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CHANCE

GLOBAL ENVIRONMENT NEWSLETTER

Welcome to the Summer edition of our Global Environment Newsletter. This edition covers the following topics:

INTERNATIONAL

IMO Releases its Initial Greenhouse Gas Strategy for Shipping: *Strategy targets 40% GHG emission reductions by 2030, with efforts to achieve 70% reductions by 2030*

The International Maritime Organisation (IMO) has adopted an Interim Greenhouse Gas Strategy following the 72nd session of the Marine Environment Protection Committee in London in April 2018.

Maritime transport currently accounts for 2.5% of global greenhouse gas emissions and, according to the IMO, is predicted to increase between 50% and 250% by 2050. The Interim Strategy seeks to curb this negative trend by establishing a framework for IMO Member States to achieve a shared vision for decarbonisation of international shipping.

"Maritime transport currently accounts for 2.5% of global greenhouse gas emissions and, according to the IMO, is predicted to increase between 50% and 250% by 2050"

The Interim Strategy records a "level of ambition" that all Member States have agreed to aim for, being:

- A reduction in CO2 emissions across international shipping by at least 40% by 2030, while pursuing efforts toward a 70% reduction by 2050 (each compared to 2008 levels);
- A peak in GHG emissions from international shipping as soon as possible, followed by a reduction of at least 50% by 2050 compared to 2008 levels, while maintaining efforts to phase GHG emissions out entirely, "consistent with the Paris Agreement temperature goals"; and
- A decline in the carbon intensity of ships through the implementation of further phases of the Energy Efficiency Design Index for new ships, and continuing to strengthen the energy efficiency design requirements for ships.

In addition to establishing emission reduction targets, the Interim Strategy provides a list of possible short-, medium- and long-term measures which, if implemented, will help to achieve the necessary emissions reductions. The measures include, for example:

"In addition to establishing emission reduction targets, the Interim Strategy provides a list of possible short-, mid- and long-term measures which, if implemented, will help to achieve the necessary emissions reductions"

- In the short term, establishing an improvement programme for existing shipping fleet and considering measures to encourage port developments to minimise adverse impacts;
- In the medium-term, implementing programmes for the effective uptake of alternative low-carbon and zero-carbon fuels and continuing to enhance technical cooperation and capacity building activities; and
- In the long term, pursuing the development and provision of zero-carbon or fossil-free fuels and encouraging other innovative emission reduction mechanisms.

Another element of the IMO's plan to develop a "comprehensive IMO strategy on the reduction of GHG emissions from ships", is the mandatory data collection system for fuel consumption of ships which came into force in March 2018. This data collection system was designed to provide an evidentiary foundation for further objective and transparent policy debate within the Marine Environment Protection Committee.

Similar data collection obligations also exist under EU Regulation (2015/757) on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport which took effect from 1 January 2018. This regulation requires all ships exceeding 5,000 gross tonnage, regardless of flag or port of

registry, to monitor and report on CO2 emissions per voyage into, between, and out of EU (and EFTA) ports.

Together, these initiatives represent a positive environmental shift within the shipping industry and will provide a solid base for further work by the IMO and Member States to continue to combat climate change.

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Green Bond Principles 2018: *New version refines environmental objectives and recommends independent external review*

The 2018 editions of the Green Bond Principles, Social Bond Principles and Sustainability Bond Guidelines have been published at the 2018 Green and Social Bond Principles Annual General Meeting and Conference. A number of complementary documents were also published – best practice guidelines for external reviews; a high-level mapping of the GBP, SBP and SBG to the UN's Sustainable Development Goals (SDG); and a framework for impact reporting of social bonds.

The newly published sets of principles maintain the existing direction of travel. They remain voluntary and focused on the four key principles with the aim of improving standards and transparency. The additional complementary documents support this aim.

Worth noting is the refinement made to the GBP's eligible environmental objectives which are now listed as climate change mitigation, climate change adaptation, natural resource conservation, biodiversity conservation and pollution prevention and control. These categories are similar but do not completely align with those listed in the recently published EU's sustainable taxonomy proposals (See article " Sustainable Finance Legislative Proposals Published").

External Review Guidelines

A key recommendation is that issuers seek an independent external review distinct from any consultant who has assisted in the preparation of a green bond framework or reporting process. The guidelines stress that external reviewers should:

- Follow fundamental ethical and professional principles;
- Satisfy certain organisational requirements, for example, having the appropriate organisation structure and sufficiently experienced staff;
- Include in the review a minimum number of disclosures about the reviewer, such as its credentials, conflict of interest of policy and methodologies used; and
- Have expertise in the relevant categories, assess the benefits targeted by the green or social bond, confirm alignment with the core principles and evaluate the potential risks.

"*A key recommendation is that issuers seek an independent external review distinct from any consultant who has assisted in the preparation of a green bond framework or reporting process*"

Sustainable Development Goals mapping paper

The SDG mapping paper is intended to provide a broad frame of reference by which issuers, investors and bond market participants can evaluate the financing objectives of a given green, social or sustainability bond against the UN's Sustainable Development Goals (SDGs).

Social bonds impact report framework

This framework provides core principles and recommendations for issuers and a reporting template for both quantitative and qualitative information. As with the similar GBP framework, it is voluntary and reporting may need to be adapted by issuers depending on their own circumstances.

All the newly published information is available on the GBP Green, Social and Sustainability bonds webpages hosted by ICMA at https://www.icmagroup.org/green-social-and-sustainability-bonds.

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EU

Circular Economy Package Legislation Adopted: *New rules on recycling, waste separation, landfilling and extended producer responsibility to be transposed by Member States by 5 July 2020*

On 22 May 2018, the EU Member States approved a range of legislative measures forming part the EU's Circular Economy Package. The Circular Economy Package aims to prevent waste and, where this is not possible, to significantly increase rates of recycling. The measures are targeted at all aspects of a product's lifecycle, ranging from product design and packaging, through to consumption and waste management.

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The measures adopted in May 2018 were implemented through amendments to various existing EU directives, including to the Waste Framework Directive (2008/98/EC), the Packaging and Packaging Waste Directive (94/62/EC), and the Landfill Directive (1999/31/EC).

Revised recycling targets are included in the new measures adopted, including an overall target of 55% of municipal waste to be recycled by 2025, increasing to 65% by 2035. In terms of the recycling of packaging waste, new targets have been set at 65% to be recycled by 2025, and 70% by 2030. These overall packaging waste recycling targets are accompanied by a series of material specific targets.

New measures have also been introduced for waste collection, requiring hazardous household waste to be collected separately by 2022, bio-waste by 2023 and textiles by 2025. These measures are in addition to existing rules requiring separate collection for paper and cardboard, glass, metals and plastic.

New measures are also directed at the phasing out of landfilling, with targets that:

- By 2030, all waste suitable for recycling or other recovery will be prohibited from landfills; and
- By 2035 the amount of municipal waste committed to landfills must be reduced to 10% or less of the total generated.

New measures relating to 'extended producer responsibility' ('EPR') have also been introduced. EPR relates to making producers bear financial and/or organisational responsibility for the management of the waste stage of the life cycle of a product. EPR is already a policy principle in various EU Directives, such as the Packaging Directive, and Waste Electrical and Electronic Equipment Directive 2012/19/EU. A number of different EPR schemes are in place across the EU, but because the relevant EU Directives have not previously specified how such schemes should be implemented, there are a range of differing practices. However, through the recent amendments, where EPR schemes have been adopted by Member States, minimum requirements for such schemes must be adhered to. These include minimum requirements for the cost coverage of EPR schemes, standards relating to monitoring, reporting, and evaluation, and the requirement that the roles and responsibilities of all relevant actors involved are clearly defined.

"The measures came into force on 4 July 2018, and Member States will have until 5 July 2020 to transpose the measures"

The measures came into force on 4 July 2018, and Member States will have until 5 July 2020 to transpose the measures into the domestic laws, regulations and administrative provisions necessary to comply with the relevant directives.

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European Commission Proposes New Protection for Whistleblowers: *A new Directive seeks to improve reporting channels and prevent retaliatory behaviour.*

In April this year, the European Commission adopted a package of proposals designed to provide greater protection for whistleblowers. The move follows the public scandals of late that have exposed just how limited the protection is for people who seek to expose alleged corporate wrongdoings in the public interest.

"Only ten EU countries are recognised as having comprehensive whistleblower laws. This lack of consistent protection throughout the EU, coupled with a common fear of retribution, is widely regarded as a strong deterrent to would-be whistleblowers speaking out"

At present, protection for whistleblowers throughout the EU is strongly fragmented, in some cases limited to only certain sectors or particular types of wrongdoings. Only ten EU countries are recognised as having comprehensive whistleblower laws. This lack of consistent protection throughout the EU, coupled with a common fear of retribution, is widely regarded as a strong deterrent to would-be whistleblowers speaking out.

From an environmental perspective, the Commission acknowledges that "*evidence-gathering, detecting and addressing environmental crimes and unlawful conduct against the protection of the environment remain a challenge*". Further, while whistleblower protection exists in only one EU instrument on environmental protection (Directive 2013/30/EU on the safety of offshore oil and gas operations), greater protection for whistleblowers is necessary to achieve the EU's environmental objectives.

The measures set out in the Directive of the European Parliament and the Council on the protection of persons reporting on breaches of Union law (2018/0106/COD) are designed to ensure the effective enforcement of EU laws. The measures include:

- Obligations on Member States to ensure that legal entities in both private and public sectors establish and maintain appropriate internal reporting channels through which potential whistleblowers can easily and confidently bring information;
- Obligations on Member States to ensure that competent authorities have in place independent and autonomous external reporting channels for receiving information, and secure procedures to investigate and ultimately remedy any issues identified;
- Prescribing minimum standards on the protection of reporting persons and the explicit prohibition of particular types and forms of retaliation against reporting persons including, for example, dismissal, discrimination or negative performance assessment; and
- A requirement that Member States provide for effective, proportionate and dissuasive penalties to ensure the effectiveness of the rules on the protection of reporting persons, whilst discouraging malicious and abusive whistleblowing.

"The Commission expects these new measures will greatly improve whistleblower protection throughout the EU by achieving a more consistent approach"

The Commission expects these new measures will greatly improve whistleblower protection throughout the EU by achieving a more consistent approach, and will ultimately assist in strengthening the proper functioning of the single market, including in respect of environmental protection.

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Sustainable Finance Legislative Proposals Published: *A new environmental sustainable taxonomy, requirements to disclose ESG risks and carbon benchmarking*

The European Commission has published a series of legislative proposals to implement its Sustainable Finance Action Plan. The objective of the proposals is to make sustainable finance mainstream and use the capital markets to help fight climate change and implement other sustainability objectives. Four key elements are covered in the legislation:

"The objective of the proposals is to make sustainable finance mainstream and use the capital markets to help fight climate change and implement other sustainability objectives"

Environmental Sustainability Taxonomy

Development of a common taxonomy which would seek to define activities that are environmentally sustainable in the following areas:

- Climate change mitigation and adaptation;
- Sustainable use and protection of water and marine resources;
- Transition to a circular economy;
- Waste prevention and recycling;
- Pollution prevention and control; and

- Protection of healthy ecosystems.

The proposal sets out basic criteria for determining whether activities are sustainable but these will be supplemented by technical screening criteria to be defined in due course. Financial products or corporate bonds marketed as environmentally sustainable would then need to comply with these criteria. It is intended that the taxonomy would be applied on a phased basis from July 2020. While the taxonomy will initially only cover environmental sustainability issues, it is likely to be extended to social issues in due course.

Guidance and Disclosure of ESG risks

Institutional investors will be required to consider and disclose how Environmental, Social and Governance (ESG) factors feature in decision-making on investments and advisory services. The proposals will apply to asset managers, insurance undertakings, pension funds and investment advisors. The intention is that this will enable investors to obtain more comparable information on ESG risks and opportunities.

"Institutional investors will be required to consider and disclose how Environmental, Social and Governance (ESG) factors feature in decision-making on investments and advisory services"

Carbon Benchmarks

The proposal would add to new benchmarks to the existing financial Benchmark Regulation:

- a low carbon benchmark for underlying assets with fewer carbon emissions than a standard investment index; and
- a positive carbon impact benchmark for assets where carbon emission savings exceed emissions.

MiFID2

An amendment to the revised Markets in Finance Instruments Directive (MiFID2) would be made to require financial firms to take into account a client's ESG preferences as part of their investment objectives, and to include ESG considerations in their description of, and advice in relation to, financial instruments.

Further detail on these proposals and analysis is contained in our briefing: "The EU's Sustainable Finance legislative proposals – What you need to know"

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EU/UK

The 'People Over Wind' Habitats Assessment Case: *Mitigation and avoidance measures can no longer be taken into account when determining whether full habitats assessment is required for projects.*

The European Court of Justice's recent decision in *People Over Wind and Sweetman v Coillte Teoranta* (C-323/17) (April 2018) is set to change the way developers must approach habitats regulation assessment (HRA). The first two stages (of the four stage HRA process set out in the box overleaf) were the key focus of the decision.

The matter was a carefully chosen test case, referred from the Irish courts and taken by an experienced litigant. It concerned effects of a development on the habitat of the freshwater pearl mussel, a species with a seriously declining population. The developer had at the Stage 1 "Screening" stage determined that there would be no likely significant effects on the basis of mitigation works to be undertaken as part of the project (in this case, sediment control processes). This enabled the developer to reach a "no significant effects" conclusion so that it did not need to move to a full Stage 2 "Appropriate Assessment" which would require analysis of effects on the affected site's conservation objectives.

In its decision, the CJEU held that "…*it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site".* Developers and local authorities are now grappling with how the decision will change current practice.

A change to current practice

In the UK, case law has been clear that if certain 'features' have been incorporated into the project (and are certain to be effective) there is no sensible reason why those features should be ignored at the screening stage merely because they have been incorporated into the project in order to avoid or mitigate effects. This approach appears no longer to be open to developers or Competent Authorities, with the CJEU aligning the decision closely to the EU's Methodological guidance on *Assessment of plans and projects significantly affecting Natura 2000 sites Methodological guidance*.

The wording of the decision is widely drafted, referring to any measures intended to "avoid or reduce" harmful effects. The focus is now likely to turn to describing features, which may previously have been badged as mitigation measures, as part of the project itself. Initial advice published in the UK indicates that decisions such as siting of development can be considered as part of the project itself (and so factored into the screening stage). However other "good practice" mitigation such as buffer zones (e.g. separating a habitat from new plant) would not be able to be considered at the screening stage.

What does it mean in practice?

The significance of the decision is that we can expect many more projects to have to progress their habitats assessments through to an appropriate assessment, at which stage mitigation can be factored into the assessment of effects. However, it seems unlikely that the ultimate outcomes of HRA will change as a result of the decision. This is because mitigation previously used to conclude a finding of *no adverse effects on the integrity of a European site at* "Stage 1: Screening" will instead be applied to reach that conclusion at "Stage 2: Appropriate Assessment".

It will however increase the burden on developers to prepare additional information to support applications.

Four stages of HRA

Stage 1 Screening: *Is the project likely to have a significant effect on the interest features of the site alone or in-combination with other plans/projects?*

Stage 2 Appropriate Assessment: *Are there implications on the site's conservation objectives? If so, can it be ascertained that the proposal will not adversely affect the integrity of the site?*

Stage 3 Assessment of Alternatives: *Are there conditions/other restrictions that would enable it to be ascertained that the proposal would not adversely affect the integrity of the site? Are there alternative solutions?*

Stage 4 Assessment of IROPI: *Are there imperative reasons of overriding public interest? (compensation may be required)*

"we can expect many more projects to have to progress their habitats assessments through to an appropriate assessment"

It will also increase the transparency of the HRA process and enable the public to have more visibility on (and therefore more ability to challenge the efficacy of) mitigation measures designed to avoid effects on European designated sites.

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BELGIUM

New Soil Clean-up Statute in The Walloon Region: *Less stringent decontamination standards set to incentivise clean-up works*

On 1 March 2018, the Walloon Parliament approved a new clean-up statute, which will replace the current 2008 Walloon clean-up statute. The main objective of the new legislation is to incentivise the clean-up of former industrial sites for redevelopment by providing more efficient survey procedures, and by setting realistic clean-up objectives.

"The main objective of the new legislation is to incentivise the clean-up of former industrial sites for redevelopment by providing more efficient survey procedures, and by setting realistic clean-up objectives"

In this article we comment on the following aspects of the new statute: (i) trigger events for the mandatory conduct of a preliminary soil survey, (ii) requirements in case of property transactions; and (iii) clean-up objectives.

Under the new statute, a preliminary soil survey must be carried out in the following situations:

- Before applying for a permit covering the development of a new project on land that is registered as potentially contaminated;
- When the operation of a potentially polluting activity on a site ceases;
- After a contamination incident has occurred; or
- If the regional environmental authority considers that there are serious indications that land is contaminated.

Based on the results of this preliminary soil survey, the environmental authority may require the party that caused the contamination or, if that party cannot be identified, the operator, owner or holder of other property rights (rights *in rem*) in the land, to conduct additional surveys and clean-up.

A mandatory soil survey is not triggered by transferring property rights in a potentially contaminated site (unlike the position in the Brussels Metropolitan Region and the Flemish Region). However, before transferring any such rights or an environmental permit, the transferor will have to provide the transferee with a *soil certificate*. This is an administrative document summarising the information that the authorities hold regarding the condition of the soil and groundwater and the operation of potentially polluting activities on the relevant land. Based on the content of this certificate, parties can then decide whether they wish to conduct a soil survey on a voluntary basis, before proceeding with the transfer. Transfers undertaken without the necessary certificate being provided may be annulled in court.

"before transferring [any property rights] or an environmental permit, the transferor will have to provide the transferee with a soil certificate"

Where a preliminary soil survey identifies contamination exceeding applicable intervention thresholds, a clean-up obligation is triggered. Under the current 2008 statute, such contamination caused after 30 April 2007 must be removed

entirely so that soil and groundwater reference values are met. Reference values reflect the condition that the soil and groundwater would have if the relevant land had not been impacted by any human activities in the past. Meeting the reference values is costly and may be difficult to achieve in practice. The new statute therefore no longer requires clean-ups to meet these values. It provides that the clean-up of new contamination may be considered as completed if the contamination is reduced below 80% of the intervention threshold.

"The new statute therefore no longer requires clean-ups to meet [reference] values"

For historical contamination (i.e. contamination caused before 30 April 2007), the new statute confirms that clean-up is only required if that contamination presents a severe risk for human health or the environment. Clean-up of such contamination must, as a minimum, remove that risk.

The new clean-up objectives for post-30 April 2007 contamination apply as from 1 April 2018. The remaining provisions of the new statute (e.g. in relation to preliminary soil surveys) are scheduled to enter into force on 1 January 2019.

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CHINA

Recent Developments in the Hong Kong Green Bond Market: *New $100bn green bond issuance programme and grant scheme established.*

There have been a number of significant developments in the Hong Kong green bond market in recent months.

The Hong Kong Government announced a green bond issuance programme in February 2018. In his speech on the 2018-19 Hong Kong Government Budget, the Hong Kong Financial Secretary announced that the programme would have a borrowing ceiling of $100 billion; and that sums borrowed would be credited to the Capital Works Reserve Fund to provide funding for green public works projects of the Government. The intention is to encourage more issuers to arrange financing for their green projects through Hong Kong's capital markets.

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In introducing the required draft legislation to the Legislative Council in June 2018, the Hong Kong Secretary for Financial Services and the Treasury noted that: "*The Programme will align with guidelines/standards widely accepted by global investors for green bond issuance. To follow the best market practice and set a good example for other potential green issuers, the Government is inclined to engage independent reviewers to verify and/or certify the alignment of the frameworks of individual issuances under the Programme with these green bond issuance standards*." More details are yet to be released, including the scope of green public works projects and the tenure of the bonds.

In January 2018, the Hong Kong Government also announced that it will introduce a Green Bond Grant Scheme to subsidise qualified green bond issuers using the Green Finance Certification Scheme (Certification Scheme) launched by the Hong Kong Quality Assurance Agency (HKQAA) in January

2018. The subsidy per issue is up to US$102,000 (HK$800,000) to cover certification expenses and the issuance would need to carry a minimum size of around US$64 million (HK$500 million).

Under the Certification Scheme, HKQAA acts as a third party conformity assessment provider. It evaluates the eligibility of green finance projects by assessing the effectiveness of an environmental method statement provided by the issuer at pre- and post-issuance stages and issuing relevant certifications. The Certification Scheme was developed with reference to a number of widely recognised international and national standards including, among others, the UN Clean Development Mechanism, the Green Bond Principles, the People's Bank of China Announcement No. 39 and its Annex: Green Bond Endorsed Project Catalogue, and ISO 26000:2010 Guidance on Social Responsibility. There have been three corporate green bond issuances under the Certification Scheme, including property developers Swire Properties, New World Development and Modern Land.

The Hong Kong government is also actively seeking supranational organizations to issue benchmark green bonds in Hong Kong. For example, the World Bank has recently issued its first HKD-denominated green bond of HK$1 billion.

"The Hong Kong government is also actively seeking supranational organizations to issue benchmark green bonds in Hong Kong"

The importance of the green bond sector in Hong Kong is also demonstrated by Hong Kong hosting the 2018 Green and Social Bond Principles Annual General Meeting and Conference on 14 June 2018. The event, which is organised by the International Capital Market Association and co-hosted by the Hong Kong Monetary Authority, with the support of the Hong Kong Financial Services Development Council, is now in its fourth year, and has become one of the most high profile gatherings for leading participants in the green bond market, and increasingly for the flourishing social and sustainable bond markets and other asset classes in sustainable finance. At the event, the updated versions of the Green Bond Principles, Social Bond Principles and Sustainability Bond Guidelines, as well as a number of complementary key documents, have been published (See article "Green Bond Principles 2018").

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NETHERLANDS

Exiting Coal in the Netherlands: *Dutch Government proposes a new phased ban on coal-fired power generation*

The Cabinet of the Dutch Government which took power in October 2017 has set an ambitious target to reduce CO2 emission in The Netherlands by 49% by 2030 (against 1990 levels). This exceeds the contribution that the EU has set the Netherlands to help meet its 2030 carbon reduction targets (the EU considers its 2030 targets to be a fair and ambitious contribution to the Paris Agreement objectives).

In order to achieve the Dutch target, the Cabinet aims to secure a significant increase in renewable energy generation, supported by an effective subsidy

regime. It will also put a halt to CO2 emissions from coal-fired power plants, which are an important source of CO2 emissions in the Netherlands, contributing about 10% to annual Dutch emissions.

Currently, there are five operational coal-fired power plants in the Netherlands. Two of those have been in operation already for 20 years or more, but the other three only became operational in the last decade and apply more modern and efficient generation techniques.

In May 2018, the Cabinet launched an internet consultation on a "Bill forbidding coal-fired power production" ("*Wet verbod op kolen bij elektriciteitsproductie*"). Once passed by Parliament, it is intended that the Bill would enter into force immediately to prohibit operation of the most inefficient plants (with a net electricity efficiency of less than 40%). For plants with a net electricity efficiency between 40% and 44% the prohibition is intended to take effect as from 1 January 2025 (which we understand will include the two older plants mentioned above). For those with a net electricity efficiency above 44% (which we understand will include the three newer plants mentioned above), the prohibition will take effect from 1 January 2030.

"Once passed by Parliament, it is intended that the Bill would enter into force immediately to prohibit operation of the most inefficient plants (with a net electricity efficiency of less than 40%)"

Unsurprisingly, the responses to this Bill in the market have been mixed. It is positively received by the NGO and other groups promoting sustainability, although they are critical of the lengthy duration of the phase-out period.

The phase-out periods in the Bill were chosen by the Cabinet on the basis of a reasonable period for investors of these plants to make a reasonable return on investment. Of course, it can (and probably will) be debated how realistic these periods are.

"The phase-out periods in the Bill were chosen by the Cabinet on the basis of reasonable a reasonable period for investors of these plants to make a reasonable return on investment"

To ascertain compliance with the first Protocol of the European Convention on Human Rights, the Bill includes the right to claim damages for an operator who can prove that, compared to other coal-fired power plants, it has been individually and adversely affected by the closure of its plant.

The Dutch measures are yet another step along the path towards a coal-free future. In November 2017, an alliance of more 20 partners (including The Netherlands and other governments, businesses and organisations) signed a declaration on ending coal-fired power generation. The declaration announces an intention on the part of signatories to phase out traditional coal power generation and a moratorium on new coal plant without Carbon Capture and Storage (CCS). Businesses commit to powering operations without coal, and all commit to clean power policies and restricting traditional coal power finance without CCS. It is also being reported that some of the world's largest insurance companies are now refusing to provide insurance cover to coal mining companies and coal-fired power generators over concerns that global warming will increase claims on policies.

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UK

Open Cast Mine Rejected on Grounds of Climate Change Impact: *Possibility that applicants for development projects will need to consider supply chain impacts*

The UK Government recently refused an application for planning permission for an open cast coal mine on the basis that it would exacerbate climate change. Particular emphasis was placed on the cumulative effects of emissions in the atmosphere in the long term and the importance to which the Government affords combatting climate change. The Secretary of State for Housing Communities and Local Government concluded that the overall scheme would have an adverse effect on greenhouse gas emissions and climate change of "very substantial significance", and this was given very considerable weight when deciding whether to grant permission.

"the overall scheme would have an adverse effect on greenhouse gas emissions and climate change of "very substantial significance""

HJ Banks & Company Ltd had sought permission for a surface mine for the extraction of coal, sandstone and fireclay. The council initially resolved to approve the mine, but the application was called in by the Secretary of State because of concerns relating to consistency with the Government's commitment to replace coal-fired power stations and the Clean Growth Strategy. The Inspector then also recommended that the application be approved, however the Secretary of State disagreed and decided to refuse planning permission.

Central to the Secretary of State's decision was his interpretation and application of paragraph 149 of the National Planning Policy Framework. This provides that "*[p]ermission should not be given for the extraction of coal unless the proposal is environmentally acceptable, or can be made so by planning conditions or obligations; or if not, it provides national, local or community benefits which clearly outweigh the likely impacts to justify the grant of planning permission*."

The Secretary of State considered that there is a potentially wide scope on what environmental considerations might apply in considering the meaning of "environmentally acceptable" in the first limb of the test, and that considerable landscape harm (together with other environmental harm) would significantly outweigh biodiversity or other environmental benefits of the scheme. He therefore concluded that the scheme would not be environmentally acceptable, and could not be made so through the imposition of planning conditions or obligations.

" the benefits of coal extraction and employment should be afforded great weight, but that this needed to be weighed against a number of adverse impacts, including the "very considerable negative impact caused by the adverse effect of Green House Gas emissions and on climate change.""

More importantly, the Secretary of State disagreed with the Inspector's interpretation that the second limb of the test is limited to social and economic dimensions. He considered that the "*the environmental harm considered in the assessment of environmental acceptability under the first limb of the test constitute a major part of the likely impacts for the second limb*." He considered that the benefits of coal extraction and employment should be afforded great weight, but that this needed to be weighed against a number of adverse impacts, including the "*very considerable negative impact caused by the adverse effect of Green House Gas emissions and on climate change*."

Balancing this impact, and a number of other factors, the Secretary of State found that the second limb of the test in paragraph 149 of the National Planning Policy Framework did not support the scheme. That is, that the national, local and community benefits of the scheme would not clearly outweigh the likely impacts so as to justify the grant of planning permission.

We understand that the Secretary of State's refusal is being challenged in the High Court in October, with the applicant arguing that there were serious legal errors in the Secretary of State's reasoning and that the decision departs from previous precedent where permission for extraction projects has been granted.

The conclusions reached by the Secretary of State in relation to the very substantial significance of adverse effects on greenhouse gas emissions and climate change, and the considerable weight given to such effects in deciding whether to grant permission, could have broader implications for new coal extraction projects and other emitting industries. In this regard, the National Planning Policy Framework provides that "*Planning plays a key role in helping shape places to secure radical reductions in greenhouse gas emissions, minimising vulnerability and providing resilience to the impacts of climate change, and supporting the delivery of renewable and low carbon energy and associated infrastructure*."

It will be interesting to see how the High Court treats this issue when it is considered later in the year, and whether planning authorities will start to give greater weight to the cumulative effects of emissions in the atmosphere. Applicants may need to start giving greater consideration to scope 3 emission impacts (i.e. supply chain impacts) and be able to prove that the benefits of new projects clearly outweigh any such impacts.

"Applicants may need to start giving greater consideration to scope 3 emission impacts (i.e. supply chain impacts) and be able to prove that the benefits of new projects clearly outweigh any such impacts"

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