Annex

1. Our challenge, counter-claims made, judicial outcomes, and obligations of the UK regarding the implementation of the European Electronic Communications Code

1.1 Our challenge was to UK national regulatory authorities(1) as a consequence of their responses to the remedies we sought under European Union Withdrawal Act (EUWA) 2018 Schedule 8 paragraph 39(5). Those remedies sought to rectify deficiencies and to quash relevant *'conduct'*. The conduct concerned the transposition of the EECC(2) in the absence of public health/environmental protections being an *'instrument/or provisions of an instrument'* operating under the jurisdiction of UK local authorities/local planning authorities (LAs/LPAs).

link: https://www.legislation.gov.uk/eudr/2018/1972/introduction/adopted

link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972

1.2 The counter-claims of preclusion, out-of-time for judicial review, and of no direct effect of EU directives, and our defence against those arguments, arise from controversy over how the EECC *'general authorisation system'* was brought into use in the UK.

1.3 We challenged both the counter-claims and the judicial acceptance of them. In our view that acceptance was wrong and unjust. It resulted in *'Totally Without Merit'* (*'TWM'*) certification of our judicial review application of 20 December 2023 (JRA20/12, Attachment 2, bundle pp. 82 to 111), and of our appeal application of 28 November 2024 (AP28/11, Attachment 10, bundle pp. 244 to 275). It also raised matters of post-Brexit constitutional significance, because LJ Falk's 31 October 2024 Court of Appeal Order precluded our challenge on the paragraph 3 judgment (JF02, Attachment 12, bundle pp. 212-213) that,

> *'the EECC directive is not part of English law'*.

1.4 The counter-claims, and *'TWM'* certifications, make the UK Government guidance on *'How to Implement EU directives'* (2018) critical. In particular, in respect to the *'form and methods'* available for the implementation of directives through paragraphs 2.6 and 2.7 of the guidance
https://assets.publishing.service.gov.uk/media/5fef0b128fa8f53b759f67db/withdrawn-eu-transposition-guidance.pdf

1.5 The UK Government was required to aid harmonisation between national regulatory authorities and other competent authorities by pre-setting,

> *'objectives and criteria to underpin their work'* (EECC Recital 21) … alongside … '*stability' …* (and) *… 'to establish, in advance, appropriate criteria to determine compliance with the objective of efficient use of radio spectrum by the holders*

(1) being the Department of Housing, Communities and Local Government (DHCLG) previously named the Department of Levelling-Up, Housing and Communities (DLUHC), the Department of Health and Social Care (DoH&SC), and the Department of Science, Industry and Technology (DSIT).

(2) the EECC as UK Assimilated law, and as agreed in 2018 with Recitals, are both available in the links at the foot of paragraph 1.1, above.

(alongside) *... 'ensuring predictability' …* (and) *...'to preserve legal certainty and investment when implementing the conditions attached to individual rights of use and general authorisations'* (EECC Recital 121).

1.6 Public health protection is crucial to the objective of achieving an efficient use of the radio spectrum, as affirmed by EECC Recital 110,

> *'the need to ensure that citizens are not exposed to electromagnetic fields at a level harmful to public health is imperative. Member States should pursue consistency across the Union to address this issue, having particular regard to the precautionary approach taken by Recommendation 1999/519/EC, in order to work towards ensuring more consistent deployment conditions'* (110).

2. Our 'lacuna' claim, and the significance of pre-action remedies

2.1. On the significance of EECC Recital 110, we observed in paragraphs 1.5.7 and 1.5.8 of Section 1.5 *'EU Recommendations 1999/519/EC'* of our 13 September 2023 pre-action *'Submission'* (SUB13/9, Attachment 1, bundle p.8) that,

> *'this imperative cannot be met casually, as it requires the UK government and all UK EECC competent authorities to apply … Recommendations 1999/519/EC to new and emerging technologies, with a requirement to keep abreast of contemporary knowledge and guidance from a vaguely specified public health source ie: by the Recommendations using the phrase '<u>such as</u>' the International Commission on Non-Ionising Radiation (ICNIRP), and through the joint enactment of appropriate precautionary approaches to public safety* (1.5.7)',

and that,

> *'the ICNIRP guidelines are not an emissions standard. Most cogently, any guidelines regarding emissions are recommended as a component part of European Council procedures, with those procedures requiring application through the transposition of the EECC into UK domestic law as a binding procedural standard* (1.5.8)'.

2.2 That the ICNIRP guidelines are part of a binding procedural standard under LAs /LPAs competent authority jurisdiction, is particularly important in respect to EECC Annex I (B)(3) powers to attach conditions to general authorisations for telecommunication system EECC Recital 105-type or 106-type developments as:

> *'measures for the protection of public health against electromagnetic fields caused by electronic communications networks in accordance with Union law, taking utmost account of Recommendation 1999/519/EC'* (at Annex I(B)(3)).

implying that public health protection must be applied precisely in certain circumstances.

2.3 Our assertion that a *'systemic lacuna'* is perpetuated with respect to how the EECC public health protection provisions were brought into effect in the UK, is reinforced by remedies that we advocated as being required administratively to rectify deficiencies as presented in Section 5 paragraphs 5.1.1 to 5.4.2 '*Remedies required within the scope* *of the DLUHC and DoH powers under Schedule 8 Paragraph 39(5) EUWA powers*' of our pre-action '*Submission',* are for example, justified as remedy 11,

> '*collaboration between DLUHC/DoH to achieve a competent enactment of EECC Recitals 21 and 121'*,

as part of Section 5.4 paragraphs 5.4.1 and 5.4.2 *'The requirement to end ambiguity regarding the status of Local Authorities (LAs)/Local Planning Authorities (LPAs) as EECC competent authorities'* (SUB13/9, Attachment 1, bundle pp.35 to 41).

3. The guiding principle of the UK government's *'How to Implement EU directives'*, and the consequent dual-type directives

3.1 The Government's guiding principle for implementing EU directives at paragraph 2.5 (see link at paragraph 1.4, above), was,

> *'wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation'* (2.5).

3.2 Paragraph 2.6 read,

> *'when a Directive specifies the objectives to be achieved, while leaving the "<u>form and methods</u>" to the discretion of each Member State, there may be potential to seek to implement through the use of alternatives to regulation. It may also provide that certain decisions or "implementing measures" will be specified at a later date by the Commission …'* (2.6).

3.3 Paragraph 2.7 read,

> *'in practice, most Directives leave no discretion as to whether to implement by way of legislation <u>or other binding provision</u> ... however, on occasion a Directive may be implemented in a manner that may be more flexible than command-and-control regulation, e.g. self-regulation, co-regulation or legally binding guidance'* (2.7),

and the scope for implementation by, *'legislation or other binding provision'* or by *'legally binding guidance*' is central to our case.

3.4 It is unlikely that *'legally binding guidance'* supplants *'legislation or other binding provision'* as an appropriate means for implementing the EECC. The reverse prospect is envisaged across the EU as a revised EECC is currently proposed to gain EU Regulation status.

https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-digital-networks-act-dna

The absence of *'legally binding guidance'* is discussed further at paragraphs 6.4 to 6.6, below.

3.5 The UK planning system applies jurisdictional autonomy on an applicant's issue of a valid planning application. If new legislation is required, it would be introduced if existing binding provisions are deemed inadequate to regulate development in respect to the use of land and buildings (see paragraph 10.1 below).

4. European Union Withdrawal Act (EUWA) 2018 Schedule 8 Paragraph 39(5) and 39(6) provisions, as a Brexit safeguarding mechanism

4.1 EUWA 2018 provisions for challenging the prior *'conduct'* of national regulatory authorities involved in the implementation of a relevant directive through the restricted Schedule 8 Paragraph 39(5) and 39(6) mechanisms, are qualified in the first instance by being excluded from EUWA 2018 Section 4 limitations.

4.2 Section 4(3) exclusions were designed to secure rights not previously qualified by EU Courts or UK Courts which may have been undermined by pre-Brexit failures to implement any relevant and required provisions, or enactments of relevant directives.

4.3 We affirm that our case raised at the outset,

> *'a carefully constrained administratively targeted public health-oriented claim'*,

described in the context of paragraph 17 of our 4 September 2024 appeal application (AP4/9 Attachment 8, bundle p.205).

4.4 Clearly, the *'form and means'* available to national regulatory authorities to balance how EU directives are enacted by *'competent authorities'* operating under separate jurisdictions, are variable as stated in paragraph 2.7 of the guidance and are therefore prone to misapplication.

4.5 Our perspective on misapplication was voiced in paragraph 6.5 of our 6 May 2024 Appellant's Notice *'Skeleton Argument'* (SK6/5 Attachment 6, bundle p.170),

> *"it is vitally important to note that the EECC transposition required compliance by 'administrative provisions', not just the enactment of laws and regulations. Law and regulations could be compliant whilst 'administrative provisions' could be non-compliant, or even worse may undermine the 'subject matter, scope and aims' of the Directive"*(6.5),

and that perspective was addressed further in respect to the justiciability of our challenge in Section 8 *'The SoSfHSC and SoSfLUH&C/SoSfDSIT argue that the claim is out of time'*, in paragraphs 8.9 to 8.12 of that skeleton argument (AN6/5 Attachment 6, bundle pp.174-175).

4.6 EUWA 2018 Schedule 8 paragraphs 39(5) and 39(6) were a *'Brexit-safeguarding mechanism'* for rectifying flaws in the implementation of an EU directive such as the EECC, which was intended to be fully operational ten days before Exit Day(3).

The *'safeguarding mechanism'* provided a post-implementation opportunity for us to challenge (as reported in paragraph 6.1.5 of our *'Grounds'* for judicial review (GR20/12 Attachment 2, bundle p.107)),

> *'any enactment' (1) ... 'made against either administrative action or domestic legislation other than Acts of Parliament or rules of law' (2)… or <u>'any conduct'</u> (2) (our emphasis) ... 'concerning the flawed enactment of a directive that may(2)*

(3) otherwise described as the EU Implementation Period (IP) Completion Day, being on the 31 December 2020.

(our emphasis) ... *'concerning the flawed enactment of a directive that may be ... 'incompatible with any principle of EU law' (3)* (with referenced notes being):

(1) derivation from EUWA 2018 (revised) Schedule 8 paragraph 39(5)(b)(ii).

(2) as per explanatory note 409 EUWA 2018 – the quashing of conduct by 'other public authorities' could take direct effect by the public authority accepting that a challenge is successful, or after a Court does so by deciding that the challenge is justified and that direct rights flow as a consequence.

(3) as per explanatory note 410 EUWA 2018'.

4.7 The EUWA 2018 Section 4 *'Saving for rights etc. under section 2(1) of the ECA',* was as stated in the original version of the legislation

link: https://www.legislation.gov.uk/ukpga/2018/16/section/4/enacted

4.8 The application of EUWA 2018 Section 4 barriers to challenge in clauses 4(1) and 4(2), were made subject to clause 4(3) which stated that,

(3) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation),

by which EUWA 2018 Section 5 and Schedule 1 lead to Schedule 8 paragraph 39(5) and 39(6) qualification criteria, including the disapplication of clause 4(2)(b) concerning EU directives, and therefore,

'of a kind' … 'rights, powers and liabilities, obligations, restrictions, remedies and procedures',

that may otherwise have been determined. Qualification through the four-stage exclusion procedure, is precise and purposeful.

4.9 The status of our challenge in respect to EUWA 2018 Schedule 8 paragraphs 39(5) and 39(6) as part of UK law, would be precluded entirely if LJ Falk's 31 October 2024 Order paragraph 3 statement that, *'the EECC is not part of English law',* (paragraph **1.3**, above) was true. That negative assessment and the 'preclusion claim' made originally by the Defendants, jointly should have been addressed judicially through objective tests for qualification.

4.10 In our 28 November 2024 appeal application at paragraphs 47 and 48 (GR28/11 Attachment 10, bundle pp. 233 to 234), we asserted the significance of the Court of Appeal *'good practice observations/guidance'* as issued in the *Wasif v SoSHD* case (2016), quoting paragraph 17 of the judgment in part, as below,

'it is inescapable that the distinction between those cases which are "bound to fail" (and thus fall for certification as 'totally without merit' (TWM)) and those where permission is refused on the less definitive basis ... is a matter for the assessment of the judge in each case. The scope for general guidance is limited ... However, we would make the following observations:

(1) At the risk of spelling out the obvious, <u>judges should certainly not certify applications as TWM as the automatic consequence of refusing permission. The criteria are different</u> (our emphasis)'.

(2) ...

(3) The potential value of an oral renewal hearing does not lie only in the power of oral advocacy. It is also an opportunity for the claimant to address the perceived weaknesses in the claim which have led the judge to refuse permission on the papers (and which should have been identified in the reasons). The points in question may not always have been anticipated or addressed in the grounds and skeleton argument (particularly if the judge has drawn them from the respondent's summary grounds see (6) below). <u>The judge should only certify the application as TWM if satisfied that in the circumstances of the particular case a hearing could not serve such a purpose; the claimant should get the benefit of any real doubt</u> (our emphasis)' …

(note: with subsections (5) and (6) also being *'TWM'* certification relevant observations, but are now excluded for brevity),

in the expectation that such a hearing would be granted to dispose of our application.

4.11 Had our application for a hearing been granted we would have been able to present,

i) our *'condition precedent/condition subsequent logic'*, to justify our case for judicial review qualification based on our evidence for a *'systemic lacuna',*

and,

ii) the value and viability of our administrative public health protection-oriented remedies, in theory and in practice.

4.12 The absence of a hearing prevented us from advancing the *'condition precedent /condition subsequent'* mechanism in the High Court, in the Court of Appeal or in the Supreme Court. We were therefore denied the opportunity to explain the practical viability of the remedies we originally sought. Those remedies concerned the forms and methods by which the UK Government could implement EECC public health protections properly as described in our pre-action 'Submission' Section 5 *'Remedies required within the scope of the DLUHC and the DoH under Schedule 8 paragraph 39(5) EUWA 2018 powers'* (SUB13/9 Attachment 1, bundle pp. 35-43).

5. The origin of the rights we asserted through EUWA 2018 Schedule 8 paragraphs 39(5) and 39(6)

5.1 We have consistently argued that the Defendant's <u>time-limitation</u> claim made in response to our 20 December 2023 judicial review application (JRAR1 25/1 Attachment 4 paragraphs 33 to 38, bundle pp. 128 to 129), and (JRAR2 25/1 paragraphs 6 to 13 pp. bundle 134 to 135) required judicial determination. We describe that issue as *'condition subsequent'* to the resolution of the <u>preclusion</u> claim, and the resolution of both claims as, in turn, a *'condition precedent'* to consideration of the substantive matters raised in our judicial review application.

5.2 Our rights flow from the principles of *'effectiveness', 'equivalence' and 'procedural autonomy',* interconnected through the *'procedural autonomy test'* regarding how the EECC, as a paragraph 2.7-type Directive, needed to be brought into effect through a *'form and method',* of implementation compatible with UK domestic planning law, planning policy and planning procedures.

5.3 We maintained our advocacy of our right to a hearing rather than accepting a *'forced finality'* on the <u>preclusion</u>, <u>out-of-time</u>, and <u>no direct effect of EU Directives</u> positions deemed to remain conclusive prior to the issue of our appeal application of 4 September 2024 (AP4/9 Attachment 8 pp. bundle 198 to 211), which was then made subject to LJ Falk's 31 October 2024 controversial claim that, *'the EECC is not part of English law'* (paragraphs 1.3 and 4.9 above).

5.4 We pursued remedies from the outset and beyond judicial proceedings, consistent with our 16 January 2024 post-judicial review application paragraph 3.(c)2 CPR 18 clarification of our intentions, issued on the request of a Defendant Department, stating that:

> *'after exhausting all alternatives to judicial review, our interest is limited to decisions concerning our asserted rights that if taken wrongly can be reversed through the enactment of remedies that bring those rights properly into effect'* (CPR18 Attachment 3, bundle p.312),

despite the absence of any hearing (ie: at stage one), by seeking access to Brexit *'safeguard mechanisms'* operated through a three-stage process (ie: through stages two and three) being;

1. EUWA 2018 Schedule 8 paragraphs 39(5) and 39(6),
2. EUWA 2018 (revised) Section 6D Incompatibility Orders, and,
3. Retained EU Law (Revocation and Reform) Act (REULA) 2023 Section 7 remedies, which were potentially available up to 23 June 2026.

5.5 We sought an EUWA 2018 Section 6D Incompatibility Order through our 22 January 2025 appeal application (AP22/1 Attachment 12, bundle pp.244 to 275), seeking an appeal hearing on LJ Falk's 19 December 2024 Order (JF03 Attachment 11, bundle pp. 242 to 243) certifying our 28 November 2024 application (AP28/11 Attachment 10, bundle pp.214 to 241) as *'TWM'* (paragraph 1 of the Order), and on her further argument that,

> *'the fact that the Appellants consider that there is a critical lacuna <u>cannot affect the law that the court is bound to apply</u>* (LJ Falk's emphasis). *Assertion of the importance of the issue makes no difference. Courts have no power to legislate. The Appellant's complaint is a political, not legal, one'* (paragraph 4),

deepening our dissatisfaction with her paragraph 3 statement in her 31 October 2024 Order (JFO2 Attachment 9, bundle pp.212 to 213).

5.6 Our 22 January 2025 appeal application sought:

> i) clarification of the applicability of EUWA Schedule 8 paragraph 39(5) and 39(6) provisions to our judicial review application,
>
> ii) a stay of execution on all previous Orders, and,
>
> iii) an EUWA 2018 Section 6D Incompatibility Order.

5.7 In paragraph 2.22 of our *'Statement of Case and Evidence supporting the Grounds'* (bundle p.261), we proposed that section 6D might operate through a two-stage process, with a *'preliminary incompatibility order'* confirming that judicial review would be necessary to complete the required evaluation of any potential incompatibility between case-relevant assimilated direct legislation and case-relevant domestic enactments. We assumed that EUWA section 6D created a consequent jurisdiction. A specific example, and a generalised summary of how compatibility might be investigated, were set out in paragraphs 2.25 to 2.37.

5.8 In paragraph 2.21 we reported that from our perspective,

> *'significant injustice represented by the concluding sentence to paragraph 4 of LJ Falk's 19 December order is intolerable, if it is assumed that finality in proceedings has been reached. As, such injustice would hinge on a flawed interpretation by J Jarman and LJ Falk of the EUWA 2018 Part 4 'specific transitional, transitory and savings provision' protected by Schedule 8 paragraphs 39(5) and 39(6), being overridden in relation to EUWA Section 4, and particularly how paragraph 2 is interpreted, given that paragraph 3 confirms that Section 4 of the Act is clearly made subject to Section 5 and Schedule 1 (exceptions to savings and incorporation)'.*

5.9 Paragraph 2.22, also reported the terms of the EUWA 2018 (revised) Section 6D provisions (replaced with a link below, for access to the clauses of the section), introduced as:

> *'finality on this matter of interpretation is not inevitable, because proceedings are made subject to EUWA 2018 (revised) Section 6D provision for the making of 'incompatibility orders', which reads …* link: https://www.legislation.gov.uk/ukpga/2018/16/section/6D with the paragraph concluding that we,
>
> *...'venture no comment on how Section 6D EUWA provision applies, other than reinforcing our expectation that Sir Richard Buxton's opinion in Berky at paragraph 69 (quoted at ¶2.11, above) that,*
>
> > *'the prospect must therefore be that any assertion of a Community point that is not plainly unarguable will attract the jurisprudence contended for by the applicants',*
>
> *appears applicable to protect rights we seek, 'not rendered impossible in practice or excessively difficult to achieve', as referenced back, for example, to our 28 November application in paragraph 2.5'.*

5.10 Our 25 January 2025 application to the Court of Appeal was rejected administratively on jurisdiction that was assumed to apply under the Senior Courts Act 1981 (MB-R24/1, Attachment 13, bundle pp. 276-278), which was reinforced by Dingemans LJ's Order of the 7 February 2025 (LJD7/2, Attachment 15, bundle pp. 289-290) reporting that,

> *'the jurisdiction of the Court is set out at section 15 Senior Courts Act 1981. No further action will be taken on the application notice that you have filed'.*

contrary to our position that EUWA 2018 Section 6D obligations created a distinct and specific jurisdiction, as argued in Section 4 of our further pleadings of 29 January 2025 to enact obligations placed on the Court of Appeal under that Section of the Act (CoP29/1, Attachment 14, bundle pp.282-283).

5.11 We sought permission to appeal to the Supreme Court via the Court of Appeal in a 24 February application (PCA-SC24/2, Attachment 16, bundle p.291), which was similarly rejected administratively.

5.12 We then applied for permission to appeal direct to the Supreme Court through a 13 March application (SCA13/3, Attachment 18, bundle p.308 to 327). The application asked in Section 1 *'Specific grounds for permission to appeal to proceed to judicial review'* at paragraphs 1.1 to 1.17, for permission to be granted by the Supreme Court on our *"truism that a 'not plainly unarguable' challenge cannot be 'TWM"* conclusion, drawn on the *Berky* case, with paragraph 1.5 of the *'Grounds'* highlighting,

> *"the 'Community point' in our case being, in essence, that EECC generated telecommunication service related 'material planning considerations' arise, and can be distinguished clearly and decisively from other matters of policy and practice, as demonstrated in the Tesco Stores Ltd v Secretary of State for the Environment & Ors [1995] UKHL 22 case. Meaning that the taking into account of such 'material planning considerations', and disposing of them effectively is legally binding upon Local Authorities (LAs) and Local Planning Authorities (LPAs), when a qualifying planning application/EECC general authorisation (or the latter alone) require determination"* (1.5).

5.13 As required in Supreme Court procedure, we identified matters of public importance raised in our application at paragraphs 1.3, 1.9, 2.30, 2.33 and 2.39.

5.14 The Supreme Court concluded in a 4 July 2025 Order (SCO4/7 Attachment 19, bundle p.328) that,

> *'permission to appeal be REFUSED on the ground that the appeal is wholly devoid of merit'.*

6. Rights asserted: precautionary public-health protection and consideration of submitted evidence

6.1 In our Judicial Review *'Statement of Facts'*, paragraphs 5.15 to 5.17 (SoF20/12 Attachment 2, bundle pp.102 to 104) we rely upon case precedents as background to asserting the rights we sought to protect being,

> *'case C-201/02 Wells* (detailed and relied upon), and c*ase C-416/10 Križan'.*

6.2 We asserted in paragraph 5.16 that our rights are,

> *'founded on the principle of effectiveness which this* (our) *… challenge seeks to protect, 'are, not rendered impossible in practice or excessively difficult to exercise', as they concern:*
>
> > *1. citizen rights to public health protection applied through the EECC 'procedural standard' in a telecommunication services specific environmental impact assessment (as affirmed in EECC Recital 46 as being specific to such services), that must be conducted prior to a general authorisation/planning permission being granted for the siting of a new mast/antennas by a LPA, or through the facilitation of small cell deployments by a LA, and,*
> >
> > *2. the right of citizens in the circumstances described in 1. above, and as described in the <u>DLA Piper</u>*(4) *<u>statement</u> (our emphasis) issued on behalf of Public Health England (paragraphs 1.7.4 and 1.7.7 of the 'EUWA 2018 Submission'), by having their written objections raising legitimate interests in such circumstances, and the evidence they submit on the adverse health effects/environmental effects of proposed developments being properly taken into account before requests for LPA/LA authorisations/permissions for applications/contractual arrangements, are determined' (5.16),*

and we described impact of a *'lacuna'* in the effective management of the radio spectrum in relation to our rights 1 and 2 in paragraph 5.19 above.

6.3 The *'DLA Piper statement'*(5) underpinning right 2, is explained and justified in our pre-action *'Submission'* at Section 1.7, *'Can LAs/LPAs immunise themselves from taking into account contrary and contradictory evidence on what constitutes an established adverse health effect of radio-frequency radiation (RFR)'* (SUB13/9 Attachment 1, bundle pp.10 to 12).

6.4 <u>First</u>: in paragraph 1.7.3, our use of the description *'non-exclusive status of ICNIRP guidance'* follows from Section 1.5 *'European Council Recommendation 1999/519/EC',* and the Section 1.6 *'Legal accountability: Guidelines and Standards',* analysis in our pre-action *'Submission'*. The distinction between the procedural standard that is applied by the 1999 Recommendations does not give ICNIRP guidelines an exclusive status as *'legally binding guidance'*, such as to aid activation of a paragraph 2.7-type Directive (as defined at Section 1 at paragraph 1.8 above) through means other than by legislation or other binding provision.

6.5 <u>Second</u>: in paragraph 1.7.4 we report that,

> *'this is particularly the case, as DLA Piper (Solicitors) on behalf of Public Health England (PHE) stated specifically in response to a letter before claim*(4) *issued*

(4) DLA Piper acted on a pre-action challenge initiated by the applicants and others, representing Public Health England (PHE) as an agency under the direction of the Department of Health and Social Care (DoH&SC).

(5) on the 2019 version of the guidance Mobile phone base stations: radio waves and health'. A link to the July 2024 version is at footnote (8), below.

on a potential 2019 judicial review case concerning PHE's reliance on ICNIRP guidelines, (reporting) that,

> *'the Guidance is not maintained and revised by PHE for the explicit purpose of any other body undertaking any other statutory function. If in any other context regard is had to the Guidance that is entirely a matter for the discretion of the relevant body and it must determine what weight to place on the Guidance given the clear indication as to the sources from which the advice and recommendations in the Guidance are derived. Equally, that body must determine what other evidence from your clients or other members of the public or interested parties to consider in making any decision* (letter dated 8th August 2019, Attachment 24, at bundle pages 392 to 396, Section 1.5 paragraph 2)' (1.7.4).

6.6 Third: we present the fact that,

'public objections to proposed masts/antennas may be the only means through which LPAs/LAs are notified of evidence of harm, injury and nuisance caused by exposure to RFR, or of 'in situ' specific public health/environmental protection requirements drawn from valid science' (1.7.5).

6.7 In paragraphs 5.16 and 5.17 of our Judicial Review application *'Statement of Facts'* , we asserted rights 1 and 2 as highlighted at paragraph 6.2 above (JRA20/12 Attachment 2, bundle pp.103 and 104),

"… are set in the context of being 'of a kind' comparability to the rights asserted in the Wells case, and through the case asserted in this Schedule 8 paragraph 39(5) challenge (Section 4.2 titled, 'Of a kind' comparability' ... are derived from … (principles of European law stated therein) …"*.*

6.8 Our appeal application of 4 September 2024 at paragraphs 6 to 7, describes the *'lacuna'* and its significance, with subtlety and precision (AP4/9 Attachment 8, bundle p.203):

'our compelling and exceptional reason why this application should be granted, and that the Appellant's Notice filed on the 6 May 2024 should be re-opened under CPR 52.30 overrides,

i) all reasons advanced by Jarman J and Falk LJ in their respective Orders refusing permission to apply for judicial review,

ii) the negative 'totally without merit' certification applied to our claim, and,

iii) the 'no real prospect of success' posited decisions as a consequence of both Jarman J and Falk LJ failing to engage with, accept and resolve the underlying lacuna in the effective management of the radio spectrum, as highlighted at paragraph 1.4 of the accompanying Skeleton Argument that we issued in support of our 6 May 2024 Appellant's Notice' (6).

The lacuna was,

"in the effective management of the radio spectrum which unlawfully extinguishes

the citizen rights 1. and 2. (as stated at paragraph 6.2, above) *that require protection through the tasks/functions performed by LPAs/LAs as primary regulators of involuntary public exposure to Radio Frequency Radiation (RFR)', and it was, 'not attributed* (in paragraph 5.19 of the N461 Application SoFC *by causation though a flawed act of legislation, nor through a negated or neglected act relating to the implementation of a binding provision', signifying that the lacuna was not a failure on the part of the UK Government to legislate, nor through the failure of a provision of UK legislation"*(7),

and its significance was, and remains, a consequence of the national regulatory authority *'conduct'* in relation to administrative provisions, as explained in paragraph 4.5 above,

> *"could be non-compliant, or even worse may undermine the 'subject matter, scope and aims' of the Directive".*

7. Falk LJ's 31 July 2024 perspective on our substantive argument, and on Ofcom's public health protection role

7.1 As we explained in paragraph 2.3 of our 6 May 2024 Appeal Notice skeleton argument at Section 2 *'SoSfH&SC/SoSfLUHC/SoSfDSIT error in assuming that the claim challenges the legality of EECC Regulations 2020'* (SK6/5 Attachment 6, bundle pp.161 to 163)*,* there was no requirement placed upon the UK,

> *'to include a general authorisation legal framework to operate within the legal framework that define the powers and the obligations of Ofcom as the EECC national competent authority (ie: the EECC Regulations 2020***(6)** *within which Ofcom's statutory powers and obligations in UK law are tied). Indeed, for practical reasons it is sensible for the twin frameworks to be kept entirely separate'.*

This fact was used, in part, to counter Jarman J's Reason 1 of his Order of 26 April 2024 (JJO26/4 Attachment 5, bundle pp.139 to 141) refusing permission on his judgment that,

> *'in reality the challenged decision arose in 2020 and this claim is substantially out of time'*.

7.2 In respect to the UK planning system as *'binding provision'*, and appropriately so in relation to specific material planning considerations, no barrier should hinder the effectiveness of dual-jurisdiction regulation by both Ofcom and LAs/LPAs (as described in summary in paragraph 1.1 of Section 1 '*the contested subject-matter of the claim*' (of the appeal skeleton argument at bundle pp.159 to 160). The existence of a functional EECC jurisdiction being applied by Ofcom would not compensate for the absence of a functional jurisdiction being exercised by LAs/LPAs, as demonstrated through Section 4 of the skeleton argument under the heading *'The jurisdictionally constrained role of Ofcom in the protection of the public from RFR exposure'* (of the appeal skeleton argument at bundle pp.165 to 169).

(6) On the assumption that time-limitation was triggered by the EECC Regulations 2020 being brought into force on the 10 November 2020, which coincided with our pre-action Initiative 1, as described in paragraphs 7.17 and 7.18, below.

7.3 Our appeal application of the 4 September 2024 *'Grounds'* at paragraphs 19 to 22 (AP4/9 Attachment 8, bundle pp.205 to 206), sought to clarify Ofcom's powers and obligations for regulating involuntary public exposure to RFR in respect to how the UK Government adopted the International Commission on Non-Ionizing Radiation (ICNIRP) Guidelines, made the subject of Jarman J's reasons 3 and 4 of his Order, and Falk LJ's definition of the substance of our complaint (being the concluding paragraph 8 of her 31 July Order (JF01 Attachment 7, bundle p.195)) which read:

> *'as to the substance of the complaint (although it does not arise for consideration, given the points already made), as I understand the grounds and skeleton argument the complaint appears to be that it is insufficient that the UK government follows ICNIRP guidelines because the position is not made sufficiently clear or mandatory for local authorities and local planning authorities. However, as I understand it from the bundle (pp.275-276)* <u>*Ofcom went through a process in 2021 of incorporating ICNIRP limits directly into spectrum authorisations, giving it power to act if limits are breached'*</u> (our emphasis)'(8).

7.4 Falk LJ's assumptions are difficult to interpret. Her paragraph 8 statement seems to imply that ICNIRP sufficiency at the national level/international level, and its consequences re: its application through planning policy and for LA/LPA decision-making in any circumstances, are resolved through Ofcom spectrum licensing. If that interpretation is correct the EECC general authorisation system would be superfluous in respect to both the quality of the ICNIRP guidelines, and to how they are applied by LAs/LPAs *'in situ'*(7).

7.5 Falk LJ's sentence,

> '*Ofcom went through a process in 2021 of incorporating ICNIRP limits directly into spectrum authorisations, giving it power to act if limits are breached',*

is derived from a 12 April 2021 Ofcom email exhibited in paragraph 3.3 of our pre-action Submission, titled A1.3 *'Bath and North East Council denial of its EECC competent authority status alongside Ofcom's denial of its competent authority obligations'*, which reported in paragraph 6 (SUB13/9 Attachment 1, bundle pp.52 and 53) that,

> *'subject to our final decision in this on-going process, the new EMF condition* (on spectrum licensing) *will come into force around mid-May 2021 and require licences to ensure they comply with ICNIRP general public limits'* (6).

7.6 As demonstrated in paragraphs 19 to 24 of our 4 September 2024 appeal application (AP4/9 Attachment 8, bundle pp.206 to 207), the UK Health Security Agency (UKHSA) in its guidance *'Mobile phone base stations: radio waves and health'*(8), on 30 July 2024 (the day prior to the issue of LJ Falk's Order) reported that,

> *'Industry …* (have) *… voluntarily committed to comply with the guidelines* (ie: ICNIRP guidelines) *and to provide certificates of compliance with planning applications for base stations'.*

(7) 'in situ' denotes the disposal of a planning application/or the grant or refusal of a general authorisation after locality siting considerations are examined and addressed by a LA/LPA through EECC 'binding provision'.

7.7 On sites not shared with other licensees Schedule 2 clause 7 of a current standard licence confirms that Ofcom's *'Guidance on EMF Compliance and Enforcement'* applies,

> *"when evaluating its compliance with paragraphs 1, 2 and 3 ..., the Licensees* *__shall take into account__* (our emphasis) *Ofcom's 'Guidance on EMF Compliance and Enforcement' that is in force at the relevant time".*

7.8 The updated Guidance (9 February 2026), reports at paragraph 15.3 that,

> *'when deciding whether to take enforcement action and what enforcement action may be the most appropriate, Ofcom will consider all relevant factors. These may include the following factors (as appropriate) although other factors may also be relevant:*
>
> *• the available evidence indicating a spectrum user may be in breach of the general public EMF limits or does not hold appropriate EMF compliance records; • the risk of harm to the public including (a) the location of the relevant site and proximity to busy public spaces; and (b) the age and health status of the public at risk'.*

7.9 The obligation to,

> *'__take into account__ Ofcom's 'Guidance on EMF Compliance and Enforcement' that is in force at the relevant time',*

is voluntary, which reinforces our argument that LAs/LPAs provide the only precautionary public health protection functions that impact directly upon the siting of masts and small cell deployment consistent with our pre-action Submission (SUB13/9 Attachment 1, paragraph 1.8 bundle pages 12 and 13) analysis; our explanation of our judicial review claim (CPR18 16/1 Attachment 3, bundle pages 165 to 169); and our Appeal Section 4 *'Jurisdictionally constrained role of Ofcom in the protection of the public from RFR exposure'* (AN6/5 Attachment 6, bundle pages 165 to 169).

7.10 Ofcom as a consequence, performs a post-construction monitoring function. In respect to the EECC general authorisation system, the distinction between Ofcom and the roles of LAs/LPAs is not in contention. Explanatory note at paragraph 7.26 to the European Electronic Communications Code and EU Exit Regulations 2020, which we have not previously relied upon, but for current clarity might be examined - link:

https://www.legislation.gov.uk/ukdsi/2020/9780348213089/memorandum/contents

read under the heading *'General authorisations and Ofcom Powers'* (page 9), that the regulations were,

> *'minor amendments … to ensure the notification and information requirements for providers who intend to provide a network, service or facility under the general authorisation regime are updated in line with the EECC Directive (2018/1972/EU) …* (and that) *... Ofcom does not currently require a notification process and the amendments do not create any new notification requirements. Rather the amendments ensure that the notification and information requirements are updated should Ofcom choose to apply them in future'* (7.26).

thereby reinforcing our *'not in contention'* characterisation of the 2020 Regulations.

7.11 Insufficiency in any sense, was envisaged by our pursuit of remedies through our pre-action *'Submission'* following our precautionary triggering of,

Initiative 1 the 8 August 2019 DLA Piper declaration made on behalf of Public Health England (PHE), the predecessor agency to the now-titled UK Health Security Agency (UKHSA)(8), and for interconnected purposes of legal clarity,

Initiative 2 the intervention that brought about Ministerial answers, by Jo Churchill and by Matt Warman (the Ministers responsible for public health and for the regulation of telecommunication services development respectively), to Wera Hobhouse MP questions on the EECC functions performed by LAs/LPAs, with 30 November 2020 and 22 June 2021 answers respectively (see paragraphs 7.17 to 7.19, below).

7.12 Initiative 1 predates the 21 December 2020 transposition of the EECC; whilst Initiative 2 post-dates transposition. The latter helps resolve the conundrum over the *'enigmatic EECC Recital 106'* and its relationship with EECC Annex I (B)(3) conditions(9). We envisaged such an interpretation of our case as made by Falk LJ in paragraph 8 of her 31 July 2024 Order (at paragraph 7.3, above).

7.13 Section 5 of our 6 May Appellant's Notice skeleton argument titled, *'Our rejection of the SoSfH&SC's SGoR paragraph 3(iv) 'the claim for which permission is sought is flawed because it is without a legal basis in any event', is by affirming the essential cross-jurisdictional regulation of public exposure to RFR by LAs/LPAs operating as EECC competent authorities in conjunction with Ofcom as the UK EECC national competent authority',* was developed from assertions made by the SoSfH&SC reported in paragraph 5.1 of that skeleton argument (SK6/5 Attachment 6, bundle pp.169 and 170).

7.14 Initiative 2 was highlighted in our Appellant's Notice skeleton argument Section 10 *'The background to LA/LPA EECC competent authority assignment'* at paragraph 10.7 (bundle p.192), reading,

> *'it is legitimate to assume that the Remedy 5 of the 'Submission' Section 5 'Remedies required within the scope of the DLUHC and the DoH under Schedule 8 paragraph 39(5) EUWA 2018 powers' (JR Application Bundle, page 85), flowing from Matt Warman's (as SoSfDDCMS) 22 June 2021 statement that,*

(8) the UKHSA and previously Public Health England (PHE), published and updated guidance titled, 'Mobile phone base stations: radio waves and health' reaffirming in July 2024, the long-standing and definitive position 'Summary', at paragraph 4, see link:

https://www.gov.uk/government/publications/mobile-phone-base-stations-radio-waves-and-health/mobile-phone-base-stations-radio-waves-and-health

(9) *'Enigmatic'* because as demonstrated in the exhibit at paragraph A1.3.4, pre-action Submission (SUB 13/9), Ofcom assumed that EECC Recital 106 powers were within its jurisdiction, when as a matter of fact they were crucial to LA/LPA 'general authorisation' functions/obligations including those applied through EECC Annex I (B)(3) public health protection conditions, see paragraph 4.5(i) *'The jurisdictionally constrained role of Ofcom in the protection of the public from RFR exposure'* at AN6/5 Attachment 6, bundle p.166.

'the transposition of the EECC would have no effect on the status of local planning authorities where they are considered competent authorities under EU directive 2014/61/EC',

and our comment in paragraph 10.7 that the statement,

'could be interpreted straightforwardly as meaning that LPA/LA EECC competent authority status applies 'where' town planning functions need to be performed under EECC spectrum management, and consequently those functions generate specific EECC related material planning considerations that LPAs/LAs are obliged to take properly into account alongside other material planning considerations that UK planning law requires LPAs/LAs to consider when an application for a new mast/antennas or contractual arrangements for small cell siting arise',

'i) has a genesis that stretches back to 2002,

ii) that status existed formally in Directive 2009/140/EC, and also therefore through Directive 2014/61/EC 'Measures to reduce the cost of deploying high speed electronic communications networks'(10)*, and,*

iii) that it is legitimate to assume that the status of LAs/LPAs as competent authorities enacting EU Telecommunications services general authorisations originated as Directive 2009/140/EC came into effect. (10.7).

7.15 Further on Initiative 2, our attempt to gain clarity on the functions of LAs/LPAs and their EECC competent authority status was pursued with the assistance of Wera Hobhouse MP for Bath through two questions raised with appropriate UK Ministers prior to, and after the deadline for the transposition of the EECC on the 21 December 2020.

7.16 Jo Churchill, Under Secretary of State for Health's 30 November 2020 statement that,

'no further body was required to be created or designated as a competent authority as part of transposition as Ofcom acts as the telecommunications regulator in the UK',

question U114987 answered Jo Churchill, DoH&SC 30/11/2020 https://members.parliament.uk/member/4602/writtenquestions?page=43#expand-1251826

was correct in respect to the role Ofcom performs across the UK, and consistent with Matt Warman, Under Secretary of State for Digital, Culture, Media and Sport 22 June 2021 statement that,

'whilst the Directive gave member states flexibility to assign certain functions to competent authorities, as under prior EU and domestic law, Ofcom is retained as the designated telecoms national regulatory authority in the UK.

question UIN 15347 answered Matt Warman, DoDCMS 22/6/2021 *https://members.parliament.uk/member/4602/writtenquestions?page=39*

(10) Directive 2014/61/EC is UK Assimilated law, operating alongside the EECC.

7.17 Matt Warman's further statements that,

> *'local planning authorities were not made competent authorities through EU Directive 2014/61/EC, as the government was already content that the functions in question relating to planned civil works were already in place' ...* and that, … *'the transposition of the EECC would have no effect on the status of local planning authorities where they are considered competent authorities under EU Directive 2014/61/EC',*

is ambivalent, and deeply so, because the EECC added distinct public health protection functions that only LAs/LPAs are able to perform *'in situ',* and should do so knowingly as an EECC competent authority.

8. Assimilated law jurisdictional complexities

8.1 Lord Sales in his April 2026 *'The concept, status and constitutional place of assimilated law in the post Brexit legal order',*

https://supremecourt.uk/uploads/Speech_Lord_Sales_14042026_7f55a3dad2.pdf

at Section 3 *'Interpreting assimilated law'* at paragraphs 32 to 39, presents a complicated perspective on the post-Brexit *'constitutional architecture'* requiring what he describes in paragraph 36 as,

> *'double movement. First, to read the unchanged legislative text as though it was promulgated subject to the new UK constitutional architecture structured by the Withdrawal Act and the 2023 Act, rather than as subject only to the EU constitutional architecture; that is, a fiction has to be applied. Secondly, to read the assimilated law, as so construed, in light of an intention of the UK legislature to secure a significant element of legal continuity; that is, the disruptive potential of the first movement has to be qualified and dampened down to some degree in the light of the object of achieving reasonable legal continuity and certainty. Difficult and delicate judgments may be called for, particularly in marginal cases'* (36).

8.2 Wade & Forsyth's *'Administrative Law'*(11) on how EUWA 2018 Schedule 8 paragraphs 39(5) and 39(6) applies (referenced at paragraphs 9.3 and 9.6 of our 6 May 2024 Appeal skeleton argument (AN6/5 Attachment 6, pp.183 and 184)), provides a simplifying analysis of the status of EU-originated law drawn from the *Miller* (2017) Supreme Court case not relied upon by us previously,

> *'EU law has substantial force in the UK by reason of ECA 1972 and no other principle of law at all. EU law is made UK law (comprising domestic rights and obligations) by way of ECA 1972. This explains why the creation of EU legal material (TEU/TFEU, regulations, directives, all explained by the CJEU) by EU institutions, even in the light of the principles of* <u>*direct effect*</u> (our emphasis) *and supremacy, do not undermine Parliamentary sovereignty. It is Parliamentary itself which authorises and maintains the 'conduit pipe' for* EU law to become domestic law (our emphasis).

(11) Wade & Forsyth's *'Administrative Law'* (12th Edition, Oxford University Press 2023 at page 110).

The application of the general principle of effectiveness and the creation of new remedies is not the 'revolution' perceived in previous editions of this book, at least insofar as the 'revolution' attacked Parliamentary sovereignty. Parliament had assigned certain legislative powers to EU institutions (via ECA 1972, section 2) but only as long as Parliament chose and even then on qualified terms, whatever the CJEU might say. Indeed, the UK Supreme Court had, prior to Miller (and prior to the 2016 Referendum) expressed the possibility that EU law will not be applied in circumstances which undermine Parliamentary sovereignty'.

8.3 In our 22 January 2025 appeal application at paragraph 2.6 (AP22/1 Attachment 12, bundle p.258), we presented further simplicity through the argument that,

> *'incomplete or inadequate transposition of EU directives pre-Brexit would not have required challenging within the CPR 54.5 (Judicial Review) time-limit on transposition for a citizen to rectify a right to which they were entitled* (2.6)',

highlighting the *Berky v Newport Council* (2012) Court of Appeal planning law judgment, at paragraphs 2.10 to 2.12, concluding with our paragraph 2.12 suggestion that,

> *'Schedule 8 EUWA 2018 Part 4 'specific transitional, transitory and savings provision' are probably designed as a post-IP Completion Day compromise measure, in acknowledgment of the reality that impacted upon party's knowledge of a flawed or inadequate transposition of an EU Directive is likely to emerge over time, and that promptness is circumstantial within time limits imposed under Schedule 8 of EUWA 2018'* (2.12).

8.4 Lord Sales affirms in paragraph 35 of his article (with our selective emphasis on its positive significance to our case) that,

> *'assimilated law is ordinary domestic law, so domestic canons of statutory construction apply … it is a common place that domestic statutory interpretation is purposive, in the sense that the courts seek to give effect to the purposes for which legislation was enacted ... the picture is further complicated by the fact that, at least to some degree, the retention of assimilated law as a category is intended … to produce a significant element of legal continuity'* (35),

8.5 We sought legal certainty from the outset. Our judicial review application *'Statement of Facts'* at paragraph 5.8 (SoF20/12 Attachment 2, bundle p.101), argued that,

> *'the principle of legal certainty should have placed beyond doubt the jurisdictional impact and the implications of LAs/LPAs performing their spectrum management functions as EECC competent authorities'.*

EECC Recital 121 was intended to design-in legal certainty by establishing criteria to bind effectiveness into the operation of the EECC *general authorisation system* (Section 1 paragraph 1.5, above):

> i) as highlighted in our pre-action *'Submission',* at paragraphs 2.7.1 and 2.7.2 (SUB13/9 Attachment 1, bundle p.23),

ii) with the absence of its effectiveness illustrated at paragraph 2.5.12 (bundle p.20),

and,

iii) with the principle of legal certainty being used by the UK Government to oppose, unsuccessfully, a request from the applicant in the *Wells* (2004) case for an EU derived environmental impact assessment directive to be applied alongside domestic planning law to protect her interests, at paragraphs 4.2.17 and 4.2.18 (bundle pp.32 and 33).

8.6 We sought legal certainty by asserting in our Relief sought 2 in our 22 January 2025 Appeal Court application at paragraphs 2.21 to 2.22, that our challenge was *'plainly not unarguable'* because of its EU law components, and therefore the challenge could not have been simultaneously *'Totally without Merit' ('TWM')* (AP22/1 Attachment 12, bundle pp.260 to 262). That followed from our 6 May 2024 appeal skeleton argument, paragraph 2 *'Grounds'* of appeal on J Jarman's *'TWM'* certification of our application (AN6/5 Attachment 6, bundle p.154), asserting that,

> *'this finding is contrary to administrative justice and our rights under Article 6.1 of the Human Rights Act (HRA)* (as asserted in section 4.4 of judicial review application (JRA20/12 Attachment 2, bundle p.90) *and our rights to a remedy through Section 7 of the HRA 1998 underpinning our ECHR Article 13 rights which entitle persons who claim that a public authority has acted, or proposes to act, in a way which is incompatible with an ECHR right, to bring proceedings in the appropriate court or tribunal'.*

9. The direct effect of the EECC *'general authorisation system'*, and the significance of the *'procedural autonomy test'*

9.1 The EECC <u>*general authorisation system*</u> had direct effect through *'binding provision'*, consistent with paragraph 2.7 of UK Government's EU Directives implementation guidance, in the absence of the required public health protection provisions, because the *'system'* grants conditional rights to Telecommunication companies concerning the siting and the operation of relevant equipment. Decisions on the siting of the equipment are subject to both the EECC and UK planning law, to which the EU principles of *effectiveness*, *equivalence* and *procedural autonomy* (ie: the *'procedural autonomy test'*) apply materially.

9.2 The significance of the *'procedural autonomy test'* is reported in paragraphs 6.2.8 and 6.2.9 of our judicial review application *'Grounds'* (GR20/12 Attachment 2, bundle pp.109 to 110). Relying upon cited European Court of Justice (ECJ) authorities, we argued that the *'system'* should have been made effective by the UK Government making *'public health imperative',* as highlighted at Section 1 paragraph 1.6 above.

10. The Town & Country Planning context within which our rights and the general public interest are set

10.1 A material planning consideration arising from Government policy has binding effect in respect to its public interest significance as asserted in Section 1 *'Contested subject-matter of our claim'*, at paragraph 1.5 of our 6 May 2024 Appeal skeleton argument (AP6/5 Attachment 6, bundle p. 161), *'in UK planning law, the existence of a material planning consideration arising from Government policy has binding effect if a LPA is obliged in law to regulate a particular type of development through granting or refusing applications for planning permission under the Town and Country Planning Act 1990, and/or associated legislation'* (1.5).

10.2 And, we further asserted in paragraph 9.23 of that skeleton argument (bundle p. 188), that our rights 1 and 2 above (at Section 6, paragraph 6.2 above), accrue as a consequence of LAs/LPAs EECC competent authority status being engaged with EECC provisions which generate material planning considerations, which must be disposed of in accordance with Lord Hoffmann's formulation as defined in the *Tesco* case (*Tesco Stores Limited v Secretary of State for the Environment [1995] (1 WLR 759)).* https://moderngov.fareham.gov.uk/documents/s25473/CDK.9%20Tesco%20Stores%20v%20SSE%201995%202%20All%20ER%20636.pdf

10.3 Lord Hoffmann emphasised that courts supervise the legality of planning decisions rather than their planning merits. A decision-maker may give a material planning consideration no weight, and the choice between maximising related public benefits and applying a policy favouring proportionality and fairness belongs to the planning authority or the Secretary of State. These principles are stated in paragraphs 56 and 57 of the judgment(12) which read:

'the law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority ...(56)

… this distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State', (57),

making the principles foundational to the UK planning system.

10.4 Development control is therefore binding in the service of the public interest if relevant material planning considerations are disposed of objectively, and the outcome of LA/LPA decision-making is made subject to statutory scrutiny where relevant and judicial review where necessary.

(12) paragraphs g and h, at (13) Section '*Materiality and planning merits'*, All England Law Report, 1995 at page 357

* * *

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Date: 25 August 2026