



Francis Taylor Building

Environmental Law Webinar

Environment Bill

23 April 2020

Andrew Fraser-Urquhart QC

Conor Fegan

Horatio Waller

Prof. Pavlos Eleftheriadis

Francis Taylor Building

T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Overview

- The Environment Bill 2020 serves two purposes:
 1. To create a new framework for environmental governance (Parts 1-2);
 2. To make provision for specific improvement of the environment (parts 3-7)
- In this talk we will summarise Parts 1-2 on the new framework and the new provisions on net biodiversity gain
- We will also provide a comparison of the Bill's provisions and the existing protections in EU law

Francis Taylor Building

T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Specific improvement of the environment

- The Bill makes provision for the specific improvement of the environment in these areas:
 - Waste and resource efficiency (part 3);
 - Air quality and environmental recall (part 4);
 - Water (part 5);
 - Nature and biodiversity (part 6); and
 - Conservation covenants (part 7).

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Policy Background

- The provisions in the first part were published in an earlier bill - the draft Environmental (Principles and Governance) Bill (published 19 Dec 18).
- This fulfilled a legal obligation set out in s16 of the European Union (Withdrawal) Act 2018 to fill the environmental governance gap caused by withdrawal from the EU.
- Two important things happened after that earlier Bill was introduced:
 1. Criticism of the Bill by the Environmental Audit Committee in its April 19 report, following evidence from env. practitioners.
 2. 2019 Election and Conservative Manifesto where pledges were made to beef up environmental standards.
- The earlier Bill was pulled. The Environment Bill 2020 builds on the provisions in the earlier bill, addressing some of the criticisms, and fulfils the manifesto pledges around environmental standards.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

New framework for environmental governance

- Environmental targets
- Environmental Improvement plans (EIPs)
- Policy statement on environmental principles
- Statements about new environmental laws
- The Office for Environmental Protection (OEP)



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Environmental Targets

- Provision made for the SoS to create environmental targets through regulations (s1) and for a cycle of review (s6) and reporting (s5).
- Targets must at least be set for “priority areas” (i.e. air quality, resource efficiency and waste reduction, water and biodiversity) and in relation to particulate matter.
- Duty on the SoS to ensure the targets are met (s4).



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Environmental Improvement Plan

- Duty on Government to produce an EIP (s7)
- The 25 Year Environment Plan published Jan 2018 will be the first EIP.
- “An [EIP] is a plan for significantly improving the natural environment in the period to which the plan relates.” The period must not be shorter than 15 years.
- Provision is made for the monitoring of EIPs, and for a cycle of review and reporting (ss7-15)

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Policy statement on environmental principles

- Requires publication of a policy statement on environmental principles, including how they are to be interpreted and applied (s16)
- Purpose is to make environmental principles central to the policy development process across government. Secured by a duty on minister to “have due regard” to the policy statement (s18) – old wording said “have regard”)
- Same environmental principles as under old bill except that Aarhus provisions removed:
 - (a) *the principle that environmental protection should be integrated into the making of policies,*
 - (b) *the principle of preventative action to avert environmental damage,*
 - (c) *the precautionary principle, so far as relating to the environment,*
 - (d) *the principle that environmental damage should as a priority be rectified at source,*
and
 - (e) *the polluter pays principle*

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Statements about new environmental laws

- Where a Minister is of the view a Bill constitutes environmental law, they must lay a statement to that effect before Parliament and a statement whether the Bill will or will not reduce the level of environmental protection provided by existing law (s19).
- Duty on the SoS to report on developments in international environmental protection legislation every 2 years (s20).

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Possible Legal Challenges

- Section 4 duty – a free standing duty or just through the review process?
- Interaction of targets and EIP
- An ongoing improvement process?
- Section 18 duty – “due regard”
- Net biodiversity gain – position pre-application – PP really required?

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk

The OEP — Legal Opportunities

- Practitioners will have another weapon in their environmental law arsenal — although replacing the Commission it is likely that the OEP will have a more visible presence on the legal landscape
- The complaints process may be a cheap and effective way of delivering results for clients outside of court with no costs risk
- Practitioners may find an ally in the OEP when involved in cases raising complex and systemic questions of environmental law
- The absence of a specific time limit on environmental reviews will be useful where ordinary time limits have expired
- The Environmental Review mechanism will be a new source of work for environmental practitioners

The OEP — Potential Legal Challenges

- OEP will be amendable to judicial review — scope for challenging decisions made during the complaints process or — more significantly — the procedure adopted by the OEP for prioritising complaints
- Potential for the OEP complaints process to be an alternative remedy in environmental cases which will have to be exhausted before judicial review proceedings can be launched
- Scope for argument over the precise ambit of the OEP's powers and functions (e.g. the definition of environmental law)
- Scope for challenging public authority responses to INs & DNAs
- Scope for using advice and scrutiny reports in other contexts (e.g. legal challenges or appeals)



Francis Taylor Building

Andrew Fraser-Urquhart QC
afu@ftbchambers.co.uk

Prof. Pavlos Eleftheriadis
pavlos.eleftheriadis@ftbchambers.co.uk

Horatio Waller
Horatio.waller@ftbchambers.co.uk

Conor Fegan
Conor.fegan@ftchambers.co.uk



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building



Biodiversity Net Gain
Horatio Waller

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Introduction

- Proposed planning condition requiring 10% biodiversity net gain for all planning permissions, with exceptions.
- Operate as a pre-commencement condition requiring a “biodiversity gain plan” to be submitted to the planning authority and approved.



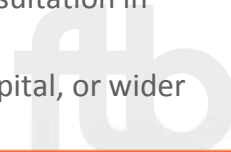
Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Policy context

- The 25 Year Environmental Plan (Jan 2018) set ambition of embedding a broad “environmental net gain” principle in the planning system.
- Revised NPPF (July 2018) introduced stronger policy on securing conservation/enhancement to biodiversity (para 175).
- Policy taken a step further. Followed Govt consultation in 2019.
- Potentially precursor to a system of natural capital, or wider environmental, net gain.



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Scope (1)

- Does not apply to NSIPs under PA 2008 or marine development under Marine and Coastal Access Act 2009.
- Applies to development under TCPA 1990.
- Exceptions: development permitted by a development order (such as PD), or under s293A of the TCPA 1990 (urgent Crown development) or any other development of such description the Secretary of State carves out through regulations.



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Scope (2)

- Draft Regs not prepared / published yet.
- Govt consultation response suggests potential exemptions or reductions in standards for:
 - Small scale development
 - Self-build resi
 - Brownfield development.on the basis of viability concerns.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Scope (3)

- Different provision may be made through regulations where development will impact “irreplaceable habitat” (para 18).
- What qualifies as IH will be defined in Regs.
- Govt consultation response suggests this includes protected sites, for example those under the Habitats Directive/Birds Directive.
- Intention seems to be to carve out sites from this regime that are already subject to the standards of the HD/BD.



Francis Taylor Building

The Biodiversity Gain Objective

- The requirement for at 10% net gain is known as the “biodiversity gain objective”.
- The biodiversity gain plan should assess the value of biodiversity before development and after development, and demonstrate that at least a 10% net gain is achieved between the earlier and later values.
- % can be varied through regulations.

Calculating biodiversity value

- Biodiversity value is to be calculated by applying the “biodiversity metric”.
- This is a document/tool which the Secretary of State will publish which measures biodiversity value (paras 3-4).



- DEFRA will update its Metric over time and request comments.

Pre-development biodiversity value

- The relevant date is generally the date of the planning application.
- Except where a person carries out activities without planning permission which lowers biodiversity value.
 - The idea is to preclude landowners /developers from degrading habitats before applying for permission.
- Also where the site is registered as a “biodiversity gain site” (i.e. a site to provide compensatory habitat) the pre-development biodiversity value is that which the site is expected to achieve, as set out in the Biodiversity Gain Site Register.



Francis Taylor Building

Post-development biodiversity value

- Apply the metric to the development plans as detailed in the biodiversity gain plan.
- To count, significant increases in onsite biodiversity value must be secured through a “suitable mechanism” (ie condition / obligation) and will be maintained for at least 30 years after the completion of development.



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Compensatory frameworks

- If the objective cannot be achieved through on-site improvements, you can compensate for deficit this by:
- buying biodiversity benefits achieved on Biodiversity gain sites (off-site benefits) to apply to your development.
- or, if that is not possible/feasible, buying biodiversity credits from the Government.



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Allocating off-site benefits

- Where not feasible to achieve the objective through on-site measures, can have allocated to the development “registered offsite biodiversity gain”.
- This is gain achieved through other development where use of this as compensation.
- Public Biodiversity Gain Site Register will give details of sites available to provide compensatory habitat, the type of habitat created etc..
- Must be agreed with the other developer/landowner.
- A new market created for selling biodiversity benefits.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Biodiversity credits

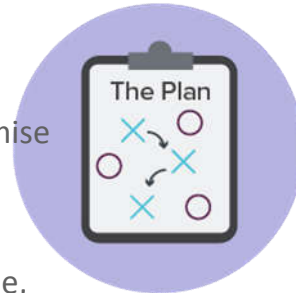
- Where on and off-site gains not available or feasible, can buy biodiversity credits.
- New system created where statutory biodiversity credits can be purchased - equivalent to a specified gain in biodiversity value.
- Money possibly used to fund the enhancement of nationally strategic habitats.



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk

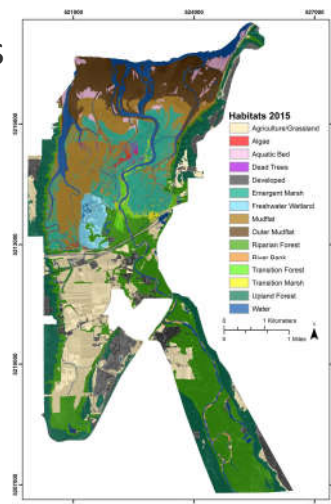
Biodiversity gain plan

- Information about steps taken to minimise adverse effect on onsite habitat,
- pre-development biodiversity value,
- the post-development biodiversity value,
- any registered offsite biodiversity gain allocated to the development and
- any biodiversity credits purchased for the development
- AND demonstrate the objective is achieved.



Local Nature Recovery Strategies

- Idea is to produce document and plan for each local area that specifies habitat priorities and strategies for the local area to guide compensatory measures.
- Likely expectation that these are used inform biodiversity gain plans.





Francis Taylor Building

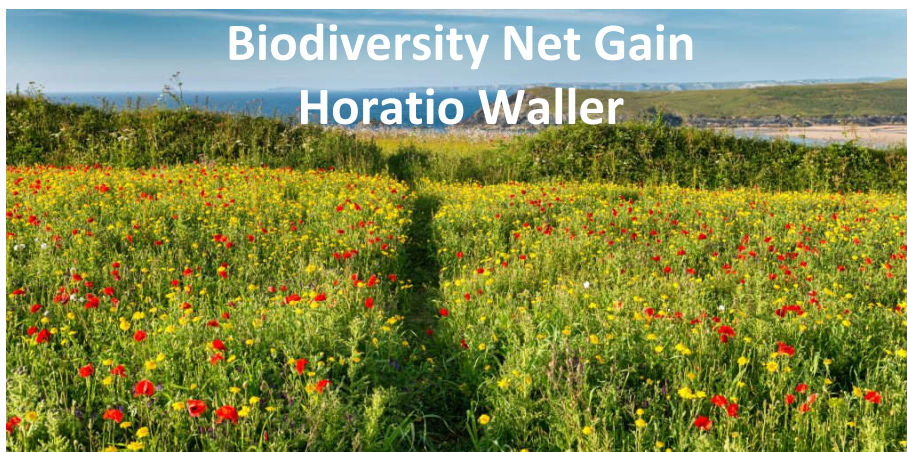
Administration

- LPA must be satisfied plan contains the key information and achieves the biodiversity gain objective.
- If LPA refuses, development cannot proceed lawfully unless the developer successfully appeals this decision to PINS.
- In practice, expected that this process will be run in parallel with a planning app.
- Regs will make provision in respect of the procedure for that determination and appeals.
- Govt consultation response indicates it will fund the additional burdens on LPAs.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk

The Office for Environmental Protection ('OEP')

Conor Fegan

conor.fegan@ftbchambers.co.uk



The OEP — Establishment & Overview

- Establishment of OEP (cl. 21 – 20 & Sch. 1) with three broad functions:
 - Advisory (cl. 27)
 - Scrutiny (cl. 25 – 26)
 - Enforcement (cl. 28 – 38)

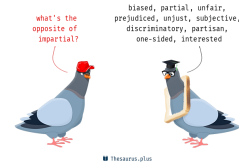


The OEP will provide a domestic replacement for the scrutiny function of the European Commission and the European Environment Agency [...] it will also manage and investigate complaints about alleged contraventions of environmental law by public authorities

Explanatory Notes to the Draft Bill

The OEP — Principal Objectives

- Principal objectives of the OEP (cl. 22(1)):
 - environmental protection (cl. 22(1)(a));
 - improvement of the natural environment (cl. 22(1)(b)).
- OEP under general duties to act ‘objectively and impartially’ (cl. 22(2)(a)) and to ‘have regard to the need to act proportionately and transparently’ (cl. 22(2)(b))
- Expected to prepare a ‘strategy’ (cl. 22(3)) demonstrating how it will comply with these provisions to be laid before Parliament (cl. 23(1)) and reviewed at least once every three years (cl. 23(3))



The OEP — Advisory Function

- Advisory functions in relation to environmental law (cl. 27):
 - duty to give advice to a minister when asked to do so (cl. 27(1) – (2));
 - power to give advice to a minister about ‘any changes to environmental law proposed by a Minister of the Crown’ (cl. 27(3)).
- Advice must be in writing (cl. 27(4)) and must be published (cl. 27(4)) along with details of any request to give advice (cl. 27(5)) with the possibility of it being laid before Parliament (cl. 27(6))
- Potential source of domestic expertise in environmental policy-making.



The OEP — Scrutiny Function (1)



- Specific duty to monitor progress:
 - in improving natural environment in line with EIP (cl.25(1)(a));
 - meeting environment targets set under cl. 1 – 2 (cl. 25(1)(b));
 - meeting any interim targets set under cl. 10 and 13 (cl. 25(1)(c)).
- Publication of an annual ‘progress report’ with particular matters to be considered (cl. 25(2) – (6))
- Report to be laid before Parliament (cl. 25(7)) no later than six months after the publication of annual report by Secretary of State (cl. 25(8))
- Secretary of State must respond and lay response before Parliament (cl. 25(9) – (11)) including responding to recommendations (cl. 24(10))

The OEP — Scrutiny Function (2)



- General duty to ‘monitor the implementation of environmental law’ (cl. 26(1))
- Reports must be published and laid before Parliament (cl. 26(3))
- Secretary of State must respond within three months and lay any response before Parliament (cl. 26(5))

The OEP — Scrutiny Function (3)



- Intention is for the OEP to provide an ‘independent assessment of progress made in improving the natural environment in accordance with the current environmental improvement plan and targets’ (Explanatory Notes @ 218)
- General duty to monitor implementation will catch environmental legislation e.g. ‘the Habitats Regulations’ (Explanatory Notes @ 227) with opportunity to assess the ‘strengths and weaknesses of legislation’ (Explanatory Notes @ 228)
- Effectiveness will depend on expertise, proactiveness and funding. Useful for NGOs highlighting systemic issues?

The OEP — Enforcement Overview (1)



- Enforcement functions relate to ‘failures by public authorities to comply with environmental law’ (cl. 28(1))
 - ‘unlawfully failing to take environmental law into account’ (cl. 28(2)(a))
 - ‘unlawfully exercising, or failing to exercise, functions under environmental law’ (cl. 28(2)(b))
- Bespoke definition of ‘environmental law’ in cl. 43
- Enforcement functions are exercisable either following a complaint (cl. 29) or by the OEP of its own volition (cl. 30(2))

The OEP — Enforcement Overview (2)



- Enforcement policy contained in the general strategy (cl. 22(6)) that sets out:
 - how it will determine if failures to comply with law are serious (cl. 22(6)(a) – (b));
 - how functions will be exercised to respect integrity of other regimes and ombudsmen (cl. 22(6)(c) – (d));
 - how it intends to prioritise cases (cl. 22(6)(e).
- The importance of prioritising cases with ‘ongoing or recurrent conduct’ (cl. 22(7)(a)), ‘serious damage to natural environment or human health’ (cl. 22(7)(b)) and ‘point of environmental law of general public importance’ (cl. 22(7)(c)).

The OEP — Enforcement Overview (3)



- | | | |
|--|-----------|--|
| <ul style="list-style-type: none"> • Equitable Remedies (e.g. quashing order or declaration) • Environmental Review (Statement of Non-Compliance) • Decision Notice • Information Notice • Investigation • Complaint Information | <p>OR</p> | <p>Judicial Review / Statutory Challenge where ‘serious failure to comply with environmental law’ (cl. 36(1)) and it is ‘necessary to make such an application to prevent, or mitigate, serious damage to natural environment or human health’ (cl. 36(2))</p> |
|--|-----------|--|



The OEP — The Complaints Process

- Person may make complaint if they 'believe that a public authority has failed to comply with environmental law' (cl. 29(1))
- Publication of a complaints policy (cl. 29(2))
- Statutory restrictions:
 - any natural or legal person, but not by 'any person whose functions include functions of a public nature (cl. 29(4))
 - must be in accordance with complaints procedure (cl. 29(3)) and must have exhausted any applicable 'internal complaints procedure' (cl. 29(5))
 - must be brought one year since alleged breach or three months since internal complaints procedure exhausted (cl. 29(6))



The OEP — Investigations

- Discretion to investigate complaints (cl. 30(1)) if complaint or information indicate there may have been serious failure to comply with environmental law (cl. 30(1) – (2))
- The investigation is into whether there has been a 'failure to comply with environmental law' (cl. 30(3))
- Must notify the public authority (s.30(4))
- Must prepare a report that outlines whether the public authority has failed to comply with environmental law, the reasons for that conclusion and any recommendations (cl. 30(5) – (8)) that may be published (cl. 30(9))



The OEP — Information Notices

- Power to issue an Information Notice (“IN”) where the OEP has ‘reasonable grounds for suspecting that a public authority has failed to comply with environmental law and this failure is serious’ (cl. 32(1))
- IN specifies the alleged breach and requests information (s. 32(2))
- Public authority under a duty to respond in writing within two months or time specified in IN (cl. 32(3) – (4)) and provide information ‘so far as reasonably practicable’ (cl. 32(3)(b))
- Response must include response to allegation and any steps the public authority intends to take in response to allegation (cl. 32(5))
- OEP can withdraw the IN or can issue more than one IN in respect of an alleged breach of environmental law (cl. 32(6))



The OEP — Decision Notices

- Power to issue an Information Notice (“DN”) where the OEP is ‘satisfied, on the balance of probabilities, that the public authority has failed to comply with environmental law and this failure is serious’ (cl. 33(1))
- DN sets out the breach and steps which OEP considers the public authority should take (cl. 33(2))
- Public authority respond within two months or time specified (cl. 33(3)) and must state whether it agrees (cl. 33(4)(a)), whether it will take steps specified (cl. 33(4)(b)) and any other steps (cl. 33(4)(c))
- OEP can only issue a DN if it has issued at least one IN in respect of the alleged breach (cl. 33(5)(a)) and can withdraw (s. 33(5)(b))

The OEP — Environmental Review (1)



- Power to 'apply to the Upper Tribunal for an environmental review' (cl. 35(1)) which is a review of:
 - the alleged conduct described in the decision notice as constituting a breach of environmental law (cl. 35(2)(a));
 - alleged conduct that occurred after the decision notice but is similar to conduct described in notice (cl. 35(2)(b))
- Determine whether the authority has 'failed to comply with environmental law' (cl. 35(5)) and when doing so 'applying the principles applicable on an application for judicial review' (cl. 35(5))
- No application before end of period for responding to DN (cl. 35(3)(a)) or before expiry of JR / statutory review time (cl. 35(3)(b))

The OEP — Environmental Review (2)



- Upper Tribunal will issue a 'statement of non-compliance' (cl. 35(6)) if the authority has failed to comply with environmental law, but this does not affect the 'validity of the conduct' (cl. 35(7))
- It may grant judicial review remedies (but not damages) (cl. 35(8) – (9)) but only if satisfied that remedy would not:
 - cause substantial hardship or substantially prejudice rights of any person other than the authority (cl. 35(8)(a));
 - be detrimental to good administration (cl. 35(8)(b)).
- Public authority must make statement within two months of statement of non-compliance outlining steps it will take (cl. 35(10))



The OEP — Judicial Review

- Apply for judicial or statutory review in relation to conduct of public authority if it considers:
 - the conduct constitutes a serious failure to comply with environmental law (cl. 36(1));
 - it is necessary to make such an application to prevent, or mitigate, serious damage to the natural environment or to human health (cl. 36(2))
- Different outcome test does not apply (cl. 36(3))
- Public authority must respond within two months to any finding of breach of environmental law with steps it will take (cl. 36(4) – (5))
- General power to apply to intervene in proceedings (c;. 36(6))



The OEP — Supplementary Provisions

- Other general duties in respect of consultation, publicity and information:
 - duty to involve relevant minister (cl. 37)
 - duty to make public statements cl. 38)
 - disclosure and confidentiality (cl. 39 – 40)
- Schedule 1 with further provisions relating to membership (sch. 1, para 1), delegation of functions (sch. 1, paras 8 – 10) and funding (sch. 1, paras 11 – 15)
- General power of competence to do “anything [...] it thinks appropriate for the purposes of, or in connection with, its functions” (sch. 1, para. 8(1))



Francis Taylor Building

The Environment Bill – Two Comparisons with EU Law

Professor Pavlos Eleftheriadis

*Professor of Public Law, University of Oxford
Barrister, Francis Taylor Building*



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Two topics

- Environmental Principles
- Enforcement Powers



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

1: ENVIRONMENTAL PRINCIPLES



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Queen's Speech October 2019

Speech

Queen's Speech 2019

Her Majesty's most gracious speech to both Houses of Parliament.

Published 14 October 2019
From: [Cabinet Office](#) and [Prime Minister's Office, 10 Downing Street](#)

Delivered on: 14 October 2019 (Transcript of the speech, exactly as it was delivered)

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

*'for the first time, environmental principles
will be enshrined in law'.*

My Ministers remain committed to protecting and improving the environment for future generations. For the first time, environmental principles will be enshrined in law. Measures will be introduced to improve air and water quality, tackle plastic pollution and restore habitats so plants and wildlife can thrive. Legislation will also create new legally-binding environmental improvement targets. A new, world-leading independent regulator will be established in statute to scrutinise environmental policy and law, investigate complaints and take enforcement action [Environment Bill].

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Speech

Queen's Speech December 2019

Her Majesty's most gracious speech to both Houses of Parliament.

Published 19 December 2019

From: [Prime Minister's Office, 10 Downing Street](#)

Delivered on: 19 December 2019 (Transcript of the speech, exactly as it was delivered)

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

‘a bill will enshrine in law environmental principles’

My Government will continue to take steps to meet the world-leading target of net zero greenhouse gas emissions by 2050. It will continue to lead the way in tackling global climate change, hosting the COP26 Summit in 2020. To protect and improve the environment for future generations, a bill will enshrine in law environmental principles and legally-binding targets, including for air quality. It will also ban the export of polluting plastic waste to countries outside the Organisation for Economic Co-operation and Development, and establish a new, world-leading independent regulator in statute.



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

How does the Bill do it?



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

The Bill introduced in the House of Commons on 30
January 2020 (*mentions policies, not principles*)

A
B I L L

TO

Make provision about targets, plans and policies for improving the natural environment; for statements and reports about environmental protection; for the Office for Environmental Protection; about waste and resource efficiency; about air quality; for the recall of products that fail to meet environmental standards; about water; about nature and biodiversity; for conservation covenants; about the regulation of chemicals; and for connected purposes.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Five Principles

- Five Principles**
 - I. integration
 - II. prevention
 - III. precaution
 - IV. rectification
 - V. polluter pays

- Complex Architecture**



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Environment Bill - clause 16(2)

16 Policy statement on environmental principles

(1) The Secretary of State must prepare a policy statement on environmental principles in accordance with this section and section 17.

(2) A “policy statement on environmental principles” is a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy.



Environment Bill - clause 16(2)

16 Policy statement on environmental principles

(1) The Secretary of State must prepare a policy statement on environmental principles in accordance with this section and section 17.

(2) A “policy statement on environmental principles” is a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy.

Note: Government Policy, not decisions,
e.g. Planning Permission, DCO



Environment Bill, clause 16(5)

- (5) In this Part “environmental principles” means the following principles –
- (a) the principle that environmental protection should be integrated into the making of policies,
 - (b) the principle of preventative action to avert environmental damage,
 - (c) the precautionary principle, so far as relating to the environment,
 - (d) the principle that environmental damage should as a priority be rectified at source, and
 - (e) the polluter pays principle.



Clause 18(1) - Effect: ‘due regard’

18 Policy statement on environmental principles: effect

- (1) A Minister of the Crown must, when making policy, have **due regard** to the policy statement on environmental principles currently in effect.
- (2) Nothing in subsection (1) requires a Minister to do anything (or refrain from doing anything) if doing it (or refraining from doing it) –
 - (a) would have no significant environmental benefit, or
 - (b) would be in any other way disproportionate to the environmental benefit.
- (3) Subsection (1) does not apply to policy so far as relating to –
 - (a) the armed forces, defence or national security,
 - (b) taxation, spending or the allocation of resources within government, or
 - (c) Wales.



Clause 18(2) - Effect: 'disproportionate'

18 Policy statement on environmental principles: effect

- (1) A Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect.
- (2) Nothing in subsection (1) requires a Minister to do anything (or refrain from doing anything) if doing it (or refraining from doing it) –
 - (a) would have no significant environmental benefit, or
 - (b) would be in any other way disproportionate to the environmental benefit.
- (3) Subsection (1) does not apply to policy so far as relating to –
 - (a) the armed forces, defence or national security,
 - (b) taxation, spending or the allocation of resources within government, or
 - (c) Wales.



Clause 18(3) - Effect: 'armed forces' etc.

18 Policy statement on environmental principles: effect

- (1) A Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect.
- (2) Nothing in subsection (1) requires a Minister to do anything (or refrain from doing anything) if doing it (or refraining from doing it) –
 - (a) would have no significant environmental benefit, or
 - (b) would be in any other way disproportionate to the environmental benefit.
- (3) Subsection (1) does not apply to policy so far as relating to –
 - (a) the armed forces, defence or national security,
 - (b) taxation, spending or the allocation of resources within government, or
 - (c) Wales.



Francis Taylor Building

Explanatory Notes – January 2020

Clause 18: Policy statement on environmental principles: effect

189 Clause 18 sets out the legal duty on Ministers of the Crown in using the environmental principles policy statement. It also details the relevant exemptions to the duty to have due regard to the policy statement.

190 Subsection (1) requires Ministers to have due regard to the environmental principles policy statement when making policies included in the scope of the duty (in other words, policy that is not excluded). This means that, when making policy, Ministers of the Crown must have the correct level of regard to the content of the environmental principles policy statement.

191 Subsection (2) sets out that the policy statement does not require Ministers to take, or refrain from taking, any action that would have no significant environmental benefit, or if the environmental benefit would be disproportionate when compared to other factors.



Francis Taylor Building

Explanatory Notes – January 2020

Clause 18: Policy statement on environmental principles: effect

189 Clause 18 sets out the legal duty on Ministers of the Crown in using the environmental principles policy statement. It also details the relevant exemptions to the duty to have due regard to the policy statement.

190 Subsection (1) requires Ministers to have due regard to the environmental principles policy statement when making policies included in the scope of the duty (in other words, policy that is not excluded). This means that, when making policy, Ministers of the Crown must have the correct level of regard to the content of the environmental principles policy statement.

191 Subsection (2) sets out that the policy statement does not require Ministers to take, or refrain from taking, any action that would have no significant environmental benefit, or if the environmental benefit would be disproportionate when compared to other factors.



Explanatory Notes – January 2020

192 In this context:

- “Significant” is to be understood as meaning ‘not negligible’. This means that the policy statement does not need to be used to change a policy direction, if the environmental impact would be negligible.
- “Disproportionate” indicates situations in which action would not be reflective of the benefit or costs, environmental or otherwise. Action taken must reflect the potential for environmental benefit, as well as other costs and benefits. For example, there is no need for a Minister to change a policy in light of the principles policy statement if the cost of this change would be very high and the benefit to the environment would be very low. Equally, if the potential environmental benefit is high, then it is proportionate to take a more significant action based on the policy statement.



Environment Bill: Complexity

- In effect:
- Principles will be set out in Policies, not in Bill itself
- Ministers are to have ‘due regard to them’
- A novel proportionality test
- Not adopted the phrase: ‘high level of protection’





What about the EU?



Article 191 TFEU (ex Article 174 TEC)

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

- General Legal Principles*
- The words highlighted in green refer to principles endorsed by Environment Bill*



Article 191 TFEU (ex Article 174 TEC)

❑ *The words in red are missing from Environment Bill*

2. Union policy on the **environment shall aim at a high level of protection** taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

An Example: Precautionary Principle



- ❑ Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405.
- ❑ The Dutch Secretary of State issued licences to engage in mechanical cockle fishing in the Waddenzee, a Special Protection Area (SPA).

Waddenzee



- ❑ The court interpreted art 6(3) of the Habitats Directive on the need of 'appropriate assessment' with the help of the precautionary principle.
- ❑ *'44. In the light, in particular, of the precautionary principle, ... a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned'*

Does it Matter?





An Example: Heathrow Case

- ❑ *R (Plan B Earth), R. (on the application of Friends of the Earth Ltd.), R (London Borough of Hillingdon Council) v Secretary of State for Transport* [2020] EWCA Civ 214
- ❑ **Section 5(8) Planning Act 2008**
 - ❑ (1) The Secretary of State may designate a statement as a national policy statement for the purposes of this Act ...
 - ❑ (7) A national policy statement must give reasons for the policy set out in the statement.
 - ❑ (8) The reasons must (in particular) include **an explanation of how the policy set out in the statement takes account of Government policy** relating to the mitigation of, and adaptation to, climate change."



'Taking into Account'

226. [...] As we have said, those words [of section 5(8)] do not require the Secretary of State to act in accordance with any particular policy; **but they do require him to take that policy into account and explain how it has been taken into account. None of that was ever done in the present case. [...]**

227. It appears that the reason why it was never done is that the Secretary of State **received legal advice that not only did he not have to take the Paris Agreement into account but that he was legally obliged not to take it into account at all [...]** In our view, that was a clear misdirection of law and there was, therefore, a material misdirection of law at an important stage in the process.



Precautionary Principle

257. That said, we would not be inclined to accept the other submission made by Mr Maurici on the Secretary of State's respondent's notice which relates to non-CO2 emissions. Mr Maurici submitted that the reason why this was not taken into account in the preparation of the ANPS was that the state of scientific knowledge was too uncertain to be capable of accurate measurement at that stage. [...]

258. Although those submissions have some force, in the end they do not persuade us. ... In line with the precautionary principle, and as common sense might suggest, **scientific uncertainty is not a reason for not taking something into account at all, even if it cannot be precisely quantified at that stage.**



Depends on Legislative Context

Is there a difference between :

- 'have due regard' (Environment Bill)
- NPS must give 'explanation of how the policy set out in the statement takes account of Government policy' (Planning Act 2020)
- Just a box-ticking exercise?

Another model: Equality Act 2010?

149 Public sector equality duty

(1) A public authority **must, in the exercise of its functions, have due regard to** the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

[...]

2. ENFORCEMENT





Francis Taylor Building

What has the EU Commission done for us?



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Institute for Government Evidence

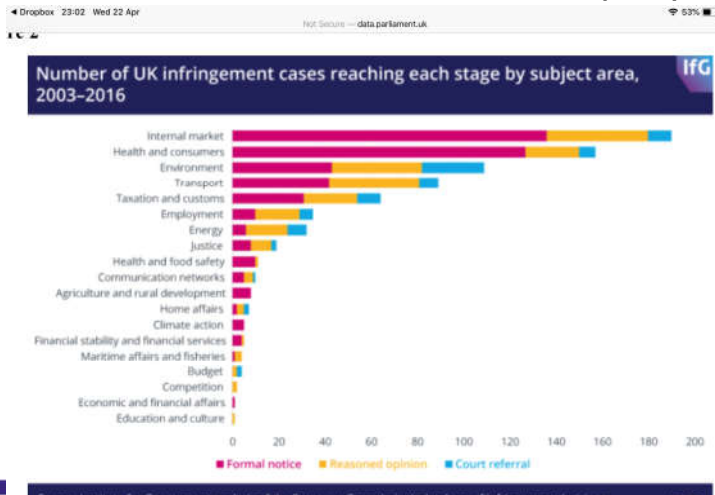
Institute for Government's Evidence to Environmental Audit Committee, HC 1951, 25 April 2019 :

- Data for 2003-2016
- More than 100 cases in environmental law
- About a third of them (29) reached the Court
- Commission won 21, UK won 4



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk

EU Commission's impact (IfG)



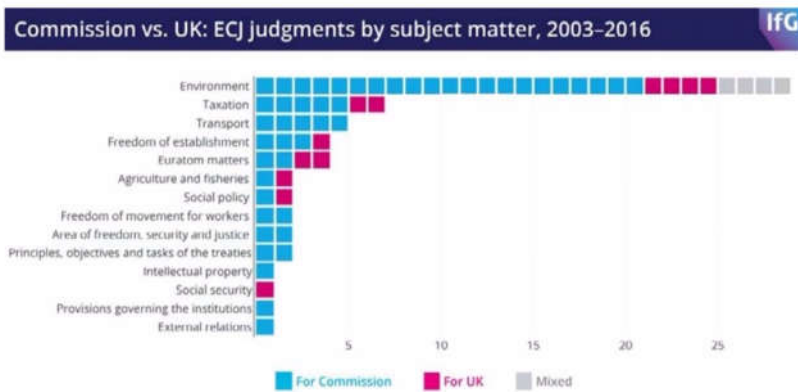
Francis Taylor |
T: 020 7353 841

Source: Institute for Government analysis of the European Commission's database of infringement decisions

BY-NC

EU Commission's impact (IfG)

Figure 1: CJEU cases involving the UK and the European Commission¹⁹²



Source: Institute for Government analysis of judgments retrieved from InfoCuria, a database of the case law of the European Court of Justice

BY-NC



Francis Taylor Building

EU resources

- DG Environment
- About 500 Staff
- Six Directorates
- Also: European Environment Agency
(independent information etc.)
- Separate DGs:
 - DG Climate Action
 - DG Agriculture & Rural Development

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Can the Office for Environmental
Protection Approach that?

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Office of Environmental Protection

CHAPTER 2

THE OFFICE FOR ENVIRONMENTAL PROTECTION

The Office for Environmental Protection

21 The Office for Environmental Protection

- (1) *A body corporate called the Office for Environmental Protection is established.*
- (2) *In this Act that body is referred to as “the OEP”.*
- (3) *Schedule 1 makes further provision about the OEP.*

Francis Taylor Building

T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Four Questions

- Resources
- Legal Powers
- Independence
- Credibility

Francis Taylor Building

T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Resources

- Unknown for the time being
- Michael Gove said in evidence that he expected about 60-120 staff



Legal Powers – Enforcement Functions

28 Failure of public authorities to comply with environmental law

- (1) Sections 29 to 38 make provision about functions of the OEP in relation to failures by public authorities to comply with environmental law.
- (2) For the purposes of those sections, a reference to a public authority failing to comply with environmental law means the following conduct by that authority –
 - (a) unlawfully failing to take proper account of environmental law when exercising its functions;
 - (b) unlawfully exercising, or failing to exercise, any function it has under environmental law.





Investigations

30 Investigations

- (1) The OEP may carry out an investigation under this section if it receives a complaint made under section 29 that, in its view, indicates that—
 - (a) a public authority may have failed to comply with environmental law, and
 - (b) if it has, the failure would be a serious failure.

- (3) An investigation under this section is an investigation into whether the public authority has failed to comply with environmental law.

- (4) The OEP must notify the public authority of the commencement of the investigation.



Process

Information Notice (clause 32)

- (a) describes an alleged failure of a public authority to comply with environmental law, and
- (b) requests that the authority provide such information relating to the allegation as may be specified in the notice.

Decision Notice (clause 33)

- (2) A decision notice is a notice that—
 - (a) describes a failure of a public authority to comply with environmental law, and
 - (b) sets out the steps the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy, mitigate or prevent reoccurrence of the failure).



Francis Taylor Building

Cumbersome Process

- Decision Notice only after Information Notice - clause 33(5)

(5) The OEP –

- (a) may not give a decision notice to a public authority unless it has first given at least one information notice relating to the failure of the authority to comply with environmental law that is described in the decision notice;
- (b) may withdraw a decision notice.



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Clause 35 - Court Proceedings

35 Environmental review

- (1) Where the OEP has given a decision notice to a public authority it may apply to the Upper Tribunal for an environmental review.
- (2) An environmental review is a review of –
 - (a) alleged conduct of the authority that is described in the decision notice as constituting a failure to comply with environmental law, or
 - (b) alleged conduct of the authority occurring after the notice was given that is similar, or is related, to the conduct described in the notice.



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Clause 35 – Remedies

- ❑ If the UT finds that the authority 'has failed to comply with environmental law'
 - ❑ Must make a statement of non-compliance' – effectively a Declaration (which does not affect validity of measure)
 - ❑ May also grant any remedy that could be granted in JR, but only if UT satisfied that:
 - ❑ granting the remedy would not be likely to cause 'substantial hardship' or 'substantial prejudice or
 - ❑ be detrimental to good administration



Clause 35 – Timing of Environmental Review

- (3) An application for an environmental review may not be made –
 - (a) before the earlier of –
 - (i) the end of the period within which the authority must respond to the decision notice in accordance with section 33(3), and
 - (ii) the date on which the OEP receives the authority's response to that notice, or
 - (b) before the expiry of any time limit which applies to the commencement of judicial review or other similar legal proceedings for questioning the alleged conduct.



Francis Taylor Building

Problems

- Large systemic failures only
- Narrow remit of 'environmental law', e.g. excluding planning
- No fines
- Recommendations not binding
- Lengthy Process to get to UT



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Independence

- OEP will be a non-department public body
- Suggestion by Committees: Parliamentary Body (e.g. National Audit Office)
- Proposals rejected by the Government
- Strong control by SoS, including budget



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Independence?

SCHEDULE 1

Section 21

THE OFFICE FOR ENVIRONMENTAL PROTECTION

Membership

- 1 (1) The OEP is to consist of –
 - (a) a Chair (who is to be a non-executive member),
 - (b) at least two, but not more than five, other non-executive members,
 - (c) a chief executive (who is to be the accounting officer), and
 - (d) at least one, but not more than three, other executive members.
- (2) The members are to be appointed by the Secretary of State and the OEP in accordance with paragraphs 2 and 3.
- (3) In making those appointments, the Secretary of State and the OEP must ensure, so far as practicable, that the number of non-executive members is at all times greater than the number of executive members.



Independence?

Appointment of non-executive members

- 2 (1) Non-executive members are to be appointed by the Secretary of State.
- (2) The Secretary of State must consult the Chair before appointing any other non-executive member.
- (3) The Secretary of State must, in appointing non-executive members, have regard to the desirability of the members (between them) having experience of –
 - (a) law (including international law) relating to the natural environment,
 - (b) environmental science,
 - (c) environmental policy, and
 - (d) investigatory and enforcement proceedings.



Francis Taylor Building

Funding?

Institute for Government's Evidence:

- ❑ The Equality and Human Rights Commission (EHRC), an NDPB which can issue proceedings for judicial review of government bodies if they are failing to comply with their equality or human rights obligations, reports to the Government Equalities Office, which currently sits in the Department for International Development and will soon move to Cabinet Office.
- ❑ The EHRC's budget has been reduced from £70.3 million in 2007 to £18.3 million in 2018. The EHRC has repeatedly said that, in its view, it could better discharge its duties if reported directly to Parliament.



Francis Taylor Building

Some Conclusions



Point 1: Legal principles downgraded

- EU Law: binding legal principles with primacy and direct Effect over any public authority
- Environment Bill: Policies, not legal principles, to be 'taken account of' by Ministers



Point 2: Enforcement downgraded

- EU Law: EU Commission has the size, the independence and procedural tools to bring about compliance
- Environment Bill: OEP a pale imitation.



Francis Taylor Building

Point 3: Constitutional Difficulties

- ❑ **EU Law:**
- ❑ Allows for 'higher law' through treaties and constitutions, and pools resources among states, allowing for powerful and independent Commission & Court of Justice
- ❑ **UK Unwritten Constitution:**
- ❑ UK policy makers & gov't lawyers have limited options.
- ❑ No explicit higher law (except 'common law'?)
- ❑ Are we returning to 'Elective Dictatorship' (Lord Hailsham, 1968)?
- ❑ They have not used all options: 'Constitutional Statute' *R (Buckinghamshire County Council and others) v Secretary of State for Transport (HS2)* [2014] UKSC 3

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Andrew Fraser-Urquhart QC

afu@ftbchambers.co.uk

Prof. Pavlos Eleftheriadis

pavlos.eleftheriadis@ftbchambers.co.uk

Horatio Waller

Horatio.waller@ftbchambers.co.uk

Conor Fegan

Conor.fegan@ftchambers.co.uk

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

The oral presentation including answers given in any question and answer session (“the presentation”) and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in the presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or the accompanying paper. Andrew Fraser-Urquhart QC, Horatio Waller, Pavlos Eleftheriadis, Conor Fegan and Francis Taylor Building will not accept responsibility for any loss suffered as a consequence of reliance on information contained in the presentation or paper. We are happy to provide specific legal advice by way of formal instructions.

Francis Taylor Building

T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk