

## **AVOSETTA MEETING, FRIBOURG, 23RD-24TH OF NOVEMBER 2012**

### **ENVIRONMENT AND LAND TRANSPORTATION LAW:**

#### **UK REPORT (SHARON TURNER & TOM MUINZER, RESEARCH ASSISTANT)**

##### **I. NATIONAL LEGISLATION**

*To what extent, environmental issues are taken into account in national transport policy? Does national transport policy set specific goals in order to reduce especially negative impacts from road traffic, e.g. emission goals, road traffic relocation on rail etc.?*

##### **The Concept of 'National' Land Transport Policy in the UK**

First and foremost it is important to begin by stating that there is no such thing as 'national' transport policy in the UK. Although the UK is controlled centrally from its main Parliament at Westminster in London (referred to as 'UK government'), which has authority over the entire nation, constitutional devolution (launched in 1998) resulted in the creation of legislative assemblies in each of the UK 'countries' – Scotland, Wales and Northern Ireland. Under the legal arrangements for UK devolution, responsibility for almost all aspects of transport policy for Great Britain (England, Wales and Scotland) is controlled by UK government in London. However, responsibility for transport in Northern Ireland is almost entirely devolved to the Northern Ireland Assembly. Thus, land transport policy in the UK is divided between policy for GB and Northern Ireland – although it should be noted that even within GB devolution complicates the application of transport policy made in London because responsibility for environmental and planning policy is significantly devolved – with Scotland having almost entirely transferred powers to adopt regional law and policy in this context.

Despite the fragmentation of land transport policy across the UK, the adoption of the UK Climate Change Act 2008 provided an important unifying framework in terms of integrating environmental considerations into policy development and establishing 'national' objectives for this sector.

The Act imposes a legal obligation on the UK as a whole to reduce carbon emissions by 80% by 2050 from 1990 levels. The Act applies to the UK as a whole. Although decarbonisation of the energy sector has been the government's major focus since the Act was introduced, the legal obligation to deliver radical mid-century decarbonisation has had an important impact on road transport policy. However, even the traction of this unifying emissions obligation is uneven across the UK. Although the Climate Act applies to the UK as a whole, each of the UK countries adopted differing qualities of legal obligation to decarbonize and differing levels of legal ambition concerning the pace of decarbonisation. Scotland has adopted the most ambitious target and most rigorous legal obligation (see Climate Change (Scotland) Act 2009). However, the legal traction of the Act is far weaker in Northern Ireland where the devolved administration refused to embrace the full force of the national legal obligation to decarbonize and much lower emissions reduction targets. Thus, whereas land transport policy in GB is characterized by a pronounced concentration on reducing emissions the equivalent policy sector in Northern Ireland does not reflect a coherent emphasis on reducing emissions from transport despite having the highest per capita and fastest rising road transport emissions in the UK.

The adoption of the Act has not led to setting of a specific emissions reduction target for land transport emissions for GB or Northern Ireland. However, the Act was followed by publication of a UK Low Carbon Transition Plan in 2009 which set out the first iteration of the national pathway towards delivering the emissions reductions required for 2050. This was updated in 2011 by the adoption of a new UK Carbon Plan by the Coalition Government.<sup>1</sup>

The Plan acknowledges that domestic emissions from transport rose steadily between 1990 and 2007 but reports that they have recently declined to almost 1990 levels due to economic recession but also improvements in new car fuel efficiency and the increased uptake of biofuels, driven by existing government and EU policy. That said, the Plan also points out that domestic transport emissions also account for approximately 24% of UK domestic greenhouse gas emissions (137 MtCO<sub>2</sub>e in 2009). However, while the Plan also states that by 2030 current policies should reduce transport emissions to 116 MtCO<sub>2</sub>e by 2030, no explicit emissions target for transport is set. The Plan simply concludes that by 2050 the UK transport system will need to emit significantly less carbon than today, and in particular that a policy step-change is needed to move the UK away from fossil fuels and towards ultra-low carbon alternatives such as battery electric or fuel cell vehicles.

To achieve that objective the Plan committed to a range of new initiatives :

- providing over £400 million funding for the development, supply and use of ultra-low emission vehicles – through consumer incentives, support for recharging infrastructure and research, development and demonstration
- Launched the £560 million Local Sustainable Transport Fund currently part-funding around 100 schemes delivering local transport projects that promote economic growth and cut carbon emissions
- Launched the electrification of the North Transpennine route from Manchester to York via Leeds, which will result in significant carbon savings as well as increased reliability and shorter journey times
- Launched the fourth round of the Green Bus fund providing a further £20 million for the purchase of low carbon emission buses, bringing the total support for this initiative to £95 million since its launch
- Investment of £8 million into low emission HGVs and their supporting infrastructure

Primary responsibility for transport policy in Great Britain rests with the Department for Transport (DfT) and the Secretary of State for Transport in London. DfT's primary policy focus is expressed by the Government in the following terms:

‘Safe and dependable transport is essential to UK society and the economy. The government is working to make rail, road, air and water transport more efficient and effective, keep them safe and secure, and reduce greenhouse gas and other emissions.’

DfT's priorities reflect a strong emphasis on improving the environmental performance of transport networks in Great Britain; however, policy is arguably dominated by its focus on contributing to compliance with the Climate Act 2008 rather than any other environmental impacts. DfT has added

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<sup>1</sup><http://www.decc.gov.uk/publications/basket.aspx?filetype=4&filepath=11%2ftackling-climate-change%2fcarbon-plan%2f3702-the-carbon-plan-delivering-our-low-carbon-future.pdf#basket>

an objective to protect the built and natural environment when constructing transport including environmental design, assessment and operation of the strategic road network. This has been integrated into the official Design Manual for Roads and Bridges (DMRB), a 15 Volume guide that contains a Volume on Environmental Design (Vol.10) and Environmental Assessment (Vol.11). It has also committed to improving the environmental performance of roads – however, in terms of policy activity, its greatest emphasis appears to be on reducing carbon emissions from transport.

The major examples of environmental integration in GB transport policy are as follows:

1. In 2012 UK Government announced its plans for a major programme of investment in high speed rail links between the major cities in Great Britain. To implement this vision the DfT launched 'High Speed 2' in 2012, which was described by the Secretary of State for Transport as the most significant transport infrastructure project in the UK since the motorways were built in the 1950s and 1960s and the most significant investment in rail transport since the Victorian era. The first phase of construction is due to start in 2017 and be completed by 2025.
2. DfT is committed to delivering substantial improvements in the existing rail network, creating new capacity to improve services for passengers and delivering the electrification of important rail routes by 2020.
3. DfT is committed to reducing carbon emissions from road transport through a wide range of initiatives centered on developing the market for and use of electric and other ultra-low emission vehicles. The Government has set aside over £400 million to support and promote the development and usage of Ultra-low emission vehicles (ULEVs). These vehicles include electric, plug-in hybrid and hydrogen fuelled vehicles. The Office for Low Emission Vehicles (OLEV) is a cross-Whitehall team dealing with this scheme. The Government has published a policy framework outlining the infrastructural development programme for plug-in vehicles,<sup>2</sup> ('Making the Connection') and specific 'plugged-in places' across the UK have been targeted for development.<sup>3</sup> The UK's ambition to enhance the eco-performance of its vehicles ties in with a strong EU performance in the area of energy efficiency for vehicles; see, e.g., 'Carmakers Zoom past European Carbon Targets', ENDS Report, Jan 2012 Issue 444, pp.8–9).
4. DfT is working with the International Maritime Organisation to negotiate measures to reduce greenhouse emissions from ships.
5. DfT supports the production and use of sustainable biofuels as a means of reducing emissions from transport. DfT policy emphasises that it only supports the production of biofuels that deliver greenhouse gas savings and do not cause environmental damage.
6. DfT has developed policy to encourage sustainable local travel. Two-thirds of all journeys taken in Great Britain are under 5 miles – DfT states that many of these trips could be walked, or made by bike or public transport and has adopted a series of policies and initiatives to make these modes of transport more attractive and to encourage people not to drive. To this end DfT has introduced a range of funding mechanisms designed to achieve this objective, in particular a 'Better Bus Areas' fund to make bus services more punctual, interconnected, green and accessible, a 'green Bus Fund' to support investment in low

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<sup>2</sup> <http://assets.dft.gov.uk/publications/making-the-connection-the-plug-in-vehicle-infrastructure-strategy/plug-in-vehicle-infrastructure-strategy.pdf>

<sup>3</sup> These are: East of England, Greater Manchester, London, Midlands, Milton Keynes, North East, Northern Ireland, Scotland.

carbon buses and free travel for older and disabled people. DfT is also supporting the introducing of 'smart ticketing' designed to make local transport more customer-friendly and to encourage people to use it; more specifically it is providing an extra £15 million to help increase investment in smart ticketing equipment particularly among small and medium-sized bus companies; and £45 million to extend smart, flexible ticketing across London and the south east through the South East Flexible Ticketing (SEFT) programme.

To encourage more cycling DfT is:

- funding local authorities through the Local Sustainable Transport Fund to make cycling safer and easier. The *Local Sustainable Transport Fund – Guidance on the Application Process* (DfT, 2011) overviews the scheme.<sup>4</sup>
  - providing guidance documents on bike maintenance, cycle routes and safety
  - encouraging employers to sign up to the Cycle to Work guarantee
  - promoting the National Standard for Cycle Training through the 'Bikeability' award scheme
  - providing funding for safe, secure and sheltered cycle parking at stations which will be complemented by cycle hire, cycle repair facilities and improved and safer cycle routes to stations
7. To reduce the need to travel, DfT is promoting the use of alternative methods ('*Smarter Choices*') of working (eg: remote working and staggered office hours) to reduce congestion and overcrowding during peak times and make better use of transport infrastructure throughout the working day and reduce transport emissions. It has strategically targeted specific sectors of society in order to encourage actors ranging from businesses to private citizens to adopt low-carbon alternatives to travel where possible.<sup>5</sup> For an overview of DfT policy activity in this context, see: *Smarter Choices – Changing the Way we Travel: Main Document* (DfT 2005). For an analysis of policy activity in this context see: 'DfT asks "Is your Journey Necessary?" ENDS Report Dec 2011 Issue 443, p.32.

#### *Policy Implementation Update:*

The following is a summary of the key policy and operational targets set by UK Government for DfT concerning the reduction of emissions from UK transport and its progress thus far against those targets, (these include aviation):

Dec-2011	Dec-2011	Complete transposition of transport elements of the Renewable Energy Directive
Dec-2011	Dec-2011	Complete transposition of greenhouse gas (GHG) savings requirements of the Fuel Quality Directive
Started	Jan-2012	Implement the inclusion of aviation within the EU Emissions Trading System
Started	Mar-2012	Review strategy to support transition from early ultra-low emission vehicle market to mass market
Started	Mar-2012	Push for early EU adoption of electric vehicle infrastructure standards
Dec-2011	May-2012	Establish (a) a National Chargepoint Registry that will allow chargepoint manufacturers and operators to make information on their infrastructure, including location, available in one place; and (b) a Central Whitelist that enables users of chargepoint networks to access chargepoints across the country

<sup>4</sup> Available online here: <http://assets.dft.gov.uk/publications/pgr-regional-transportfund-pdf/guidance.pdf>

<sup>5</sup> See the government website at <http://www.dft.gov.uk/topics/sustainable/smarter-choices>.

May-2012	May-2012	Release details on the second tranche of projects to be supported by the Local Sustainable Transport Fund
Mar-2012	Jul-2012	Consult on sustainable aviation framework for UK
Mar-2012	Aug-2012	Launch of competition for low carbon trucks demonstration trial.
Jun-2012	Jun-2012	Release details on the large projects to be supported by the Local Sustainable Transport Fund
Mar-2012	Aug-2012	Launch of competition for public gas refuelling infrastructure projects (for gas-fuelled trucks)
Jan-2012	Sep-2012	Review progress from industry-led schemes to reduce fuel consumption and emissions from the freight sector and reconsider the case for government intervention
Dec-2012	Dec-2012	Decide whether or not to include international aviation and shipping in UK carbon budgets and 2050 target
Started	Jan-2013	Provide input into the European Commission's ongoing review of the EU's new car and van CO2 targets for 2020
Started	Mar-2013	Release second round funding to successful bidders for Plugged-in Places pilots programme to encourage the establishment of electric vehicle recharging infrastructure
Mar-2013	Mar-2013	Adopt sustainable aviation framework
Mar-2013	Jun-2013	Provide an update to the Plug-in Vehicle Infrastructure Strategy

***Main transport legislation applying to road and rail in Great Britain:***

- *Transport Act 2000*

The Transport Act 2000 made a number of reforms to local transport planning and delivery, including the requirement for all local transport authorities in England outside of London to produce a Local Transport Plan, and new powers for local authorities to enter into Quality Partnerships with bus operators and to introduce Road User Charging schemes and Workplace Parking Levies.

- *Planning Act 2008*

The Planning Act (as amended by the Localism Act 2011) is a key element of the legislative framework introduced to deliver the UK's decarbonisation obligation. Under the 2008 Act a developer intending to construct a 'Nationally Significant Infrastructure Project' (NSIP) must obtain "development consent". (Please note – 'national' in this context refers only to Great Britain). The National Infrastructure Directorate of the Planning Inspectorate receives and examines applications for development consent. In the case of transport NSIPs, after examining an application, the Planning Inspectorate makes a report and recommendation on the project to the Secretary of State for Transport. The Secretary of State then decides whether to grant or refuse development consent. If the decision is to give consent for a project to go ahead, the Secretary of State will make a 'development consent order' containing the consent and other authorisations (e.g. to purchase land compulsorily) that the developer needs to construct and operate the project. Nationally significant infrastructure projects (NSIPs) in the land transport sector include:

- a) new roads which are to form part of, or which are to link directly with, the strategic road network (Motorways and Trunk Roads) operated by the Highways Agency;
- b) new railway lines in England which are to be operated by Network Rail;
- c) new rail freight interchanges over 60 hectares in area in England;
- d) new large scale harbours in England or Wales; and

- *The Climate Change Act 2008*

This Act established a long-term framework and target to reduce the UK's greenhouse gas emissions by at least 80% relative to 1990 levels by 2050. While the Act does not establish sector specific decarbonisation targets, UK Government has explicitly accepted that road transport must contribute significantly to meeting this target. The DfT is responsible for transport's adherence to the national Carbon Plan, produced by Government in late 2011 (discussed above). The plan lays out the national means of reducing transport emissions: see The Carbon Plan (Great Britain: HM Government, 2011).

- *Town and Country Planning Act 1990*

Empowers DfT to issue a range of orders and measures:

- a) Stopping up/diversion orders to close or divert highways to allow development.
- b) Stopping up/diversion orders to close or divert highways that provide private means of access to premises where these cross or enter the route of a proposed new (or to be improved) highway.
- c) Pedestrianisation orders to remove vehicle rights.
- d) Rights of way extinguishment orders to remove rights of way over land that local authorities hold for planning purposes.

- *Local Transport Act 2008*

This legislation empowers local authorities to take steps to meet local transport needs in the light of local circumstances.

- a) gives local authorities a range of powers to improve the quality of local bus services
- b) allows for the creation of an influential new bus passenger champion to represent the interests of bus passengers
- c) gives local authorities the power to review and propose their own arrangements for local transport governance to support more coherent planning and delivery of local transport
- d) updates existing legal powers so that, where local areas wish to develop proposals for local road pricing schemes, they have the freedom and flexibility to do so in a way that best meets local needs – while ensuring schemes are consistent and interoperable.

- *Cycle Tracks Act 1984*

Local highway authorities can make an order to convert a footpath into a cycle track. They can then confirm the order if there are no objections. Orders that have unresolved objections must be referred to the Secretary of State for Transport to confirm. The Secretary of State will decide whether to call a public inquiry so an inspector can hear the objections and then report back before a decision is made or not call a public inquiry and make a decision based on the submitted order and its objections.

- *Traffic Management Act 2004*

Introduced in 2004 to address congestion and disruption on the road network. Places duty on local traffic authorities to ensure the expeditious movement of traffic on their road network and those networks of surrounding authorities. Gives authorities additional tools to better manage parking policies, moving traffic enforcement and the coordination of street works. Part 1 of the Act makes provision for the designation of individuals as traffic officers by, or under an authorisation given by, the Secretary of State or the NI Assembly.

- *Transport and Works Act 1992*

The Transport and Works Act Orders Unit (TWAOU) in DfT processes, and issues decisions on, applications under the Transport and Works Act 1992 for powers to construct and operate railways, tramways and other guided transport systems, and works which interfere with navigation rights.

- *Highways Act 1980*

The majority of the law governing the creation of highways is contained in Part III of the Highways Act 1980 (HA 1980). Highway authorities have power to compulsorily acquire land for highway purposes. Both the Secretary of State for Transport and a county council have the power to build a new highway under section 24 of the HA 1980. A road built under this power is maintainable at the public expense (section 36). Where the highway is to be a special road or a trunk road it will either form part of a scheme under section 16 of the Act or be provided for by order under sections 10 and 18. A highway which is being constructed as part of a 'nationally significant infrastructure project' is an exception. For such highways applications for development consent are governed by the Planning Act 2008 (in England and Wales).

- *Human Rights Act 1998*

The Human Rights Act 1998 embeds the European Convention on Human Rights (ECHR) into UK law, and requires that UK law must comply with convention rights. Transport law and policy therefore must accord with the ECHR. For example, Article 8 of the ECHR provides for respect for family and private life, so transport infrastructure, noise and smoke pollution

from transport on roads, etc., ought not to interfere unduly with the level of enjoyment of family life that residents nearby are to be accorded.

- *The Renewable Transport Fuel Obligations Order 2007 as amended by the 2009 and 2011 Amendment Orders*

The UK's commitment towards greater utilization of sustainable biofuels is implemented via the 2007 Order as amended.<sup>6</sup> This national transition is partially driven by the Renewable Transport Fuels Obligation (RTFO) at the EU level.<sup>7</sup> In the UK the RTFO is directly overseen by the DfT. In the UK the RTFO requires fossil fuel suppliers to derive a percentage of fuels for road transport supplied in the UK from sustainable renewable sources, or else to pay a charge. The scheme applies to all fuel suppliers who supply 450,000 litres of fuel a year or more.

- *Railways Act 1993*

This legislation privatized the railways in Britain and created the regulatory framework for operating and regulating rail infrastructure and a franchise system for the provision of passenger services.

## **2. INSTRUMENTS TO MANAGE AND REDUCE ROAD TRAFFIC**

*Is there a national debate on the sense and nonsense of traffic tolls and other instruments to manage and reduce road traffic, and if so, has this led to changes or corrections of the regulatory framework?*

Congestion is a recognized traffic issue that the UK endeavors to monitor and mitigate. Government authorities flag the conventional negative effects of congestion, such as slower speeds and longer journey times, however they are also sensitive to more purely environmental impacts and also to effects upon vehicles themselves. The introduction to DfT's congestion statistics report acknowledges:

“Environmentally, increased congestion can lead to increased pollution and carbon emissions as vehicles spend more time stationary or at very low speeds where engine efficiency is lower. In addition, greater levels of congestion can result in increased wear and tear to vehicles due to the high frequency of braking and acceleration that often occur in slow moving traffic.”<sup>8</sup>

Emphatic conceptual debates on toll charges do not seem to greatly predominate in national political discourse on transport. Rather, toll debates seem to arise in reference to road-specific

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<sup>6</sup> Other pieces of law interact with / drive these laws to varying degrees: the Energy Act 2004 (Part 2); the Climate Change Act 2008; the Biodiesel Duty (Biodiesel Produced From Waste Cooking Oil) (Relief) Regulations 2010; HM Revenue and Customs note on the extension of the duty differential for biodiesel from used cooking oil; the Biodiesel and Bioblend Regulations 2002; the Hydrocarbon Oil Duties Act 1979.

<sup>7</sup> It had previously been overseen by the now-defunct Renewable Fuels Agency.

<sup>8</sup> *An Introduction to the Department for Transport's Congestion Statistics* Para 2,4 (Department for Transport, 2012)



situations. Thus for example the government recently announced that the extremely congested A14 would be tolled as a means of reducing congestion: see 'A14 upgraded to be toll road paid for by motorists', *BBC News*, 19 July 2012, Deborah McGurran.<sup>9</sup> This appeared to be a decision tailored specifically to the problems embodied by the A14, as opposed to indicating a wider attitude whereby it was felt tolls could be readily applied in more general situations involving congestion across the country. The Institute for Fiscal Studies (IFS) has reported that there is a "compelling" case for extending a toll framework in the UK,<sup>10</sup> however the Government has not moved on this, and is perhaps unlikely to do so given that the UK public traditionally dislikes the idea of having to pay through toll processes (see e.g., the general public discomfort exhibited at the A14 toll itself,<sup>11</sup> and the two million signatures gathered by the Labour government against a national road pricing plan<sup>12</sup>).

### *Fuel Tax Escalator – A failed experiment*

A experiment in a fiscal instrument which eventually hit the buffers of tough politics was the fuel price escalator introduced by the Conservative government in 1993. It set in advance an annual increase of 3% ahead of inflation, later rising to 6% under the Labour Government in 1997. The purpose of the tax was not so much to price people off the roads but to provide a long term price signal to encourage manufacturers to produce far more fuel efficient vehicles. There was some evidence that this was beginning to have an impact, but in 2000 there were major protests by farmers and road hauliers blocking fuel distribution depots, leading to shortages and political panic and a subsequent abandonment of the fuel escalator by Labour. in November of that year. Nevertheless Fuel Tax represents around 75% of the retail; price of fuel, and in todays economic climate there are strong pressure to reduce the tax in the interests of competitiveness. Political acceptance of the escalator tax was not helped by the fact that it essentially became another revenue source for Treasury – if it has been directed towards improving public transport and similar measures, the story might have been different.

### *Implementation of Directive 1999/62*

The UK appears to be in full compliance with Directive 1999/62, known as the 'Eurovignette Directive', which lays out the acceptable arrangements for vehicle taxes, tolls and charges relating to road use for Member States. The key piece of transposing UK legislation is the Heavy Goods Vehicles (Charging for the Use of Certain Infrastructure on the Trans-European Road Network) Regulations 2009.<sup>13</sup> A statement published by DfT indicates that the present UK Coalition Government is dissatisfied with the current system:

"[The Coalition wishes] to ensure fairer arrangements for UK hauliers. UK-registered HGVs already pay tolls or user charges on motorways and, frequently, other roads in most EU Member States. Save on some specific pieces of infrastructure (the M6 Toll and various

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<sup>9</sup> <http://www.bbc.co.uk/news/uk-england-18913663>

<sup>10</sup> "Compelling Case for UK Road Charging, IFS Study Says", *BBC News*, 15 May 2012: <http://www.bbc.co.uk/news/business-18064363>

<sup>11</sup> <http://www.bbc.co.uk/news/uk-england-18913663>

<sup>12</sup> <http://www.bbc.co.uk/news/business-18064363>

<sup>13</sup> The title of the legal instrument is considerably overlong and convoluted.

bridges and tunnels), there are no tolls or user charges in the UK. As most foreign operators currently purchase their HGVs' fuel outside the UK, they therefore contribute nothing towards the cost of our roads. »<sup>14</sup>

The Directive's evolution does not appear to have required a high degree of complex legislative action from the UK, for the UK was seen to be in harmony with the initial Directive, and it was only when the 2006 amendments were implemented that it felt the need to significantly adapt national law:

Prior to Directive 2006/38/EC, the Government had taken the view that no legislative action was required as regards transposition of Directive 1999/62/EC. However, following the amendments introduced by Directive 2006/38/EC, the Government decided that legislative action was required.<sup>15</sup> In the UK fuel and vehicle excise duties make the required contribution towards covering the costs of road infrastructure. Conventional road tolls are rarely utilized in the UK. Though as just stated the UK generally does not levy tolls, the M6 is a major roadway that builds in toll gates, arguably illustrating how in the UK there is scope for 'special' deviations from a policy norm in certain infrastructural or regional cases. Besides from the M6 other significant tolling is mostly limited to bridges and tunnels. A London congestion charge (introduced 2003) and a Durham congestion charge (introduced 2002, the first UK congestion charge) also operate. These impose fees on vehicles using road areas designated as Congestion Charge Zones at certain specified times. The charges not only ease congestion but also raise money for transport system maintenance and development. The rail sector is privatized and operators attempt to charge competitive ticket prices that will be both low enough to attract customers away from other transport media and high enough to secure adequate profits.

*Does there exist an emission trading system on vehicles and how does it function?*

Beyond the application of the EU Emissions Trading Scheme (covering energy-intensive industries and electricity generation, including the manufacture of vehicles) the UK does not have an ETS that applies to road transport itself. The legal powers for ETS at the UK level are set out in the Greenhouse Gas Emissions Trading Scheme Regulations.

*If not, to what extent will an adaption of national law be necessary to introduce an emission trading system on vehicles?*

The EU Effort Sharing Decision is in place to drive down transport emissions at the Member State level. In addition the UK has adopted the Climate Change Act 2008, Energy Act 2008, the Renewable Energy Strategy and the Low Carbon Transition Plan to drive a rapid and radical process of mid-century decarbonisation. As with the rest of the EU, the UK must also abide by the Renewable Transport Fuels Obligation, transposed nationally under the Renewable Transport Fuels Obligation Orders. There is thus a strong legislative and policy framework already in place driving the UK towards rapid and radical mid-century emissions reduction. The UK is well placed to augment its

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<sup>14</sup> Statement from the DfT, here: <http://www.dft.gov.uk/news/statements/penning-20120125/>

<sup>15</sup> *Explanatory Memorandum to the Heavy Goods Vehicles (Charging for the Use of Certain Infrastructure on the Trans-European Road Network) Regulations 2009*, DfT, para.4.2

general emissions reduction regulatory regime with the introduction of a trading scheme for road transport, or b) the present system might be adequately intensified to further drive down transport emissions without the need for the introduction of a trading scheme for transport. In relation to the former it should be noted that the Climate Change Act gives a broad power to introduce emissions trading regimes in relation to any activities that are “regarded as indirectly causing or contributing to greenhouse gas emissions” These powers could encompass schemes relating to transport though no proposals are envisaged at present.

### *Transit Exchange System*

If by the ‘transit exchange system’ the authors of the Questionnaire mean a market-based system involving the sale of trips to bidders who gradually raise the fare price through bidding for permits – as in the case of the Alpine Crossing Exchange - there does not appear to be a transit exchange system in place in the UK. The UK policy environment is not particularly receptive to the process whereby monies are levied through tolling and related instruments; thus when features like toll junctions arise they are frequently unpopular, and local communities in particular tend to argue for their removal. In strict legal terms, however, there do not appear to be any barriers as to why Parliament could not legislate to establish such systems; however where the scheme crossed the border of more than one UK country some administrative collaboration would be required between devolved jurisdictions. In the context of Northern Ireland, any such scheme would require transboundary collaboration with Ireland.

## INSTRUMENTS TO PROMOTE RAIL TRAFFIC AND COMBINED TRAFFIC

*Is there any specific legislation promoting rail traffic and combined traffic, such as regulation, price control, subsidies etc.?*

The railway system in Great Britain was privatized in the 1990s at which point infrastructure, passenger and freight services were separated. Infrastructure is owned and operated by Network Rail – a private ‘not for dividend’ company. Network Rail’s stewardship of British rail infrastructure is regulated by the independent Office of Railway Regulation (ORR). Passenger train services are provided through franchises let by the government (DfT) to private train operators (normally for approximately periods of 15 years).

Using its powers under the Railways Act 1993 DfT regulates the existence and price of a number of rail fares, including commuter fares and the majority of long distance and off-peak fares. DfT also restricts the amount by which train operators can increase regulated fares each year, using a formula based on the retail price index (RPI), a commonly used measure of inflation. The average limit on regulated fares will increase by RPI+1% for 2013 and 2014. DfT’s planning assumption is that from January 2015 onwards the cap on prices for average regulated fares for franchised train operators will increase by RPI+1% (although it has also acknowledged that even higher above inflation price rises may be necessary to fund a major investment in infrastructure planned – discussed below). Having said that, DfT also states that in the longer term, investment in rail services are designed to reduce the costs of running rail services so that it can bring an end to above-inflation fare increases. Pricing is also affected by ORR’s role in regulating the operation of rail infrastructure. Under the Railways Act ORR is required to promote the protection of the interests of users and the promotion of competition, efficiency and economy in the provision of railway services.

The British franchising system has been the subject of considerable controversy in recent years. Privatisation has given Britain one of the most expensive rail systems in Europe (deemed to be 50% more expensive than the nationalized system). Serious concerns have also been expressed about the lack of transparency surrounding the setting of fares between different services and difficulties in making meaningful price comparisons. In May 2011, DfT commissioned an independent review of the costs of rail in Britain. The final report was published by Sir Roy McNulty (*Rail Value for Money*<sup>16</sup>). The study reported that while rail works well operationally, with good safety and punctuality, and has seen impressive growth in demand from passengers and freight, it is too expensive to run. In response DfT has published *Reforming our Railways* (March 2012),<sup>17</sup> which sets out the government’s vision to improve services for customers – both passengers and freight users – and make the railways financially sustainable in the longer term, so they can continue to contribute to the country’s economic growth and environmental goals. The new strategy aims to reduce costs by £3.5 billion per year by 2019.

This year also witnessed an embarrassing judicial review by Virgin Railways following their loss of the franchise to operate the West Coast mainline service, which forced DfT to admit to significant technical flaws in the way the rail franchise process has been conducted. The Government has since

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<sup>16</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/4203/realising-the-potential-of-gb-rail-summary.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/4203/realising-the-potential-of-gb-rail-summary.pdf)

<sup>17</sup> Cm 8313 (March 2012)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/4216/reforming-our-railways.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/4216/reforming-our-railways.pdf)

paused all other outstanding franchise competitions (Great Western, Essex Thameside and Thameslink) pending the outcome of two independent reviews which are designed to ensure future competitions are robust and deliver best value for passengers and tax payers.

### *How are infrastructure costs for rail traffic financed?*

Rail infrastructure in Britain is financed by the profits made by Network rail, which are put back into the infrastructure investment, and taxpayers/rail commuters. Following publication of the *National Infrastructure Plan* in November 2011, in July 2012 the Government unveiled a £9.4 billion package of public investment in railways in England and Wales from 2014-2019 – described by DfT as the “biggest investment in rail infrastructure for the last 150 years.” The Prime Minister has described it as an investment programme designed to create "a truly world-class rail network". This building programme will be largely funded by above-inflation fare rises (3%) already begun in 2010. In addition to significantly increasing capacity, this investment programme is strongly oriented towards delivering the electrification of the rail system, which the Secretary of State for Transport states will reduce general train costs over the long term. It is hoped that 75% of rail journeys in the future would be on electric trains and that investments would help get "more of our freight off the roads and on to rail".

### **Case-Law**

#### *IMPLICATIONS OF ECJ RULINGS:*

In C-195/90<sup>18</sup> Germany was deemed by the ECJ to have failed to have fulfilled its obligations with regard to taxation on the use of roads by heavy goods vehicles. Germany had introduced a tax on the use of roads by heavy goods vehicles but had simultaneously reduced tax on motor vehicles paid by national carriers. This was deemed impermissible because it naturally disadvantaged carriers from non-German Member States, thereby contravening EEC Treaty Art.76. As a result of the case the UK must be mindful to apply an acceptable degree of harmonized treatment for both its UK and non-UK vehicles. The authors have found no evidence to suggest it is doing otherwise.

C-205/98<sup>19</sup> centered on Directive 93/89. Here the ECJ ruled that tariff differences pertaining to vehicles following either the full or partial itinerary on a motorway that operate to the detriment of hauliers that are nationals of other Member States involves indirect discrimination. In particular, tariff differences in the case were found to be discriminatory with regard to the destination / origin of the vehicles in question. The ECJ also determined that toll rates are to be set based on their proportionate relation to the construction / operation / development costs of a particular road network, and that these costs are to pertain to the appropriate part of the road where the toll operates as opposed to all sections of the road. The case reinforces the UK's duty to ensure any tolls or vehicle levies are in accordance with EU harmonization and thereby do not discriminate against non-UK vehicles, and tolls recouping construction costs are to work within this system in a manner that does not over-reach the reasonable proportions of infrastructural development costs the stretch of road to which the toll corresponds. The reader is reminded that the UK is a relatively isolated nation, and that it does not apply extensive national tolling systems. While the UK must

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<sup>18</sup> C-195/90, *Commission of the European Communities v Federal Republic of Germany*.

<sup>19</sup> C-205/98, *Commission of the European Communities v Republic of Austria*

abide by these rules, then, they are perhaps of less significance for the UK than they are for other more toll-heavy Member States that share border contact with neighbours.

In Case C-320/0220 the ECJ considered turnover taxes that were providing special arrangements applicable to second-hand goods under Directive 77/388 Art.26(a). The court determined that live animals may be classed as second-hand goods and therefore can be governed by the Directive's common system of value added tax, which aims to harmonise turnover taxes. The significance of the case for the Avosetta meeting remains unclear! In C-28/0921 the ECJ considered whether Austria had contravened Arts 28 & 29 EC by prohibiting lorries of over 7.5 tonnes carrying certain goods from using a section of Austria's A 12 motorway. It was held that the restrictions on this major roadway, of important use for transit amongst several Member States, contravened the free movement of goods principle. Counter arguments evoking environmental protection and pollution mitigation proved unsuccessful. Whilst the case re-affirms the need for equal treatment for vehicles regardless of the Member State they originate from, and also emphasizes the role transport infrastructure is to play with regard to upholding the free movement of goods, the UK has no major thoroughfares through which other Member States are crucially required to pass due to its isolated position in the sea. Northern Ireland does share a border with the Republic of Ireland, and in this context the UK is required to treat the Republic's vehicles with an appropriate level of harmonisation under these laws. At present Northern Ireland has no toll gates. Read more widely, the case indicates that environmental impact must register highly if it is to be allowed to disturb the free movement of goods in practice.

*Is there any national case law on transport issues where EU issues came into play?*

*- relating to tolls and user charges?*

*- relating to driving bans (e.g. night lorry ban in London)?*

These cases do not appear to have been at the centre of any major UK legal actions. As tolling is not as pronounced in the UK as in certain other Member States this perhaps militates against the matter arising as frequently as it otherwise might. Nonetheless, certain significant national cases do exist. In *Confederation of Passenger Transport UK v Humber Bridge Board* [2002] EWHC 2261 (Admin), for example, as the result of an administrative error, large busses were not defined as 'goods vehicles', which thereby placed them outside of the charge range at the UK's Humber Bridge toll. The court found that buses were to be considered as falling within the definition and ordered the necessary changes to be made. Thus busses had to pay the toll. In *Robertson v Hingston* 1999 GWD 24-1165 (Scottish case) the courts made clear their intention to ensure that where tolls were rightfully due drivers were unequivocally obligated to pay them; in this specific instance the court found against a man who when asked to pay the Skye bridge toll refused, responding "no"!

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<sup>20</sup> C-320/02, *Forvaltnings AB Stenholmen v Riksskatteverket*.

<sup>21</sup> C-28/09, *European Commission v Republic of Austria*.

## LAND-USE PLANNING AND ENVIRONMENTAL IMPACT ASSESSMENT

*Are there different levels of the planning of transportation infrastructure? If so, which ones and how do they differ from each other?*

Although the Scottish and Welsh administration enjoy significantly devolved controls over land use planning, control over transport policy and regulation remains significantly centralized. Northern Ireland is the only UK devolved administration where transport and planning powers have been almost entirely devolved. The remainder of these comments will thus focus on the land-use planning system in Britain.

Control over land-use planning in Great Britain is essentially a 2-tier process.

- In general the planning system is a 'plan led system' with planning policy established by central government and development control decisions made by local government, subject to a Ministerial power to 'call-in' controversial decisions.
- Decision making concerning nationally significant infrastructure – including transport – is not made by local government. Control of decision making in this context has been the subject of significant change and controversy.

### *Reform of general planning policy*

In January 2011 the planning system in England and Wales was reviewed so as to draw together the numerous Planning Policy Statements and Planning Guidance Notes issued by government into one coherent National Planning Policy Framework (NPPF). Although cast as a significant effort to simplify planning policy, the Framework was also intensely controversial because it sought to create a presumption in favor of development – albeit referred to as 'sustainable development' by the Government. It came into force in 2012. 'Sustainable transport' is a major feature of the new Framework, and the use of public transport, walking and cycling are presently foregrounded under the strategy. 'Nationally Significant Infrastructure Projects' (NSIPs) are not dealt with under the NPPF but under the separate planning framework created by the Planning Act 2008 and related National Policy Statements (discussed below).

In relation to sustainable transport, the NPPF urges local planning authorities to encourage solutions that support greenhouse gas emissions and reduce congestion. Local Plans should therefore support sustainable modes of transport. All development that generates significant amounts of movement should be supported by a 'Transport Statement' or 'Transport Assessment'. Plans and decisions should take account of whether the opportunities for sustainable transport modes have been taken up to reduce to the need for major transport infrastructure. It goes on to provide that development should be located and designed to:

- accommodate the efficient delivery of goods and supplies;
- give priority to pedestrian and cycle movements, and have access to high
- quality public transport facilities;
- create safe and secure layouts which minimise conflicts between traffic and cyclists or pedestrians, avoiding street clutter and where appropriate
- establishing home zones;
- incorporate facilities for charging plug-in and other ultra-low emission vehicles; and
- consider the needs of people with disabilities by all modes of transport.

### *Control of nationally significant infrastructure projects*

It was generally agreed that the UK would require substantial infrastructural investment, particularly in energy and transport, in order to achieve the emissions reduction obligation required by the Climate Change Act 2008 – effectively to facilitate the building of a low carbon economy. Gordon Brown's Labour administration took the view that the traditional system of decision making concerning major infrastructure development was unsatisfactory – in particular because it was too slow. In addition to requiring consents under several separate pieces of legislation for a single project, public inquiries surrounding proposed projects often significantly protracted decision making (by up to 7 years). In addition, the Secretary of State retained the power to make the final decision and to ignore the recommendation of the Planning Inspector who heard the public inquiry.

In 2008 the Labour Government introduced the Planning Act 2008 as one of three key “legislative pillars” designed to support delivery of the UK's obligation to build a low carbon economy under the Climate Change Act 2008. In particular the Act was designed to streamline and expedite decision making concerning strategic infrastructure development.

Under the 2008 Act major infrastructure projects of national importance required just one type of consent, “development consent”, removing the need for consent under several different pieces of legislation. This consent would be granted by a new body, the Infrastructure Planning Commission (IPC), which would consider the evidence and take the final decision. Evidence would be considered in writing, unless the IPC chose to have an oral session. There would be no public inquiry of the traditional type. The Secretary of State would have no role in the individual decision, and no opportunity to overturn the decision of the IPC. The IPC would take its decisions mainly on the basis of the relevant National Policy Statement (NPS) adopted by the DfT. Under the Act, NPSs would be published in draft, open to public consultation and to consideration by a Parliamentary Select Committees, before approval by the Secretary of State for DfT. During the transitional period before the relevant NPS (transport, energy, waste etc...) was adopted the IPC could still consider the evidence, but the Secretary of State was empowered to take the final decision.

The Act was the subject of intense NGO and political criticism in particular because it was argued that the process represented a retreat from normal democratic controls of land use planning. The streamlined procedure left little opportunity for the public to challenge arguments in favor of controversial proposals and decision making was not taken by an elected politician. It was also argued that judicial review would also be used to challenge decision making by the IPC thus returning delay to the system.

In 2010 a general election led to the formation of a new Coalition Government comprising the Conservative and Liberal Democratic parties. Giving people more power over development in their areas (the so-called ‘Localism’ agenda) has been a central tenet of their political agenda. Prior to the election both of the Coalition parties were critical of the undemocratic nature of the IPC with the Conservatives committing to its abolition in the event of electoral victory. The new Coalition Government introduced the Localism Act 2011 which introduced significant changes to the system of planning control for major infrastructure projects in Britain. Section 128 of the Act abolished the IPC with effect from April 2012. Although the IPC had started to function, delays in the adoption of NPS meant that the Secretary of State had retained political control of decision making thus the IPC has had little impact on major infrastructure planning. Applications for major infrastructure are now handled by the Planning Inspectorate with powers of final decision making retained by the relevant Secretary of State. Decisions concerning major infrastructure development are still made with regard to National Policy Statements. The NPS for transport has not yet been published.



Prior to submitting an application for development consent for major infrastructure development, the proposer is required to prepare a Statement of Community Consultation setting out the opportunities and scale of the public consultation process concerning the proposal. Once the proposal is formally submitted, there are limited opportunities for its amendment. The Planning Inspectorate has 6 months to examine the proposal and a further 3 months to make a decision. The Inspector's recommendation is then communicated to the Secretary of State who has a further 3 months to make a final decision.

*If there is road construction planning on a higher level, are the different transportation modes (roads, railways, air transportation, waterways etc) weighed against each other with a view to selecting the least environmentally burdensome?*

Because of the impact of devolution there is no standard method of balancing / weighting different modes of transport against one another across the UK to mitigate environmental impacts. The National Policy Statement for major transport infrastructure development has not yet been published. The National Planning Policy Framework requires local planning authorities to promote the most sustainable mode of transport; however, this policy framework is extremely general.

*Concerning the approval of individual road construction projects: Is there a test of need for more roads? If so, is it taken into consideration that new roads may trigger further individual transportation?*

The administrative process for trunk roads and non-trunk roads differs slightly. Trunk roads are overseen by the Highways Agency (England), the Roads Service (Northern Ireland), Transport Scotland (Scotland) and the Welsh Department of Economy and Transport (Wales). In London, however, Transport for London administrates the trunk road system, and all other major roadways. Local councils hold administrative responsibility for lesser roadways across the UK. Approval for individual roads takes place within this system and will often result in consultation between various administrative bodies. Approval will be sensitive to an apparent need or lack thereof for more roadways, and further sensitivity towards 'sustainable' transport and the national decarbonisation agenda means that the potential impact of individual transportation is factored into the decision process.

*To what extent have alternatives to be taken into account?*

*(a)What is the legal basis of alternatives testing:*

The SEA, EIA and Habitats Directives provide the legal basis for alternatives testing in the GB planning system. EU Directives are implemented separately by all UK administrations.

## **SEA Process**

The legal basis for the SEA Directive in GB is:

- The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No. 1633).
- Environmental Assessment of Plans and Programmes (Wales) Regulations 2004
- The Environmental Assessment (Scotland) Act, 2005 came into force on the 20th February 2006.

The following comments focus on the position under the English Regulations:

Regulation 12 of the English Regulations provides that where an SEA is required, the responsible authority shall prepare or secure the preparation of an Environmental Report which shall identify, describe and evaluate the likely significant effects on the environment of implementing the proposed plan or programme and *“reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.”*

In the context of post-adoption of the plan or programme, Regulation 16(3) requires the authority responsible for adopting the plan or programme to provide a range of information concerning the decision making process to SEA consultees and members of the public, including the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with.

Practical Guidance published by the Office of the Deputy Prime Minister (originally responsible for implementation) emphasized that consideration of alternatives included consideration of the ‘business as usual’ scenario – ie the ‘zero option’. This approach also appears to be supported by the more specific guidance adopted by DfT concerning SEA for transport plans and programmes.<sup>22</sup>

The DfT guidance emphasizes that alternatives can be different ways of:

- achieving the objectives of the plan;
- achieving the aspirations of the local community;
- dealing with environmental problems...
- dealing with transport problems<sup>23</sup>

It goes on to say that Alternatives will often focus on specific measures, but should:

- include strategic level alternative strategies and measures, including demand management and fiscal measures.
- be realistic: a deliberate selection of alternatives that have much more adverse effects than the proposed plan is not appropriate (European Commission, 2003).
- help to achieve Government's transport objectives.

DfT guidance also sets out a sustainable "hierarchy" of alternatives as follows:

- (i) *need or demand: is it necessary?*  
Can the need or demand for accessibility be met without new development / infrastructure at all? Can the need to travel be obviated?

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<sup>22</sup> The fully-formed guidance document is here:

<http://www.dft.gov.uk/webtag/documents/project-manager/unit2.11.php>

<sup>23</sup> <http://www.dft.gov.uk/webtag/documents/project-manager/unit2.11.php#4> at paras 4.4.1 – 4.4.2.

- (ii) *mode or process: how should it be done?*  
Are there technologies or methods that can meet the need with less environmental / sustainability damage than 'obvious' or traditional methods?
- (iii) *location: where should it go?*
- (iv) *timing and detailed Implementation:*  
When, and in what sequence, should developments be carried out? What details matter and what requirements should be made about them?

Although the guidance document do not explicitly state that alternatives should include “other” projects (eg rail instead of road construction) and do acknowledge that consideration of alternatives may be beyond the decision makers powers – the SEA guidance on alternatives is very broadly drafted and thus could be viewed as allowing consideration of such alternatives.

Lastly it should be noted that Scotland adopted the most expansive approach to implementation of all UK administrations in that the Directive was implemented using primary legislation and applies SEA to policy proposals – which is not the case elsewhere in the UK. Scottish SEA processes are thus likely to produce the most extensive consideration of genuine alternatives in terms of “other” projects as the assessment process is likely to take place at an earlier stage in the policy development process.

## **EIA Process**

The EIA Directive is also implemented separately for all parts of the UK. In England its legal base is provided by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, which consolidate earlier measures introduced to implement the Directive. Schedule 4 of the Regulations make clear that the environmental information contained in the Environmental Statement upon which the assessment is made – must always include an outline of the “main alternatives studies by the applicant and an indication of the main reasons for the choice made taking into account the environmental effects” of the proposed development.

EIA at domestic level thus builds in consideration of alternatives, however the means of determining alternatives is left rather open, as in the case of SEA. The EIA guidance states that:

It should be noted that developers are now required to include in the environmental statement an outline of the main alternative approaches to the proposed development that they may have considered, and the main reasons for their choice. It is widely regarded as good practice to consider alternatives, as it results in a more robust application for planning permission. Also, the nature of certain developments and their location may make the consideration of alternatives a material consideration. Where alternatives are considered, the main ones must be outlined in the environmental statement.<sup>24</sup>

Although the guidance might suggest that there is scope for developers to pay little regard to alternatives, in reality the scope to do so is limited by the fact that planning applications will be considered weak if scant attention has been paid to alternative options. Thus it is in developers’ interests to be thorough on the matter.

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<sup>24</sup> *Environmental Impact Assessment : Guide to Procedures*, (The Crown, 2006) paragraph 33.

## Habitats Directive

The provisions in the Directives are transposed into domestic legislation by a variety of instruments, in England principally the Wildlife and Countryside Act 1981 (as amended), and the Conservation of Habitats & Species Regulations 2010 (as amended). These regulations apply in the terrestrial environment and in territorial waters out to 12 nautical miles. For UK offshore waters, the Directives were transposed by separate regulations – The Offshore Marine Conservation (Natural Habitats &c.) Regulations 2007 (as amended). Separate implementing legislation is adopted for Scotland, Wales and Northern Ireland.

In 2012 UK Government published a major review of the implementation of the Habitats and Wild Birds Directive in the UK<sup>25</sup> and included a reflection on the interaction between the Natura 2000 regime and the major infrastructure development. Although the review reported that implementation of the Directives was proceeding well, it emphasized that major investment in infrastructure was a key element of the Coalition Government's plan for economic recovery and highlighted the potential impact of this programme of investment for several EU designated sites in the UK. To reduce the risk of delay and uncertainty in the development planning process, the Government has recently established a cross-Government Major Infrastructure and Environment Unit (MIEU) designed to ensure that regulatory requirements of the Directives do not pose an undue burden to delivery of the top 40 major infrastructure projects. One of the key priorities for the MIEU will be to identify the implications of the requirement in the Habitats Directive to undertake an appropriate assessment of these projects and in particular the requirement to consider 'Imperative Reasons of Overriding Public Interest' and 'alternatives' – which is also embedded in the implementation Regulations. The MIEU is also tasked to improve interaction between government, developers, regulators and NGOs on these issues. In addition the Review commits to the development of improved Guidance on key aspects of the regulatory framework governing implementation of and compliance with the Habitats Directive – including improved guidance on consideration of alternatives. In this regard the review promises to:

“clarify that consideration of alternatives to a plan or project means genuine alternatives rather than any possible alternatives, and that if a strategic policy is in place (e.g. development of offshore wind energy) the consideration of alternatives should be framed by that policy”.

### **Additional National Initiatives on 'Alternatives':**

One of the most potentially interesting approaches to exploring alternatives in the transport context in the UK is UK's Carbon Valuation Process. In addition to introducing a legal duty to reduce carbon emissions, the regulatory framework introduced by the Climate Change Act 2008 included an obligation on UK Government to introduce legally binding 5-yearly carbon budgets. The onset of binding carbon budgets applying across the UK economy led UK Government to introduce a formalized system for valuing the emissions impact as part of the process of appraising and evaluating public policies and projects. Carbon values are used in the framework of broader cost benefit analyses to assess whether, taking into account all relevant costs and benefits (including impacts on climate change), a particular policy may be expected to improve or reduce the overall welfare of society. More specifically government policy in this context states that making the carbon valuation of proposed policies explicit helps to:

- Ensure the climate impacts of policies are fully accounted for;

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<sup>25</sup> <http://www.defra.gov.uk/publications/files/pb13724-habitats-review-report.pdf>

- Ensure full account is taken of the evidence in decisions;
- Ensure consistency in decision making across policies; and
- Improve transparency and scrutiny of decision making

Government guidance on this valuation process highlights that policies and projects that are likely to have a material impact on emissions include:

- policies where one of the primary purposes is to reduce emissions,
- policies that put an explicit price on carbon such as taxes and subsidies;
- investments in infrastructure and projects that are relatively carbon-intensive,
- investments in low carbon infrastructure that serve to displace or defer higher intensity investments. These also include certain investments in the power and transport sectors

It furthermore highlights that the approach adopted to valuing carbon can have a significant impact on the assessment of the costs and benefits of these policies and other policies that have less obvious, but potentially significant, carbon impacts (and explicitly highlights policies that increase the demand for road transport). It furthermore stresses that the carbon values set out in the Guidance Notes published by the Department of Energy and Climate Change apply whatever the type of policy or project being appraised, providing there is some material impact on emissions.

For further detail as to the operation of this valuation process – see A Brief Guide to Carbon Valuation Methodology for UK Policy Appraisal Processes.<sup>26</sup>

## **PRODUCT LABELING**

*To what extent is long-distance travelling taken into account in the Eco Management and Audit Scheme-Regulation (1221/2009)?*

The EU Eco-Management and Audit Scheme (EMAS) acts as a means whereby bodies monitor and report on their environmental management performance. The scheme has been in operation since 1995. It is a voluntary scheme in the UK, as it is in the other EU Member States. The Regulations clearly incorporate travel into their provisions (see., e.g., Annex I.2(a)(ix), where the “direct environmental aspects” of “transport issues” are to be considered). They do not appear to expressly address long-distance travelling in a direct and considered way, however. At the national level in the UK long-distance travel does not seem to be a particularly prominent EMAS consideration; for example, the Government-sponsored facility Business Link, which produces guides on the national management system frameworks, does not foreground long-distance travel as a significant feature in its reports.<sup>27</sup>

*To what extent does national law provide for product labeling in order to reflect long-distance transportation and thus energy-consumption of products? Does EU law set any (and if so which) limits to such a labeling?*

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<sup>26</sup> <http://www.decc.gov.uk/en/content/cms/emissions/valuation/valuation.aspx>

<sup>27</sup> <http://www.businesslink.gov.uk/bdotg/action/layer?r.s=sm&topicId=1073858799>

A specific framework closely integrating product labeling and long-distance transport does not seem to have been formally developed in the UK. Given that product origins are to be labeled on products, the consumer is perhaps expected to infer transportation-energy considerations; for example, a UK consumer purchasing a product in the UK that is labeled as having been produced and packaged in the UK will no doubt have required considerably less transport than, say, a product produced in Taiwan and packaged in China. With express regard to energy and labeling, the EU employs an Energy Labeling Directive 2010. This extended the previous key piece of legislation, the Energy Labeling Directive 1992. The chief purpose of the 2010 Directive was to help realise in practice the EU Energy Efficiency Action Plan's goal of cutting EU energy consumption by 20% for 2020. The Directive covers energy-related as well as energy-using products, and products used in both commerce and industry are incorporated in addition to domestic appliances. The Directive is implemented in UK law by the Energy Information Regulations 2011, and these apply to energy-related products that have a significant direct or indirect impact on energy consumption and other resources.

*How can this labeling be done nationally without breaching EU rules? Is adaptation of EU-law necessary?*

As per the previous comment, national law does not seem to have a rigorous framework addressing expressly long-distance transport and energy consumption. Attention might again be drawn to the UK's climate governance framework, which is designed to steadily lower greenhouse gas emissions up to 2050 and that will thus be endeavoring to reduce long-distance transport as much as possible due to the emission reductions this will facilitate.

In June 2011 the UK set the Energy Information Regulations 2011 in place to implement the requirements of the Energy Labeling Directive 2010, with the Eco-design for Energy-Related Products (Amendment) Regulations 2011 creating some modest changes in November. This appears to have taken place in a generally uncontroversial manner. Major conflict between UK and EU labeling rules in the area of transport does not seem to have arisen as a prominent national issue. On the point of whether "adaptation of EU-law [is] necessary", however, it seems more likely that if this dimension of EU transport is to be improved it will benefit from top-down EU level co-ordination.

## UK Annual Updates: (Richard Macrory)

### Courts should still have national discretion over remedies even where EU law broken

In common with many other jurisdictions national courts have always had some discretion when it came to granting remedies in public law challenges – i.e. even if a planning decision, say, was found to be contrary to law, the courts were not obliged to quash it, if, for example, they felt that compliance would have made no difference to the final result, or the breach was minor. This was very much the approach taken by courts in the early years of EU environmental assessment requirements. But in the 2001 Berkeley decision (a case where the need for a formal Environmental Assessment for a project was never considered) the highest court held that where breach of the EU requirements was involved, courts really retained little or no discretion – the overriding obligation to ensure effective application of EU law trumped national discretion. This very strict approach led to numerous challenges to development for the most minor breaches of EU law.

Very recently, Lord Carnwath, the most senior judge specializing in environmental law, has questioned this strict approach in a decision of the Supreme Court, **Walton v The Scottish Ministers** ([2012] UKSC 44, 17 October 2012). The case concerned a road scheme and whether an SEA was required for revisions. Carnwath's comments were strictly not necessary for the result but important pointer for the future. He re-examined some of the key ECJ cases, and considered the principles of national procedural autonomy, equivalence and effectiveness, and considered that the ECJ gave more discretion to national courts than some had considered: *"Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirements arises from a European rather than a domestic source."*

### No Permit Defence for Private Nuisance Action against waste company

Local residents sought compensation from a waste disposal company for continuing smell problems using the private tort of nuisance. The essence of a nuisance action is what sort of conduct or use of land is reasonable. The company had at all times complied with detailed regulatory requirements under a licence from the Environment Agency. The High Court held that under a modern regulatory system compliance with detailed environmental controls should provide a good defence to any nuisance action for compensation. The Court of Appeal held this went too far – compliance with statutory requirements might be relevant (e.g. where negligence alleged, or where one was asking what sort of damage was foreseeable) but did not provide a statutory defence as such. As Lord Carnwath put it, *"An activity which is conducted in contravention of planning or environmental controls, is unlikely to be reasonable. But the converse does not follow. Sticking to the rules is an aspect of good neighbourliness but it is far from the whole story – in law as in life."* *Barr v Biffa Waste Services Court of Appeal* [2012] EWCA Civ 312

### **Local authorities and others bodies made liable if CJEU fines the UK**

The Localism Act 2011 gives power to Ministers public authorities including local government bodies, to pay all or part of any financial sanctions imposed for breach of EU law by the CJEU. It is understood that in relation to devolved governments (Wales, Scotland, Northern Ireland) there was an informal understanding that if the devolved administration were responsible for the breach they would have to reimburse the UK Government. The new legislation makes this all much more transparent and widens the bodies who can be held liable. There is quite a complex procedure of making an Order, giving notices, etc. and a determination “whether any acts of the authority did cause or contribute to the infraction of EU law”

The UK has not to date had a financial sanction imposed by the CJEU but has come close to it. The provisions on liability are argued to be a consequence of greater devolution of powers : *“The Government is giving local authorities more powers and freedoms to conduct their business and deliver services to the public. This includes a major reduction in the ‘oversight’ role of central government. Local authorities must, therefore, accept responsibility for the consequences of their actions or inactions.”*

(Regulatory Impact assessment, Localism Act, p 5-6)

### **Carbon reporting for companies to be introduced from April 2013**

Under the Climate Change Act 2008 the Government has a duty to make corporate carbon reporting mandatory by April 2013 or explain to parliament the reasons for not doing so. They have recently announced plans to introduced carbon reporting. Initially the annual duty will apply to just over 1000 of the largest companies on the stock exchange but may well be extended to others. The annual reports by directors must cover all greenhouse gases, all parts of the business owned by the company including overseas, and both direct emissions and indirect emissions from purchased electricity, heating and cooling. Emissions which are a consequence of the organisation’s actions, but which occur at sources which the organisation does not own or control are excluded. The regulations also require that directors include an intensity ratio when reporting on their

Emissions, but the intensity ratio used – whether financial or activity – is not specified and it is left to each company to conclude which is of most interest to its stakeholders.

### **Enforcement Undertakings as a new Environmental Sanction**

The formal sanction for a breach of most environmental regulations in the United Kingdom has long been a strict liability criminal offence. Under Regulatory Enforcement and Sanctions Act 2008 (based on proposals by Richard Macrory), regulators in England and Wales can acquire a wider range of sanctioning powers in addition to the criminal law.. The Environment Agency is now experimenting with these in a limited number of areas including Packaging Regulations implementing the EU Directive.

Where a company has failed to register under the regulations, the Environment Agency can still prosecute the company concerned in the criminal courts. But if they judge the failure was accidental



or negligent at the most, they may decide instead to impose an administrative penalty where the company has made financial savings by non-compliance. But instead of the regulator imposing a penalty, the company itself can come up with a 'self imposed penalty' in the form of an Enforceable Undertaking. This can include payments to charities representing any financial gain made plus an uplift agreed by the Agency (currently the Agency is working on around a 30% uplift). Failure to comply with the Undertaking renders the company open to the imposition of a penalty for the original offence.

Since the beginning of 2012 when first introduced around 55 undertakings have been formally accepted, mainly in the field of packaging regulations and some 430000 Euros been paid to local environmental charities. The Undertakings are publicly available documents. The Environment Agency does not require a formal admission of guilt before accepting an Undertaking, and are now finding the companies in breach are voluntarily owning up.

For details see Environment Agency web-site:

<http://www.environment-agency.gov.uk/business/regulation/116844.aspx>

Extract from web-site:

To view a list of offers accepted and details of the offence and any corrective actions taken, download:

- [Enforcement undertakings accepted by the Environment Agency - January to July 2012 \(Excel, 23KB\)](#)

At present the suite of new sanctioning powers has not spread to other areas of environmental regulation and hardly beyond environmental law. The new Coalition Government has over the past twelve months been ambiguous in its support with some senior Ministers concerned that regulators could bully smaller companies which have not the time or expertise to appeal. On November 8 2012 the Government finally announced its new policy saying that in future Orders granting regulators powers to impose civil sanctions will generally only be permitted if the power to impose financial penalties is restricted to large companies (250 employees plus) . All other new civil sanction powers (compliance notices, enforceable undertakings, stop notices) will be available in respect of any size of business.

### **Climate Change and Energy Debates**

There is currently considerable debate over the future of the UK energy policy. Under the Climate Change Act 2008, the Government has a long term legal duty to achieve an 80% cut in greenhouse gases by 2050 (on 1990) levels, with interim five year carbon budgets also set in law. In May 2011 (after much internal political debate) the Government agreed an ambitious Fourth Carbon Budget 2023 – 2027.

But a number of political drivers are challenging future directions. The general economic climate and whether it will cost the UK too much to be ahead of others, especially the rest of the EU; growing antagonism over the environmental impact of major sources of renewables, especially on shore wind; increasing availability of gas in preference to coal; the current generation of coal fired

generation stations and nuclear coming to the ends of their lives, and a view that the EU Emissions Trading Regime itself is unlikely to provide the long term incentives for substantial investment in lower carbon technologies in a privatized energy generation and supply market. At present sources of electricity are around 35% coal, 42% gas, 13% nuclear and 6% renewables (with a target of 31% renewables by 2020). The Government plans to publish an Energy Bill shortly which may clarify some of the markers, but there are deep internal political conflicts within the Coalition Government on the future direction.