43/10); [2013] Env. L.R. 21. This case concerned a long-standing project to direct the upper waters of the River Acheleos to the River Pinios for the purpose of providing water for irrigation, electricity production and a water supply to urban areas. Of the many issues which were referred to the CJEU, one was whether or not this project was a "plan and programme" for the purposes of the SEA Directive. The CJEU addressed this question and resolved it succinctly and as follows:

> "92. By its seventh question, the referring court seeks, in essence, to ascertain whether a project for the partial diversion of the waters of a river, such as that at issue in the main proceedings, must be regarded as a plan or programme falling within the scope of Directive 2001/42.
>
> 93. In that regard, it must be observed that, in order to establish whether a project falls within the scope of Directive 2001/42, it is necessary to consider whether that project is a plan or a programme within the meaning of art.2(a) of that Directive.
>
> 94. Under the second indent of art.2(a) of Directive 2001/42, only plans and programmes required by legislative, regulatory or administrative provisions are to be regarded as "plans and programmes" within the meaning of that Directive.
>
> 95. It is not evident that the project concerned constitutes a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny (see, to that effect, *Inter-Environment Bruxelles and Others* (C-567/10) [2012] ECRI-0000, [30]).
>
> 96. Consequently, the answer to the seventh question is that a project for the partial diversion of the waters of a river, such as that at issue in the main proceedings, is not to be regarded as a plan or programme falling within the scope of Directive 2001/42."

16. The case of Patrice D'Oultremont v Region Wallone (Case-290/15) concerned provisions relating to wind power installations including the regulation of

environmental issues such as shadow flicker and noise limits, providing for instance in relation to noise limits particular parameters depending upon what kind of planning zone the installation was to be placed in. Having noted that parties were seeking identification of possible definitions of the terms "plans and programmes" Advocate-General Kokott analysed the position of the measure concerned in the following terms:

> "32. The fact that, in the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, the Court, relying on a finding concerning the objectives of the SEA Directive in the judgment in *Inter-Environnement Bruxelles and Others*, has since defined the meaning to be ascribed to the expression plan or programme has so far been overlooked. According to that finding, a plan or programme is a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny ('the Court's definition').
>
> 33. Furthermore, the Court has held that, given the (general) objective of the SEA Directive, which consists in providing for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly.
>
> 34. Where there is any doubt, the distinction between the two terms in question and other measures should therefore be drawn by reference to the specific objective laid down in Article 1 of the SEA Directive to the effect that plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment.
>
> 35. In accordance with the Court's definition, the contested order lays down criteria and detailed rules for the development of wind power installations and subjects the implementation of an unspecified number of wind power projects to rules and procedures for scrutiny. That its provisions may have significant environmental effects is obvious. For that reason alone, it would seem highly advisable for that order to be subject to an environmental assessment including public participation. In particular, on a broad interpretation of the conditions for the application of the SEA Directive, the foregoing factors indicate that the contested order is to be regarded as a plan or programme."

17. Further arguments were raised as to whether or not a plan or programme had to be area specific. Advocate-General Kokott clarified that a plan or programme for the purposes of the Directive did not have to relate to a specific area. Furthermore, she rejected the contention that before a measure could be within the terms of the definition of a plan or programme it needed to be a complete suite of criteria or detailed rules for the development of land: a partial code could come within the definition provided by the Directive.

18. These conclusions were in substance adopted by the CJEU. The CJEU concluded that the measure in relation to wind energy came within the definition provided by the Directive. The CJEU expressed the reasons for its conclusions as follows in the judgment:

> "38. First, it must be noted that it is apparent from recital 4 of Directive 2001/42 that environmental evaluation is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes.
>
> 39. Next, and as was stated by the Advocate General in point 34 of her Opinion, the delimitation of the definition of 'plans and programmes' in relation to other measures not coming within the material scope of Directive 2001/42 must be made with regard to the specific objective laid down in Article 1 of that directive, namely to subject plans and programmes which are likely to have significant effects on the environment to an environmental assessment (see, to that effect, judgment of 28 February 2012, Inter-Environnement Wallonie and Terre wallonne, C41/11, EU:C:2012:103, paragraph 40 and the case-law cited).
>
> 40. Consequently, given the objective of Directive 2001/42, which is to provide for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly (see, to that effect, judgments of 22 March 2012, Inter-Environnement Bruxelles and Others, C567/10, EU:C:2012:159, paragraph 37, and of 10 September 2015, Dimos Kropias Attikis, C473/14, EU:C:2015:582, paragraph 50).
>
> 41. As regards Article 2(a) of Directive 2001/42, the definition of 'plans and programmes' laid down in that provision sets out the cumulative condition that they are, first, subject to preparation and/or adoption by an authority at national, regional or local level or are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and, secondly, required by legislative, regulatory or administrative provisions.
>
> 42. It follows from the findings of the referring court that the order of 13 February 2014 was prepared and adopted by a regional authority, in this case the Walloon Government, and that that order is required by the provisions of the Decree of 11 March 1999.
> …
>
> 45. As for the term 'plans and programmes', whilst it is true that it must cover a specific area, the fact nonetheless remains that it is not apparent from the wording of either Article 2(a) of Directive 2001/42 or Article 3(2)(a) of that directive that those plans or programmes must concern planning for a given area. It

follows from the wording of those provisions that they cover, in the wider sense, regional and district planning in general.

46. According to the findings of the referring court, the order of 13 February 2014 concerns the entire Walloon Region and the limit values that it lays down in respect of noise are closely connected with that region, since those limits are determined in relation to the various uses of the geographical areas in question.

47. As regards the argument that the order of 13 February 2014 does not set out a sufficiently complete framework concerning the wind power sector, it should be recalled that the assessment of the criteria laid down in Articles 2(a) and 3(2)(a) of Directive 2001/42 for determining whether an order, such as that at issue in the main proceedings, may come within that definition must in particular be carried out in the light of the objective of that directive, which, as is apparent from paragraph 39 of the present judgment, is to make decisions likely to have significant environmental effects subject to an environmental assessment.

48. Furthermore, as the Advocate General stated in point 55 of her Opinion, it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in Directive 2001/42 by splitting measures, thereby reducing the practical effect of that directive (see, to that effect, judgment of 22 March 2012, Inter-Environnement Bruxelles and Others, C□567/10, EU:C:2012:159, paragraph 30 and the case-law cited).

49. Having regard to that objective, it should be noted that the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment (see, to that effect, judgment of 11 September 2012, Nomarchiaki Aftodioikisi Aitoloakarnanias and Others, C43/10, EU:C:2012:560, paragraph 95 and the case-law cited).

50. In the present case, it should be noted that the order of 13 February 2014 concerns, in particular, technical standards, operating conditions (particularly shadow flicker), the prevention of accidents and fires (inter alia, the stopping of the wind turbine), noise level standards, restoration and financial collateral for wind turbines. Such standards have a sufficiently significant importance and scope in the determination of the conditions applicable to the sector concerned and the choices, in particular related to the environment, available under those standards must determine the conditions under which actual projects for the installation and operation of wind turbine sites may be authorised in the future."

19. The most recent case before the CJEU concerned with the Directive is that of Inter-environment Bruxelles ASBL & Others v Region De Bruxelles-Capitale (C-671/16); ("IEB 2") the measure in issue in that case was a plan related to the development of the "European Quarter" of Brussels. The plan involved identifying areas to be dedicated to various types of use and was concerned with parking, travel and access facilities. It was accepted that Article 2(a) of the Directive was engaged since the measure was regulated by national legislative or regulatory provisions determining the competent authority for adopting it and the procedure for its preparation. The issue then arose as to whether or not a measure such as a zoned town planning regulation of the kind in issue was a "plan and programme" in the light in particular of the judgment of the Court in D'Oultremont. Advocate-General Kokott expressed her Opinion in relation to this issue as follows:

> "19. The starting point for the answer to this question is that the environmental assessment, as indicated in recital 4 of the SEA Directive, is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes. In addition, the distinction between the two terms 'plans and programmes' and other measures not falling within the material scope of the directive must be drawn by reference to the specific objective laid down in Article 1 to the effect that plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment. Therefore, the Court has held that, given the objective of that directive, which consists in providing for a high level of protection of the environment, the provisions which delimit its scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly.
>
> 20. The case-law to date has essentially concerned plans and programmes for which an environmental assessment under Article 3(2)(a) of the SEA Directive applied. In accordance with that provision, an environmental assessment is to be carried out for all plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of *projects* covered by the EIA Directive. Moreover, a framework for development consent of projects which are not covered by the EIA Directive may require an environmental assessment under Article 3(4) of the SEA Directive.
>
> 21. The establishment of a framework for subsequent decisions is characteristic of measures which form part of a regulatory hierarchy. In that regard, the provisions are specified in increasingly greater detail in the run-up to the final decision on the individual case, for example a development consent. At the same time, however, any margins for manoeuvre in the decision on the individual case are, generally, already limited by higher-ranking measures; in the case of development consent, for example, rules on the possible development or use of certain areas.

In this hierarchical model, the SEA Directive is intended to ensure that specifications which are likely to have significant effects on the environment are made only after those effects have been assessed.

22. Against that background, the Court's ruling in *D'Oultremont* must be considered. In accordance with that judgment, the two terms 'plans and programmes' 'relate …to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment'.

23. On the one hand, in a regulatory hierarchy, that interpretation of the two terms 'plans and programmes' in the judgment in *D'Oultremont* is intended to ensure that provisions which have significant effects on the environment are subject to an environmental assessment. On the other hand, for the purposes of a *de minimis* rule, it is also intended to prevent an environmental assessment being mandatory for individual criteria or rules which are determined in isolation.

24. Denmark therefore emphasises that a significant body of criteria and detailed rules implies a number of specifications and these specifications must also carry a certain weight.

25. However, I do not find a *quantitative* approach, which focuses on the number of specifications, convincing. For, the Court has also held that it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in the SEA Directive by splitting measures, thereby reducing the practical effect of that directive.

26. Consequently, the clarification of the criterion of a 'significant body' should be aligned *qualitatively* to the specific objective laid down in Article 1 of the SEA Directive, inter alia, to subject plans and programmes which are likely to have significant effects on the environment to an environmental assessment.

27. The establishment of criteria and rules for the development consent and implementation of projects which are likely to have significant effects on the environment must therefore be regarded as a significant body and thus as a plan or programme if those environmental impacts of the projects derive precisely from the criteria and rules in question. However, if the criteria and detailed rules established cannot have significant effects on the environment, a significant body does not exist and, therefore, nor does a plan or programme.

28. When assessing whether a plan or a programme within the meaning of Article 2(a) of the SEA Directive exists, it is therefore necessary to ascertain whether the specifications in the measure in question are likely to have significant effects on the environment."

20. Specific objections were raised by Belgium on the basis that the measure concerned contained general rules of a legislative character and also expressing concern in relation to the legal uncertainty arising from the CJEU's case law. As an aside Advocate-General Kokott noted the effect of the case law and observations upon it by the UK Supreme Court (which are dealt with below) in the following terms:

> "41. However, I would note that the case-law of the Court may have in fact extended the scope of the SEA Directive further, as was intended by the legislature and the Member States were able to foresee. In my view, however, this does not follow from the definition of the two terms 'plans and programmes', but from the interpretation of the characteristic set out in Article 2(a), second indent, in accordance with which those plans and programmes must be required by legislative, regulatory or administrative provisions.
>
> 42. As has already been said, the fact that a measure is regulated by national legislative or regulatory provisions which determine the competent authorities for adopting them and the procedure for preparing them should be sufficient. Therefore, a rather rare requirement to adopt the measure in question is not necessary; rather, it suffices if it is made available as a tool. This extends the obligation to carry out an environmental assessment significantly. As I have already stated, this interpretation that is based on the legitimate objective of applying an environmental assessment covering all relevant measures, is contrary to the recognisable intention of the legislature. The Supreme Court of the United Kingdom has therefore strongly criticised this, without, however, making a request for a preliminary ruling to that effect to the Court.
>
> 43. This case-law is not called into question by the present request for a preliminary ruling or by the parties to the proceedings. Therefore, the Court should not address it and examine it on its own initiative; rather it should reserve this for a more appropriate case."

21. The CJEU, in reaching conclusions on the questions raised, firstly, reaffirmed its construction of "required" set out IEB 1. Moving to Article 3 of the Directive it expressed its conclusions in the following terms:

> "46. Concerning the second of those conditions, in order to establish whether regional town planning regulations, such as those at issue in the main proceedings, set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive, it is necessary to examine the content and purpose of those regulations, taking into account the scope of the environmental assessment of projects as provided for by that directive (see, to that effect, judgment of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie*,C-105/09 and C-110/09, EU:C:2010:355, paragraph 45).
>
> 47. Concerning, in the first place, the projects listed in Annexes I and II to the EIA Directive, it should be borne in mind that infrastructure projects are listed under Title 10 of that second

annex, including, under point (b) of that title, urban development projects.

48. It should be noted that the contested decree contains rules applicable to all buildings, whatever their nature, and to all their surroundings, including 'areas of open space' and 'areas on which building is permissible', whether public or private.

49. In that regard, that measure contains a map which not only sets out the area to which it applies, but also defines various islands to which different rules apply as regards the location and height of buildings.

50. More specifically, that measure contains provisions concerning, inter alia: the number, location, height and surface area of buildings; construction-free spaces, including flower beds and vegetable patches in those spaces; rainwater collection, including the construction of stormwater collection tanks and storage tanks; the designing of buildings in line with their potential use, how long they will be used for and their eventual dismantling; the biotope coefficient, namely the relationship between areas that can be developed ecologically and total surface area; converting roofs with a view to, inter alia, landscape integration and greening.

51. Regarding the purpose of the contested decree, it pursues an objective of transforming the district into a 'dense, mixed urban' area and is intended to achieve the 'redevelopment of the whole of the European Quarter'. More specifically, that decree contains a chapter entitled 'Provisions relating to the composition of the planning permission and certificate application file' which lays down not only the substantive rules that will have to be applied when permission is granted, but also the procedural rules relating to the composition of applications for urban planning permission and certificates.

52. It follows that a decree such as the one at issue in the main proceedings contributes, by both its content and its purpose, to the implementation of projects listed in that annex.

53. In the second place, regarding the question whether the contested decree sets the framework for future development consent of such projects, the Court has already held that the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment (judgment of 27 October 2016, *D'Oultremont and Others*,C-290/15, EU:C:2016:816, paragraph 49 and the case-law cited).

54. That interpretation of the concept of 'plans and programmes' is intended to ensure, as was noted by the Advocate General in point 23 of her Opinion, that provisions which are likely to have significant effects on the environment are subject to an environmental assessment.

55. Therefore, as was noted by the Advocate General in points 25 and 26 of her Opinion, the concept of 'a significant body of criteria and detailed rules' must be construed qualitatively and not quantitatively. It is necessary to avoid strategies which may be designed to circumvent the obligations laid down in the SEA Directive by splitting measures, thereby reducing the practical effect of that directive (see, to that effect, judgment of 27 October 2016, *D'Oultremont and Others*,C-290/15, EU:C:2016:816, paragraph 48 and the case-law cited).

56. It is apparent from reading the contested decree that that measure contains, inter alia, provisions concerning the development of areas situated in the areas around buildings and other construction-free spaces, areas on which building is permissible, courtyard and garden areas, fences, hedges and boundary walls, pipes and cables connecting buildings with networks and sewers, collection of rainwater, and various building features, including whether they can be converted and are sustainable, certain external aspects thereof, and vehicle access thereto.

57. Having regard to the way in which they are defined, the criteria and detailed rules established by such a measure may, as was noted by the Advocate General in point 30 of her Opinion, have significant effects on the urban environment.

58. Such criteria and detailed rules are, as has been emphasised by the Commission, likely to have an effect on lighting, wind, the urban landscape, air quality, biodiversity, water management, the sustainability of buildings and, more generally, emissions within the area concerned. More particularly, as is stated in the preamble of the contested decree, the size and layout of high rise buildings are likely to give rise to undesirable effects in terms of shade and wind.

…

60. Such a finding cannot be called in question by the objection raised by the Belgian Government relating to the general nature of the regulations at issue in the main proceedings. Indeed, besides the fact that it is apparent from the actual wording of the first indent of Article 2(a) of the SEA Directive that the notion of 'plans and programmes' can cover normative acts adopted by law or regulation, that directive does not contain any special provisions in relation to policies or general legislation that would

> call for them to be distinguished from plans and programmes for the purpose of that directive. Moreover, the fact that RZTPRs, such as those at issue in the main proceedings, contain general rules, express some abstract ideas, and pursue an objective of transforming an area is illustrative of their planning and programming aspect and does not prevent them from being included in the definition of 'plans and programmes' (see, to that effect, judgment of 27 October 2016, *D'Oultremont and Others*, C-290/15, EU:C:2016:816, paragraphs 52 and 53). 10"

UK Case Law

22. The application of the Directive's definition of "plans and programmes" to particular projects and proposals has been the subject of consideration in the UK Courts. In particular in Walton v Scottish Ministers [2012] UKSC 44; [2013] PTSR 51 the Supreme Court had to consider a challenge to a road proposal around Aberdeen. One of the grounds of challenge was the question of whether or not an alteration to the proposal attracted the provisions of the Directive and required SEA. The road concerned in the case was known as the "Western Peripheral Route" or "WPR" and it formed part of a regional transport strategy described as the Modern Transport Strategy or "MTS". Lord Reed expressed his views in relation to whether or not the alteration to the WPR fell within the definition of "plans and programmes" from the Directive in the following terms:

> "59. In the present case, the WPR was subject to an EIA; and there is no longer any complaint that that assessment failed to meet the requirements of the EIA Directive. The question whether there also required to be an SEA depends upon whether the decision to construct the Fastlink as part of the WPR was a modification of a "plan" or "programme" as defined in Article 2(a) of the SEA Directive, and was therefore itself such a plan or programme; and, if so, whether it set the framework for future development consent of a project listed in Article 3(2)(a) (there being no dispute that the WPR is such a project). The reasoning of the Court of Justice and the Advocate General in such recent cases as *Terre Wallone ASBL v Région Wallone and Inter-Environnement Wallonie ASBL v Région Wallone* ((Joined Cases C-105/09 and C-110/09) [2010] I-ECR 5611, BAILII: [2010] EUECJ C-105/09, and *Inter-Environnement Bruxelles ASBL, Pétitions-Patrimoine ASBL and Atelier de Recherche et d'Action Urbaines ASBL v Région de Bruxelles-Capitale* (Case C-567/10) [201] 2 CMLR 30 suggests that these questions are to some extent inter-related.
>
> 60. In determining whether the Fastlink decision was a modification of a "plan" or "programme" as defined in Article 2(a), the first question is whether, as Mr Walton contends, the MTS (or the local transport strategies which it comprised) was a plan or programme within the meaning of that provision.

> 61. It might be argued with some force that none of these documents has been shown to have been "required by legislative, regulatory or administrative measures" as stipulated by the second indent of Article 2(a), even according the term "required" the width of meaning given to it in *Inter-Environnement Bruxelles* at para 31. It might also be argued that NESTRANS, at least, was not an "authority" within the meaning of the first indent, since it was established voluntarily and did not exercise any statutory functions. On the other hand, it might be argued that the documents "set the framework for future development consent of projects", as explained by Advocate General Kokott in her opinion in *Terre Wallone* at points 64-65, and were therefore likely to have significant effects on the environment. In those circumstances, it might be argued that a purposive interpretation of the directive would bring the documents within its scope.
>
> 62. For reasons which I shall explain, it does not appear to me to be necessary to reach a concluded view on these questions. It is sufficient to say that it appears to me to be arguable that the MTS, or the local transport strategies which formed its constituent parts, formed a plan or programme within the meaning of the directive. The question whether the decision to construct the Fastlink constituted a modification to a plan or programme can be considered on the hypothesis that the MTS (or its constituent documents) comprised such a plan or programme."

Lord Reed went on to reject the challenge on the basis that what had occurred was not a modification within the meaning of Article 2(a) of the Directive.

23. Lord Carnwath provided the following observations in relation to the question of whether the MTS was a plan or programme requiring SEA:

> "99 On the first point, like Lord Reed JSC, I am content to proceed on the assumption that the MTS, as approved by NESTRANS in March 2003, was itself such a "plan" or "programme". However, I should register my serious doubts on the point, even accepting the flexible approach required by the European authorities. I note from that the passage from *Inter-Environmental Bruxelles ASBL v Region de Bruxelles-Capitale* (Case C-567/10) [2012] 2 CMLR 909 quoted by Lord Reed JSC, at para 22, refers to regulation of plans and programmes by provisions "which determine the competent authorities for adopting them and the procedure for preparing them". There may be some uncertainty as to what in the definition is meant by "administrative", as opposed to "legislative or regulatory", provisions. However, it seems that some level of formality is needed: the administrative provisions must be such as to identify both the competent authorities and the procedure for preparation and adoption. Given the relatively informal character of the

> NESTRANS exercise, it is not clear to me what "administrative provisions" could be relied on as fulfilling that criterion."

24. These questions returned to the Supreme Court in the case of R (on the application of Buckinghamshire County Council and Others) v Secretary of State for Transport [2014] UKSC 3; [2014] 1 WLR 324. This case concerned the command paper (known in the litigation as the DNS) signalling the Government's intention to press ahead with the HS2 high speed rail proposal. In his judgment Lord Carnwath addressed the issues in relation to the Directive as follows. Firstly, he identified at paragraphs 21-23 that on the basis that the CJEU had interpreted the word "required" in the Directive as meaning no more than "regulated" (see IEB 1) that the real issue to be determined in the appeal was whether or not the DNS was a "plan or programme" which "sets the framework for future development consent". In that connection he then went on to formulate conclusions in relation to whether or not it set the framework and reached those conclusions in the following terms:

> "35. It should be borne in mind also that, although the expression "strategic" is commonly used in shorthand descriptions of the Directive, it is not a word that appears in the text. The correct title is "Directive . . . on the assessment of the effects of certain plans and programmes on the environment". It is not therefore to be assumed, as some of Mr David Elvin QCs submissions seemed to imply, that because a project is "strategic" in nature (as HS2 undoubtedly is) the presumption must be in favour of assessment under this Directive. The purpose is more specific, that is to prevent major effects on the environment being predetermined by earlier planning measures before the EIA stage is reached.
>
> 36. Against that background, and unaided by more specific authority, I would have regarded the concept embodied in Article 3(2) as reasonably clear. One is looking for something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects. That approach is to my mind strongly supported by the approach of the Advocate General and the court to the facts of the Terre Wallone case [2010] ECR I-5611 and by the formula enunciated in Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale [2012] 2 CMLR 909 and adopted by the Grand Chamber in the Nomarchiaki case [2013] Env LR 453.
>
> 37. In relation to an ordinary planning proposal, the development plan is an obvious example of such a plan or programme. That is common ground. Even if as in the UK it is not prescriptive, it none the less defines the criteria by which the application is to be determined, and thus sets the framework for the grant of consent. No doubt the application itself will have been accompanied by plans and other supporting material designed to persuade the authority of its merits. In one sense that

material might be said to "set the framework" for the authority's consideration, in that the nature of the application limits the scope of the debate. However, no one would for that reason regard the application as a plan or programme falling within the definition.

38. In principle, in my view, the same reasoning should apply to the DNS, albeit on a much larger scale. It is a very elaborate description of the HS2 project, including the thinking behind it and the Government's reasons for rejecting alternatives. In one sense, it might be seen as helping to set the framework for the subsequent debate, and it is intended to influence its result. But it does not in any way constrain the decision-making process of the authority responsible, which in this case is Parliament. As Ouseley J said, at para 96:
"The very concept of a framework, rules, criteria or policy, which guide the outcome of an application for development consent, as a plan which requires SEA even before development project EIA, presupposes that the plan will have an effect on the approach which has to be considered at the development consent stage, and that that effect will be more than merely persuasive by its quality and detail, but guiding and telling because of its stated role in the hierarchy of relevant considerations. That simply is not the case here."

39. With respect to Sullivan LJ, I do not think that position is materially changed by what he called the "dual role" of Government. Formally, and in reality, Parliament is autonomous, and not bound by any "criteria" contained in previous Government statements.

40. I have noted that the majority and the minority in the Court of Appeal adopted the same test, turning on the likelihood that the plan or programme would "influence" the decision. The majority referred to the possibility of the plan having a "sufficiently potent factual influence": para 55. Although Mr Mould generally supported the reasoning of the majority, he submitted that "influence" in the ordinary sense was not enough. The influence, he submitted, must be such as to constrain subsequent consideration, and to prevent appropriate account from being taken of all the environmental effects which might otherwise be relevant.

41. In my view he was right to make that qualification. A test based on the potency of the influence could have the paradoxical result that the stronger the case made in favour of a proposal, the greater the need for strategic assessment. Setting a framework implies more than mere influence, a word which is not used by the court in any of the judgments to which we have been referred. It appears in Annex II of the Directive, but only in the different context of one plan "influencing" another. In Terre Wallone [2010] ECR I-5611 Advocate General Kokott spoke of influence, but, as already noted, that was by way of contrast with the submissions before her which suggested the need for the plan to be "determinative"."

25. It will be recalled that in her Opinion in relation to IEB 2 Advocate-General Kokott had noted observations made by the UK Supreme Court in relation to the decision which was reached in IEB 1 on the meaning of "required". This is a reference to the observations made by Lord Neuberger and Lord Mance in their joint judgment in the Buckinghamshire case. They noted that the factors discussed by Advocate-General Kokott in her Opinion in IEB 1 strongly supported the literal and natural meaning of the word "required" as being based on a legal obligation. They went on to analyse the approach taken by the Court in its judgment in the following terms:

> "181. The Chamber then simply said that "It must be stated" that "an Interpretation" which would exclude from the scope of the SEA Directive plans and programmes regulated by rules of law in the various national legal systems, "solely because their adoption was not compulsory in all circumstances, cannot be upheld": para 28.
>
> 182. The Chamber no doubt used the phrase "in all circumstances" because the position, under the relevant national law, was that "in certain cases" (among them the case before the Chamber) the municipal authority might refuse to prepare a specific land use plan (para 18). Cases in which the authority had no option but to prepare such a plan would on any view obviously fall within the word "required".
>
> 183. However that may be, the Chamber concluded that "required" means "regulated", so as to catch even cases where no plan was required to be prepared. The only reasons it gave were that to read "required" as meaning "required" would "have the consequence of restricting considerably the scope of the scrutiny" (para 29) or "compromise, in part, the practical effect of the Directive, having regard to its objective, which consists in providing a high level of protection of the environment" and "thus run counter to the Directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment": para 30.
>
> 184. If, instead of "required", one must read the word "regulated", the question arises what it means. Is it sufficient that legislative, regulatory or administrative provisions grant powers to some authority wide enough to permit a plan or programme to be prepared? Or must such provisions actually refer to a possibility that such a plan or programme will be prepared? Or must they specify points and/or conditions that such a plan or programme, if prepared, must address and/or fulfil? The Chamber referred to provisions which "determine the competent authorities for adopting them [i e the relevant plan or programme] and the procedure for preparing them": para 31.
>
> 185. If this is what is meant by "regulated", then not all plans and programmes can on any view be covered by the SEA Directive, and the desire for comprehensive regulation of plans and programmes "likely to have significant effects on the environment" cannot be met. In any event, it follows from the fact that the SEA Directive only applies to plans and programmes "which set the framework for future development consent

> of projects", that it is not exhaustive and does not cover every form of plan and programme simply because it could be said to be likely to have significant environmental effects: see Lord Carnwath and Lord Reed JJSC's judgments. The SEA Directive and its terms must be read as a whole."

They concluded that had the issue been before the Supreme Court without any decision of the CJEU having being available they would have reached the same conclusion as Advocate-General Kokott in IEB 1 for the reasons which she gave.

The position of the Framework and National Policy in the Statutory Regime

26. The system of control regulating the development and use of land, the planning system, is a comprehensive statutory code. Within the statutory regime there are a number of references to national policy. Within Schedule 4B of the Town and Country Planning Act 1990 at paragraph 8 there is a specification of the basic conditions which must be met by a neighbourhood development order or neighbourhood plan before it can proceed to a referendum. At paragraph 8 (2) (a) the draft order or plan meets the basic conditions if

> "having regards to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order".

Turning to the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") at section 19 of that Act provisions are set out for the preparation of local development documents. In particular section 19 (2) provides as follows:

> "(2) In preparing a development plan document or any other local development document the local planning authority must have regard to-
>
> (a) national planning policies and advice contained in guidance issued by the Secretary of State."

27. Furthermore section 20(5) of the 2004 Act provides as follows:

> "(5) The purpose of an independent examination is to determine in respect of the development plan document-
>
> (a) whether it satisfies the requirements of sections 19 and 24 (1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;
>
> (b) whether it is sound; and
>
> (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation."

28. Section 39(2) of the 2004 Act requires any person who exercises any function in relation to local development documents to exercise it with the objective of contributing to sustainable development. For the purposes of section 39(2) the provisions of section 39(3) make clear that such a person "must have regard to national policies and advice contained in guidance issued by" the Secretary of State. Thus there are references within the statutory regime to national policy which are, in particular, directed to requiring that policy to be taken into account, or regard to be had to it, in taking steps, for instance, in relation to forward planning.

29. It is, of course, also the case that the Framework is a material consideration in decision taking under the statutory regime. Section 70 of the 1990 Act requires regard to be had to "any other material considerations" by virtue of section 70(2)(c). Section 38(6) of the 2004 Act similarly requires regard to be had to material considerations when decisions are reached in relation to applications for planning permission and it is beyond argument that the Framework is such a material consideration to be taken into account.

30. Observations were made in relation to the nature of national planning policy in the case of R on the application of Alconbury Developments Limited and Others v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295. This case arose in a completely different context and considered the question of the extent to which the resolution of planning appeals and other decisions taken by the Secretary of State were compliant with the right to have civil rights and obligations determined by an independent and impartial tribunal pursuant to Article 6 of the ECHR. During the course of his speech Lord Clyde made the following observations in relation to the nature and justification of national planning policy:

> "140. Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured. National planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems. As is explained in paragraph I of the Government's publication Planning Policy Guidance Notes, the need to take account of economic, environmental, social and other factors requires a framework which provides consistent, predictable, and prompt decision making. At the heart of that system are development plans. The guidance sets out the objectives and policies comprised in the framework within which the local authorities are required to draw up their development plans and in accordance with which their planning decisions should be made. One element which lies behind the framework is the policy of securing what is termed sustainable development, an objective which is essentially a matter of governmental strategy.
>
> 141. Once it is recognised that there should be a national planning policy under a central supervision, it is consistent with

> democratic principle that the responsibility for that work should lie on the shoulders of a minister answerable to Parliament. The while scheme of the planning legislation involves an allocation of various functions respectively between local authorities and the Secretary of State."

31. In Hopkins Homes Limited v Secretary of State for Communities and Local Government and Others [2017] UKSC 37; [2017] 1 WLR 1865 the Supreme Court elicited discussion in relation to the legal status of the Framework. The conclusions reached by Lord Carnwath in relation to its legal status were set out as follows:

> "19. The court heard some discussion about the source of the Secretary of State's power to issue national policy guidance of this kind. The agreed Statement of Facts quoted without comment a statement by Laws LJ (R (West Berkshire District Council) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441; [2016] 1WLR 3923, para 12) that the Secretary of State's power to formulate and adopt national planning policy is not given by statute, but is "an exercise of the Crown's common law powers conferred by the royal prerogative." In the event, following a query from the court, this explanation was not supported by any of the parties at the hearing. Instead it was suggested that his powers derived, expressly or by implication, from the planning Acts which give him overall responsibility for oversight of the planning system (see R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, paras 140-143 per Lord Clyde). This is reflected both in specific requirements (such as in section 19(2) of the 2004 Act relating to plan-preparation) and more generally in his power to intervene in many aspects of the planning process, including (by way of call-in) the determination of appeals.
> 20. In my view this is clearly correct. The modern system of town and country planning is the creature of statute (see Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132, 140-141). Even if there had been a pre-existing prerogative power relating to the same subject-matter, it would have been superseded (see R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening) [2017] 2 WLR 583, para 48). (It may be of interest to note that the great Case of Proclamations (1611) 12 Co Rep 74, which was one of the earliest judicial affirmations of the limits of the prerogative (see Miller para 44) was in one sense a planning case; the court rejected the proposition that "the King by his proclamation may prohibit new buildings in and about London".)"

Submissions

32. Prior to embarking upon an examination of the submissions made by both parties against the background of these legal materials it is necessary and appropriate to make a number of observations. Firstly, I am greatly indebted to the lawyers on both sides of the case. I am indebted to counsel for their helpful and focused submissions and to the solicitors involved in the preparation of the necessary materials which enabled an efficient hearing to be conducted. Secondly, it will be apparent from the foregoing that

there has been no detailed rehearsal of the content of the Framework in this judgment. It is to be taken as read for the purposes of what follows: relevant paragraphs are referenced. It is a public document widely available and the knowledge of its contents is assumed for the purposes of the consideration of the issues raised in this case.

33. On behalf of the Claimant Mr Kimblin submitted that whilst he proposed to examine the issues raised by Article 2(a) and Article 3(2)(a) separately there was a need to read both of these provisions together and indeed the Directive as a whole in order to arrive at the correct conclusion as to whether or not the Framework was a "plan or programme" for the purposes of the Directive. In that connection he submitted firstly in relation to Article 2(a) that the Framework was made necessary by the statutory scheme. By reference to legislative provisions such as section 19(2) he submitted that the practical considerations related to these statutory provisions made it necessary for there to be national policy. Thus, he submitted that the Framework was, as observed by Lord Carnwath, in Hopkins Homes a measure required "expressly or by implication" as a consequence of the planning legislation. Other provisions such as those relating to neighbourhood orders and plans, and a duty to contribute to sustainable development under section 39 of the 2004 Act reinforced this submission by presuming the existence of that national policy.

34. Drawing on the conclusions of the CJEU in IEB 1 Mr Kimblin submitted that the fact that the Framework might be voluntarily adopted did not preclude it being included within the definition of the Directive. He submitted that in reality the planning system would come to a halt, or be fatally flawed, if the Framework were not in place. It is, he submitted a fundamental component of the planning system, and to conclude that the Directive did not apply to it would turn the purpose of the Directive on its head bearing in mind that it is specifically directed at measures which are at the top or starting point of a hierarchy of plans which then direct the form and content of acceptable development proposals. In that it provided a key element of consistency, the Framework was a necessary component of a coherent planning system.

35. Further he submitted that the Framework as a Command paper presented to Parliament was authorized by a combination of implied statutory power and constitutional arrangements such that Article 2(a) was engaged. In addition to the legislative provisions, Mr Kimblin also drew attention to practical examples produced in the evidence lodged by the Claimant as to how the Framework operated within the planning system. Compliance with the provisions of the Framework is identified by the legislation in section 20(5) of the 2004 Act as a key issue in assessing the question of whether or not forward plans are sound. The definition of soundness itself is to be found within the Framework: see paragraph 35. Further he submitted that the contention that a local plan would itself be the subject of SEA was not an answer to whether or not the Framework should be the subject of SEA in circumstances where the provisions of the local plan were scrutinised against provisions of the Framework itself.

36. In relation to Article 3(2)(a) Mr Kimblin drew attention to a number of specific provisions of the Framework which he submitted reinforced the connection between the Framework and Article 3(2)(a). The Framework includes provisions relating to agriculture (in terms of the protection of best and most versatile land and the promotion of agricultural diversification in paragraphs 170 and at paragraph 83); it provides specific provisions in relation to forestry in terms of the protection of ancient woodland and ancient or veteran trees unless there are wholly exceptional reasons for their loss

and compensation (see paragraph 175(c)); there is reference to the UK Marine Policy Statement within the Framework and thus it touches upon fisheries; provisions within the Framework bear upon energy and in particular infrastructure associated with onshore wind and renewable sources. Policies within the Framework bear upon industry in the form of policies addressing various forms of economic activity; transport features in the Framework and specific paragraphs relate to the control of development in relation to transport infrastructure; water management is addressed in specific provisions relating to flood risk coastal change and water supply in paragraph 149. Telecommunications are specifically catered for in a requirement for strategic policies to address the need for their infrastructure at paragraph 20 (b); tourism is addressed in the Framework through paragraph 83 (c) which specifically promotes rural tourism and other provisions of the Framework which identify it as a town centre use. In short each of the individual topics which are identified in Article 2(a) are featured in the Framework and it is unarguable that the Framework is addressing "town and country planning or land use".

37. So far as setting "the Framework for future development consents of projects" Mr Kimblin referred to a number of examples contained in the Claimant's evidence of appeal decisions in which the Framework had played a key part in the determination of whether or not consent should be granted. These were, he submitted, examples of the Framework being in practical terms determinative of whether permission should be granted and included circumstances in which the development plan had been set aside, and therefore it was only the provisions of the Framework against which the merits of development could be appraised. A further instance of setting the framework for future development relied upon by Mr Kimblin related to circumstances where it was the policies of the Framework which were determinative of the correct approach to whether or not development should be granted, such as in AONB. In both of these cases the detailed criteria and policies of the Framework set the context for whether or not planning permission would be granted.

38. Finally, Ms Pindham addressed an argument raised by the Defendant in response to the claim. The Defendant contends that it would be impossible for an SEA to be conducted of the Framework which was meaningful or coherent bearing in mind the level of generality at which national policy operates. She submitted, firstly, that even if this matter were an issue, it was not an issue that the Court had to determine: this issue is a question for the decision maker. Furthermore, the provisions of Article 5(2) and Annex 1 of the Directive placed a caveat on the nature and extent of the information that would be necessary in order to satisfy any SEA requirement. Secondly, she submitted on the basis of evidence lodged by the Claimant from an expert in the area of SEA that it would be perfectly possible to submit a meaningful SEA in relation to the Framework.

39. In response to these submissions on behalf of the Defendant Mr Rupert Warren QC submitted that the Framework was neither "required by law" nor did it "set the Framework for future development consent of projects". Both of these two requirements had to be satisfied before an SEA was required. Whilst the Directive had to be read as a whole, and the provisions of Article 2(a) and Article 3(2)(a) had to be read together, nonetheless both of these requirements had to be met and they could not be elided.

40. Mr Warren submitted, based upon the observations of Lord Carnwath at paragraph 99 of the Walton case that the phrase in IEB 1 referring to plans and programmes as being

identified by provisions "which determine the competent authorities for adopting them and the procedure for preparing them" required some level of formality so as to identify both the competent authority and the procedure for the preparation and adoption of the measure. He submitted that there was nowhere to be found in any legislative or administrative provisions in the domestic context any such level of formality as could warrant the Framework being brought within the definition. There is nowhere within the legislation any express legislative requirement for national policy and those provisions which do exist within the statutory Framework simply assume the existence of national policy without demanding its production. The reference to the implied or express statutory power in Hopkins did not assist the Claimant, since that was addressed to the existence of a statutory power, not a duty, to produce the Framework.

41. In relation to the Claimant's submissions based upon the fact that the Framework was voluntary, and that voluntarily provided plans were engaged in the Directive by virtue of the decision in IEB 1, Mr Warren submitted that the fact that a measure was produced voluntarily did not mean that the Court was absolved from inquiring as to whether or not the plan was required by a legislative or administrative provision. In terms of the Claimant's submission that there was an implied statutory obligation Mr Warren submitted that it would be inappropriate to read the statutory regime as requiring the Framework by implication: there was no authority, least of all Hopkins Homes, to support an implied obligation to produce the Framework, as opposed to an implied power to do so. In each of the statutory examples relied upon by the Claimant the relevant statutory provisions either refer to having regard to national policies or taking account of them. None of them amounted to an obligation of any sort upon the Defendant to produce national planning policy and, moreover, Mr Warren refuted the suggestion that the planning system would collapse in the absence of national planning policy being available. It was as reasonable not to have national planning policy as it had been reasonable not to have regional planning guidance when that tier of planning policy was, some years ago, revoked.

42. Turning to the question of whether or not the Framework "set the framework for future development consent of projects", Mr Warren submitted that the Framework was at such a high level that it did not set detailed rules or criteria in the sense which the Directive required in order for it to be engaged. He emphasised the factual distinctions between the European authorities set out above and the highly discretionary nature of English planning system. On the basis of the high-level generality of the Framework he submitted that it was not possible to contend that the provisions of the Framework would in some way sell the pass, or predetermine, the consideration of significant environmental effects that might occur lower down the decision making hierarchy.

43. At the plan making stage the existence of the Framework did not constrain or preclude decisions being taken and being the subject of SEA at a local level. Even in respect of policies which were grounded in the Framework such as Green Belt, it would be open for a local authority to decide to scrap its Green Belt at a local level and for that to then be subject to scrutiny in the plan making process. Furthermore, he submitted it would be possible for a local planning authority to adopt a plan which was unsound, provided there were good reasons which had been independently endorsed for it to do so. Again, such would not be a decision which was foreclosed by the existence of the Framework. As a matter of process, the merits of departing from the Framework could be considered at the plan making stage without any options having been closed off by the existence

of the Framework's policy. The Framework both in plan making and decision taking was a material consideration to which weight could be ascribed, but not one which in any way legally bound the decision maker.

44. In terms of the practicality of producing an SEA Mr Warren submitted that, even were some such exercise to be undertaken, any SEA which resulted would tell any participant little or nothing in relation to the likely significant effects that might arise from the adoption of a policy at the level of generality of the Framework. On the basis that the Framework was policy which was not binding, but which could be reasoned away from, nothing worthwhile would come out of any examination of its effects. There was, therefore, a sensible practical reason for concluding that the Framework should not be subject to a requirement for SEA.

Conclusions

45. I accept that in evaluating the question of whether or not the Framework is properly within the Directive's definition of a plan or programme' it is necessary to look at Article 2(a) and Article 3(2)(a) together. Although issues raised by these provisions run together they nevertheless contain individual ingredients which, whilst they need to be understood in the context of each other and the Directive as a whole, nevertheless need to be satisfied before a measure could come within the scope of the definition. The starting point is that the Directive needs to be examined bearing in mind its wide scope and broad purpose. That purpose, as identified within the recitals, includes the importance of integrating environmental considerations into the preparation of plans and programmes through systematically accounting for their likely significant environmental effects. In the light of the fact that definitions are provided within Article 2(a) and specific provisions are made as to the scope of the direction in Article 3 (2)(a) the application of those specific provisions to a new measure must be undertaken to determine whether SEA is required by the Directive. Nonetheless, the case law both in the CJEU and at the UK level makes clear that not everything that might be a measure capable of causing significant environmental effects is something which falls within the definition.

46. The first issue which needs to be addressed in accordance with the submissions of the parties is the question of whether or not the Framework is a measure "required by legislative regulatory or administrative provisions". I have reached the conclusion that it is not for the following reasons.

47. Firstly, it is clear that, as was observed by Lord Carnwath in paragraph 99 of Walton, there is a need to identify some level of formality in the form of the legislative, regulatory or administrative provisions regulating or governing the production of the measure. I leave out of account for these purposes the debate as to whether or not the CJEU were correct in IEB 1 to define "required" as meaning "regulated". There is no need to resolve this question when, as I am satisfied, there is in reality nothing by way of any formal provisions which might be said to govern or regulate the production of the Framework.

48. To deal with the Claimant's contentions in respect of this issue, the first point is the question of the express or implied statutory power from paragraph 19 of Lord Carnwath's judgment in Hopkins Homes and the related statutory material. In my view none of the statutory provisions referred to governs or regulates the production of

national planning policy. Firstly, the statutory provisions themselves are each predicated on the basis of providing a role for national policy in taking a particular action in respect of an element of the planning system or actions within the planning systems more generally. They do not either mandate or regulate the production of national planning policy. For instance, in relation to section 19 (2)(a) a development plan document could continue to be produced even if national policy did not exist. Indeed, as Mr Warren noted, section 19 (2)(b) provides a similar provision for regard to be had to the regional strategy in preparing a local development document which, as previously noted, is a tier of planning policy which has been abolished. The absence of national policy would not mean that the preparation of local development documents would have to be abandoned. The other elements of section 19 to which regard is to be had would need to be gone through in the preparation process. Thus, section 19 (2)(a) and its reference to national policy does not regulate or prescribe the need for the existence of national planning policy.

49. Turning to the inclusion of the test of "soundness" in section 20(5)(b) of the 2004 Act, that provision does not require that the test for "soundness" be set out in national planning policy, or in some way regulate the production of the Framework. The fact that the Defendant has chosen to include criteria for the test in the Framework, rather than for instance leaving it to the planning judgment of an Inspector examining the plan, does not alter that position. Similar observations can be made in relation to the other statutory provisions relied upon so far as the observations in paragraph 19 of Lord Carnwath's judgment in Hopkins Homes is concerned.

50. I accept the submission made by Mr Warren that the identification of an express or implied power to produce national policy (which is reflected in the observations of Lord Clyde in Alconbury) is not to be transposed into either a duty or regulatory provision for the production of national planning policy. No doubt, in the light of the observations made both by Lord Carnwarth and Lord Clyde, the planning system would lack an important dimension if the Defendant chose to have no national planning policy, but that is a far cry from the inference or implication of a legislative or administrative provision regulating the production of the Framework.

51. The fact that the Framework is a material consideration in the planning system does not assist the Claimant. It is plain from the evidence which the Claimant has produced that the policies of the Framework are material considerations, and sometimes important material considerations, in the determination of planning applications. However, the role the Framework plays does not give rise to any legislative or administrative provision regulating its production. In the absence of the Framework the remaining development plan policies and material considerations would have to be evaluated in order to resolve the equation of whether or not planning permissions should be granted. In short, therefore, there are no specific statutory or administrative provisions which govern or regulate the procedure for preparing or adopting national planning policy in the form of the Framework. Furthermore, the fact that the statutory Framework makes references to the need to have regard to, or take account of, national planning policies does not amount to such a provision: they provide an explanation for why the Defendant might choose to exercise his express or implied power to produce national planning policy but, again, they do not amount to provisions within the scope of Article 2(a).

52. The assumed importance of the Framework in plan making and decision taking to which I shall turn shortly does not alter the position. Nor does the fact that the Framework is

produced voluntarily. The Framework is a voluntary measure, promulgated pursuant to an express or implied power but not produced as a result of any legislative or administrative provisions which regulate or determine the procedure for preparing or adopting it, and thus the definition from Article 2(a) as interpreted by the CJEU in paragraph 31 of IEB 1 does not apply to the Framework, and it falls outside the definition of a plan or programme which would be the subject of SEA.

53. I turn to consider the allied question of whether or not the Framework "sets the framework for future development consent" of relevant projects. In this regard I found Mr Kimblin's submissions more convincing. Firstly, it is beyond argument that the subject matter of the Framework embraces the vast majority, if not all, of the topics covered in Article 3(2)(a) of the Directive. Whilst Mr Warren is correct to note that the Framework operates in respect of some topics at a very high level of generality (bearing in mind that it is at the pinnacle of the hierarchy of planning policies), nevertheless there are features of the Framework which in my judgment support the contention that the Framework does in various respects contain a "a significant body of criteria and detailed rules" intended to have an impact on the scale, location and design of future development proposals.

54. This can be seen in several aspects of the Framework's policies. Firstly, it can be seen in the creation of a policy concept which is solely established by the Framework. A prime example is Green Belt policy which has its foundation in national planning policy. Firstly, the decision to choose to have a Green Belt policy is one which will obviously have significant environmental effects. Both in terms of Green Belt designation, and also in relation to the particular detailed policies in respect of proposals effecting the Green Belt contained in paragraph 143-147, the Framework will shape the location and scale of acceptable development proposals.

55. Secondly, the Framework contains policies which have the effect of applying a particular analytical approach, or the application of a particular set of criteria or tests, in relation to certain environmental considerations. For instance, the Framework prescribes a particular approach to the consideration of flood risk, through the application of a sequential test and an exception test specified in some detail in paragraphs 157-161 of the Framework. The selection of this particular kind of analysis prescribed by the policy will itself have an impact on the location design and scale of future development. There will undoubtedly be likely significant environmental effects from the adoption of this approach, bearing in mind that both positive and negative environmental effects are to be accounted for.

56. Thirdly, and akin to the provisions in relation to the Green Belt, certain statutory designations are given a particular policy treatment in the Framework which provides criteria and tests related to the consideration of development within statutory designations such as national parks, the Broads and AONBs at paragraph 172 of the Framework, again prescribing that the "scale and extent of development within these designated areas should be limited": this is an approach which will have significant environmental effects. Furthermore paragraph 172 provides a list of criteria against which major development should be tested.

57. Finally, the Framework provides in certain circumstances detailed policies and criteria for the determination of applications. One has already been noted above in relation to the policy protecting irreplaceable habitats, such as ancient woodland and ancient or

veteran trees, in paragraph 175 (c) of the Framework. Similarly, detailed criteria are provided in relation to appraising applications in respect of heritage assets at paragraphs 193-202 of the Framework. Again, these policies will clearly set a structure for the consideration of applications affecting irreplaceable habitats or heritage assets which will inevitably, through the detailed criteria and policy requirements, have an impact on the formulation of development proposals. I am satisfied, therefore, that in examining the detailed content of the Framework there is a clear case to be made that it falls within the language of Article 3(2)(a) in setting "the Framework for future development consent of projects".

58. The fact that it is a material consideration to which a decision maker will have regard to, and ascribe weight to in reaching a balanced judgment on the merits of a proposal, does not affect that conclusion. It is of course true to observe, as Mr Warren submits, that the provisions of the Framework are not binding but are rather policy to which weight needs to be ascribed by the decision maker. However, bearing in mind the nature of the document as a suite of policies produced by the member of the executive with specific responsibility for the planning system, the Framework is clearly a consideration of some importance. Taking the approach of Lord Carnwath in paragraph 41 of the Buckinghamshire case, the Framework has "more than mere influence" in setting a framework for future development. Mr Warren's suggestion that the non-binding nature of the Framework meant that it would be open to a local planning authority on the edge of a large urban area to abandon the retention of any land in the Green Belt had an air of unreality about it. Clearly the decision to include a policy concept of Green Belt in the Framework, together with the purposes for Green Belt set out in paragraph 134 of the Framework, alongside the identification in paragraph 135 that the general extent of Green Belts have already been established and should (according to paragraph 136 of the Framework) only be altered "where exceptional circumstances are fully evidenced and justified", provides more than merely an influence over the national local planning authority's decisions as to the formulation of its future local plan. The Framework sets a very firm context for decisions to be taken in respect of the Green Belt, and the somewhat theoretical suggestion that a planning authority could choose to depart from the Framework's policy in this respect is not a convincing reason to conclude it is merely one influence, or merely influences, the plan making process.

59. Turning to the concerns raised by the Defendant as to the practicality of undertaking SEA, I accept the submission of Ms Pindham that, firstly, that is an issue for the decision maker rather than the court. In my view there is nothing to suggest that the requirements of Article 5 and Annex 1 of the Directive could not be addressed in this case, and no evidence that what might be produced would be meaningless or of no value. There is widespread experience of SEA being undertaken in relation to local plan policies addressing the general environmental concerns in local plan's areas rather than specific site allocations or larger designations. No convincing evidence was produced to substantiate the Defendant's contention in this respect and had I been persuaded that the Framework fell within the definitions and scope of the Directive I would not have regarded this point as being at all determinative.

60. It follows that in the final analysis I am not satisfied that the Directive applies to the Framework for the reasons which I have given. It is not a plan and programme since it does not fall within the definition provided by the Directive. Bearing in mind that this matter has been proceeded as a "rolled up" hearing I am satisfied that the Claimant's

case is arguable, but ultimately I am not convinced of its substantive merits. For the reasons given the Claimant's application must be dismissed.