



**Hilary Term**

**[2015] UKSC 6**

On appeal from: [2014] EWCA Civ 1080

**JUDGMENT**

**R (on the application of Rotherham Metropolitan Borough Council and others)  
(Appellants) v Secretary of State for Business, Innovation and Skills (Respondent)**

**before**

**Lord Neuberger, President**

**Lady Hale, Deputy President**

**Lord Mance**

**Lord Clarke**

**Lord Sumption**

**Lord Carnwath**

**Lord Hodge**

**JUDGMENT GIVEN ON**

**25 February 2015**

**Heard on 22 and 23 October 2014**

**Appellants**

**Jason Coppel QC**

**Joanne Clement**

**(Instructed by Rotherham Metropolitan Borough Council  
Legal Services)**

**Respondent**

**Jonathan Swift QC**

**James Cornwell**

**(Instructed by the Treasury  
Solicitor)**

**LORD SUMPTION: (with whom Lord Hodge agrees)**

**Introduction**

**1.**

This appeal is about the distribution of European Structural Funds among the regions of the United Kingdom. It arises out of the complaint of a number of local authorities in Merseyside and South Yorkshire about the way in which it is proposed to distribute funds allocated to the United Kingdom

for the years 2014 to 2020. The appellants say that they should receive more and other regions correspondingly less.

2.

Article 174 of the Treaty on the Functioning of the European Union requires the European Union to “aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions”. Article 175 requires Member States to conduct their economic policy in such a way as to further this objective and the Union to support it by distributions from the “European Structural and Investment Funds” (or “ESI Funds”). These funds are the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund. For present purposes the most significant of them are the Social Fund and the Regional Development Fund.

3.

The Social Fund was established under article 162 of the Treaty, whose terms identify its purpose:

“In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.”

Article 176 established the Regional Development Fund. This fund, which is much the largest of the Structural Funds, is

“intended to help to redress the main regional imbalances in the Union through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions.”

4.

The distribution of money from the EU Structural Funds is a shared responsibility of the Commission and the authorities of the Member States. The Commission is solely responsible for the allocation of funds to each Member State. The money is then used to co-finance programmes, the Union contribution currently varying between 50% and 85% and the rest being met from national budgets. The expenditure of sums allocated by the Commission within a Member State is jointly determined by the Commission and the Member State. In the United Kingdom this is the responsibility of the Secretary of State for Business, Innovation and Skills.

Regulation (EU) 1303/2013

5.

Funds are allocated from the EU budget to programmes co-financed by the European Structural Funds for successive seven-year funding periods. The transition to a new funding period will commonly involve a measure of disruption. Funding budgets rise and fall. Strategic priorities both at Union and at national level change. The number and definition of the various categories of region entitled to funding support also change. Statistical tests for funding support, which commonly depend on the relationship between indices of regional development and the corresponding EU averages, may be significantly affected by the accession of new Member States. There may or may not be transitional provisions to ease the passage from one funding period to the next.

6.

The allocation of funds for programmes co-financed by the European Structural Funds for 2014-2020 is governed by Regulation (EU) 1303/2013, which I shall call the 2013 Regulation. The legal base of the 2013 Regulation is article 177 of the Treaty on the Functioning of the European Union, which requires the European Parliament and the Council to make regulations to “define the tasks, priority objectives and the organisation of the Structural Funds”. So far as the current period is concerned, these objectives are summarised in the recitals to the 2013 Regulation. The overall objective is succinctly expressed in Recital (3). It is to provide a framework within which the “Union and Member States should implement the delivery of smart, sustainable and inclusive growth, while promoting harmonious development of the Union and reducing regional disparities”. This recital reflects one of the main features of the scheme, which is that it has been designed on the footing that there is a close interaction between the reduction of regional imbalances and the promotion of growth generally.

7.

This is reflected in the drafting of the 2013 Regulation, which is directed not just to the reduction of regional disparities but to economic development in its broadest sense. Under article 89(1) of the 2013 Regulation, the Structural Funds are required to contribute to two “missions”. One is the “actions of the Union leading to strengthening of its economic, social and territorial cohesion” in the broad sense envisaged in article 174 of the Treaty. The other is the “delivery of the Union strategy for smart, sustainable and inclusive growth”. Both missions are to be fulfilled by pursuing two “goals” identified in article 89(2), namely “investment for growth and jobs in Member States and regions”, and European territorial co-operation. Of the two goals, the first is much the most important. Article 91 provides for an overall budget of (in round figures) EUR 322 billion, representing the global resources allocated for the years 2014-2020 to the Social Fund and the Regional Development Fund (together with the Cohesion Fund from which the United Kingdom does not benefit). Under article 92, 96.33% of this global amount is allocated to the “Investment for growth and jobs goal” and of this, specified proportions are allocated to three categories of region: less developed, transition and more developed. The regions in question are standard geographical units used for statistical purposes by the Commission and known as “NUTS2” regions (Nomenclature of Territorial Units for Statistics, Level 2). The categorisation of regions depends on the ratio of their average GDP per capita to that of the Union as a whole: see article 90 of the 2013 Regulation. Less developed regions have a GDP per capita below 75% of the EU average; transition regions have a GDP per capita between 75% and 90% of the EU average; and more developed regions have a GDP per capita over 90% of the EU average.

8.

To calculate a Member State’s allocation from the Structural Funds, the Commission notionally allocates an annual amount of funding to each region within that state in accordance with a methodology prescribed for each of the three categories of region by Annex VII of the 2013 Regulation. In each category, the calculation is based mainly on the region’s GDP per capita relative to the EU average. The Commission uses the resulting figures to calculate an aggregate amount for each of the three categories of region in that Member State. The sum of the three categories is then allocated to the Member State, plus a sum from the Cohesion Fund in the case of those Member States (not including the United Kingdom) which are supported by that fund.

9.

In contrast to the allocation of Structural Funds among Member States, which is prescribed by the 2013 Regulation in detail, there is no formula for the allocation of funds among regions within Member States. Instead, what is prescribed is a detailed administrative procedure for arriving at the

internal regional allocations under a scheme of shared management involving the Commission, the Member States, and local entities. The initiative, or right of proposal, belongs to the Member State. Article 4.4 provides:

“Member States, at the appropriate territorial level, in accordance with their institutional, legal and financial framework, and the bodies designated by them for that purpose shall be responsible for preparing and implementing programmes and carrying out their tasks, in partnership with the relevant partners referred to in Article 5, in compliance with this Regulation and the Fund-specific rules.”

The critical instrument is the Partnership Agreement, which determines the allocation of resources between regions and programmes to be co-financed. It is defined by article 2.20 as

“a document prepared by a Member State with the involvement of partners in line with the multi-level governance approach, which sets out that Member State's strategy, priorities and arrangements for using the ESI Funds in an effective and efficient way so as to pursue the Union strategy for smart, sustainable and inclusive growth, and which is approved by the Commission following assessment and dialogue with the Member State concerned.”

The function of the Partnership Agreement is described by Recital (20). It is to

“translate the elements set out in the [Common Strategic Framework] into the national context and set out firm commitments to the achievement of Union objectives through the programming of the ESI Funds. The Partnership Agreement should set out arrangements to ensure alignment with the Union strategy for smart, sustainable and inclusive growth as well as with the Fund-specific missions pursuant to their Treaty-based objectives, arrangements to ensure effective and efficient implementation of the ESI Funds and arrangements for the partnership principle and an integrated approach to territorial development. A distinction should be made between the essential elements of the Partnership Agreement which are subject to a Commission decision and other elements which are not subject to the Commission decision and can be amended by the Member State.”

10.

The preparation of the Partnership Agreement is governed by article 14. The agreement “shall cover all support from the ESI funds in the Member State concerned”. It is to be prepared by Member States “in dialogue with the Commission” and “in accordance with their institutional and legal framework”, and then submitted to the Commission in draft by 22 April 2014. The Commission’s functions in relation to the draft are to be found in article 16. The Commission is required to “assess the consistency of the Partnership Agreement with this Regulation” and with other Union instruments, and to make “observations” within three months of submission. The Member State is required to provide any additional information required of it and to make such revisions as are required in the light of the Commission’s observations. Finally, the Commission must within four months of submission “adopt a decision by means of implementing acts”, approving all the elements of the Partnership Agreement which are required by the 2013 Regulation to be included. A similar process governs the Commission’s approval of any amendments that may subsequently be proposed by a Member State. In the absence of specified criteria for the internal allocation of strategic funding, it is clear that the role of the Commission, as a party to the dialogue leading to the submission of the draft Partnership Agreement and the body charged with commenting on and approving it, is not simply to rubber-stamp the proposals of Member States. It calls for a scrutiny of the proposals which is at once expert and exacting. It constitutes the main machinery of compliance envisaged by the legislator.

11.

It is an important feature of the 2013 Regulation that the criteria to be applied by both the Commission and the Member States in finalising the Partnership Agreement are not based on the amounts calculated by the Commission for each region when arriving at their national allocations. Indeed, these amounts are not even published, although they can be estimated from the methodology described in Annex VII of the 2013 Regulation. Nor are allocations within a Member State based, as the Commission's calculations are, on GDP per capita or other measures of deprivation. Instead, the proposals in the Partnership Agreement are governed by broadly based criteria that are purely qualitative. Recital (21) declares that

"Member States should concentrate support to ensure a significant contribution to the achievement of Union objectives in line with their specific national and regional development needs."

The "Union objectives" are identified by article 9. The overall objective is to support the Union strategy for "smart, sustainable and inclusive growth". This is defined by article 2.1 as meaning the "targets and shared objectives guiding the action of Member States and the Union" identified in three documents adopted by the European Council. The first is the "Strategy for Jobs and Growth" at Annex I of the Conclusions of the European Council of 17 June 2010. This identifies a number of "Headline Targets", which can be summarised as an increase in the rate of employment, an improvement in the conditions for research and development, a reduction in greenhouse gas emissions, the improvement of educational levels and the promotion of social inclusion. The second is the Council Recommendation of 13 July 2010 on guidelines for the economic policies of Member States. These deal with the quality and sustainability of public finances, macroeconomic imbalances, research and development, resource efficiency and the reduction of greenhouse gas emissions, and the business and consumer environment. The third document is Council Decision 2010/707/EU on guidelines for the employment policies of Member States. These deal with labour market participation, skills, education and social inclusion.

12.

The "thematic objectives" mentioned in article 9 are set out in the article itself, which provides as follows:

**"Thematic objectives**

In order to contribute to the Union strategy for smart, sustainable and inclusive growth as well as the Fund-specific missions pursuant to their Treaty-based objectives, including economic, social and territorial cohesion, each ESI Fund shall support the following thematic objectives:

(1)

strengthening research, technological development and innovation;

(2)

enhancing access to, and use and quality of, ICT;

(3)

enhancing the competitiveness of SMEs, of the agricultural sector (for the EAFRD) and of the fishery and aquaculture sector (for the EMFF);

(4)

supporting the shift towards a low-carbon economy in all sectors;

(5)

promoting climate change adaptation, risk prevention and management;

(6)

preserving and protecting the environment and promoting resource efficiency;

(7)

promoting sustainable transport and removing bottlenecks in key network infrastructures;

(8)

promoting sustainable and quality employment and supporting labour mobility;

(9)

promoting social inclusion, combating poverty and any discrimination;

(10)

investing in education, training and vocational training for skills and lifelong learning;

(11)

enhancing institutional capacity of public authorities and stakeholders and efficient public administration.

Thematic objectives shall be translated into priorities that are specific to each of the ESI Funds and are set out in the Fund-specific rules.”

The thematic objectives are complemented by “strategic guiding principles” contained in a Common Strategic Framework at Annex I, which provide guidance as to how they are to be achieved, and by certain conditions (“ex ante conditionalities”) to be satisfied by Member States in relation to each thematic objective, which are identified in articles 18 and 19 and Annex XI.

13.

It will be apparent that, as foreshadowed by Recital (3), not all of the thematic objectives are directly concerned with reducing regional disparities. A few of these criteria are directed to traditional indices of deprivation such as employment and skill levels. Most are directed to specific developmental needs such as technical research capacity, training, information technology, business start-ups or transport infrastructure, the need for which will vary even among regions with comparable levels of poverty or deprivation. Some are directed to more general policy objectives with no necessary connection to either deprivation or developmental needs, such as climate change adaptation. Articles 14 and 15, which lay down the required contents of the Partnership Agreement, closely reflect the objectives identified in article 9 and its incorporated instruments.

The treatment of the United Kingdom NUTS2 regions

14.

There are 37 NUTS2 regions in the United Kingdom. Thirty are in England, four in Scotland, two in Wales and one in Northern Ireland, which constitutes a region in itself.

15.

In order to understand the way that Merseyside and South Yorkshire have been treated in the current Partnership Agreement, it is necessary to refer to the way that they had been treated in the two previous periods, 2000-2006 and 2007-2013. In 2000-2006, there were three categories of region called Objective 1, Objective 2 and Objective 3 regions. Objective 1 corresponded to the current less

developed category, comprising regions with a GDP per capita less than 75% of the EU average. Regions in this category received the most generous funding. Merseyside and South Yorkshire were both Objective 1 regions in 2000-2006.

16.

The allocations for the next period, 2007-2013, were fixed shortly after the enlargement of the European Union by the admission of ten new members, mostly in Eastern Europe. The new members had lower levels of GDP per capita, which depressed the EU average and meant that a number of regions which had previously been in the bottom category of development and received the most generous treatment were now in a higher category. The Regulation for 2007-2013 ((EC) 1083/2006), which I shall call the 2006 Regulation, provided for two main categories of region: “convergence regions”, which broadly corresponded to the current less developed regions with a GDP per capita less than 75% of the EU average, and “competitiveness regions” which were above the 75% threshold and broadly corresponded to the current transition and more developed categories. Article 8 of the 2006 Regulation carved out of the competitiveness category two intermediate categories of region which had previously had a GDP per capita below 75% and would have been particularly badly affected by the move into a higher category. These came to be known as “phasing-in” regions and “phasing-out” regions, although the terms themselves are not used in the 2013 Regulation. Phasing-out regions were regions which would have been convergence regions in 2007-2013 (the least developed category) but for the expansion of the EU, but moved above the 75% threshold because of the statistical impact of enlargement: see article 8.1. Phasing-in regions were regions which had moved from less than 75% to more than 75% of the EU average GDP per capita and would have done so even without enlargement. That is their development status had improved. To ease their passage into the competitiveness category, phasing-in and phasing-out regions were both eligible for additional financial support on what was described as a “transitional and specific basis”, over and above the support that they would have received as competitiveness regions.

17.

In the United Kingdom, the only phasing-in regions in 2007-2013 were Merseyside and South Yorkshire. They were entitled under Annex II, para 6(b) of the 2006 Regulation to an allocation of 75% of the 2006 level in 2007, tapering down to the national average level for competitiveness regions by 2011. The only phasing-out region was Highlands & Islands. It was entitled under Annex II, para. 6(a) to an allocation of 80% of the 2006 level in 2007, tapering down to the national average level of funding support for competitiveness regions in 2013.

18.

The new categorisation for 2014-2020 had three categories, as we have seen. In effect, the old competitiveness category for regions with a GDP per capita over 75% of the EU average was divided into two new categories, transition and more developed. According to the Secretary of State’s evidence, the transition category was devised against the background of tight budgetary constraints to provide an increased level of funding notwithstanding the reduction of the overall budget for the Structural Funds. But in the course of negotiations in the European Council, the budget for transition regions originally proposed by the Commission was cut, thus reducing the value of the new category to those whom it was intended to benefit. In the current categorisation, the United Kingdom has two less developed regions, West Wales and Cornwall. There are 11 transition regions: Northern Ireland; Highlands & Islands in Scotland; and nine English regions including Merseyside and South Yorkshire. The other 24 regions are all classified as more developed.

19.

The Commission's allocation to the United Kingdom for 2014-2020 represented a 5% reduction at 2011 prices on the allocation for the previous funding period. The Secretary of State's proposals for its allocation were formulated in two stages. The first covered the distribution of the United Kingdom's national allocation between its four component countries and the second covered allocations to regions within each country. At each stage the Secretary of State's approach was to assess the allocation of each country or region by reference to its allocation for the previous funding period. This approach was adopted so as to limit as far as possible the scope for disruptive change in the new period. It was possible because the government's regional allocations for the previous period had been carried out using a basket of economic and social indicators, and the Secretary of State considered that there had been no significant change of the economic and social geography of the country in the interval. The Secretary of State's first decision, which was announced on 26 March 2013, was that each of the four countries comprising the United Kingdom would have its overall allocation reduced by the same proportion, about 5%. The second decision, which was announced on 27 June 2013, distributed the allocations of each country among its NUTS2 regions. In the case of Northern Ireland, the allocation automatically followed from the first decision, because it was a region in itself. For present purposes, the critical points decided on the second occasion were that the nine English transition regions should receive an allocation per year for the current funding period representing an increase of 15.7% (at 2011 prices) on its allocation for 2013, the last year of the previous funding period, while Highlands & Islands (the only Scottish transition region) should receive an allocation per year of 95% of its average annual allocation over the whole of the previous funding period.

20.

The applicants have two fundamental complaints about this way of doing things. The first complaint is that although the allocation for Merseyside and South Yorkshire had risen by 15.7% from the base year of 2013, this represented a 61% reduction (at 2011 prices) on its allocation for the previous funding period as a whole. This was because in the previous funding period, although they would otherwise have ranked as competitiveness regions, they had received the special "transitional and specific" support provided for by article 8 of the 2006 Regulation. Under the terms of the 2006 Regulation it had tapered down to nil by 2011. In 2007-2013 as a whole, Merseyside and South Yorkshire had received substantially more than competitiveness regions because of the article 8 funding. But by taking 2013 as the base year for the uplift of 15.7%, the Secretary of State chose the year in which Merseyside and South Yorkshire had been entitled to no special transitional funding and had received no more than the national average for competitiveness regions. By comparison, the other English transition regions had received no special article 8 funding in the previous period and their allocations profile in that period had been flat in real terms. The second complaint is that Merseyside and South Yorkshire have done badly by comparison with Highlands & Islands and Northern Ireland. This, it is said, is because the first decision had protected the allocations to Scotland and Northern Ireland by guaranteeing them 95% of their allocations in the previous funding period. Highlands & Islands had then been allowed by the second decision to base the calculation of the 95% on its average annual allocation in the previous period, notwithstanding that, as a phasing-out region in the previous period, part of its allocations in 2007-2013 had also represented transitional additional funding tapering down to zero over the period. In other words, Highlands & Islands was not limited to the relevant proportion of its last and lowest year in 2007-2013. The net result, the appellants say, was that their regions fared worse than other transition regions in spite of having higher levels of deprivation than most of them. What they want is a principle of allocation more closely related to levels of relative deprivation.



## Preliminary observations

21.

Three points should be made at the outset.

22.

The first is that the Secretary of State's allocation is a discretionary decision of a kind which the courts have traditionally been particularly reluctant to disturb. There is no "right" answer prescribed by the EU Treaty or the 2013 Regulation to the question how EU Structural Funds should be distributed within a Member State. There is not even any clear principle on which this should be done. Instead, the Secretary of State was required to make a complex evaluation of a wide range of overlapping criteria, all of which involved difficult and sometimes technical judgments about matters of social and economic policy.

23.

Secondly, it was a judgment of a particularly delicate kind, involving the distribution of finite resources, including domestic taxpayers' funds as well as EU funds, between the four countries and the distinctive regions of the United Kingdom. In such cases, the Secretary of State is in reality arbitrating between different public interests affecting different parts of our community. It is an exercise in which the legitimacy of the decision-making process depends to a high degree on the fact that ministers are answerable politically to Parliament. As Lord Hoffmann observed in a lecture given in 2001, "Separation of Powers", 7 JR 137 (2002)), at paras 19-20:

"... there are certain areas in which, although the decision is formally justiciable because it involves the interpretation of statute or the common law, the outcome is likely to have an important impact upon public expenditure. The allocation of public expenditure - whether we should spend more or less on defence, health, education, police and so forth, whether at a national or local level - is very much a matter for democratic decision. Furthermore, a court deciding a case which will affect one form of public expenditure - for example, impose a burden of expenditure upon education authorities - has no way of being able to decide whether such expenditure should or should not have a prior claim over other forms of expenditure. It may consider that, viewed in isolation, it is fair and reasonable that children in schools should receive certain benefits or financial compensation for not having received other benefits. But because it can only view the matter in isolation, it has no way of knowing whether this means that other people dependent upon social security, police protection and so on will have to make sacrifices because there is less money for them. The only people who can make such decisions are the democratically elected bodies who are in charge of the budget as a whole. This means that even when a case appears to involve no more than the construction of a statute or interpretation of a common law rule, the courts are very circumspect about giving an answer which would materially affect the distribution of public expenditure."

24.

The third preliminary observation is that the disputed allocations are not a matter for the sole decision of the United Kingdom or the Secretary of State as its representative. Under the 2013 Regulation, the United Kingdom has the right of proposal, but its proposals must be embodied in a Partnership Agreement before they can be adopted. The Partnership Agreement is made with the Commission, acting as the relevant organ of the European Union. Once approved by the Commission it is implemented by a Commission decision. It then takes effect as an instrument of the Union. At the time when the present proceedings were brought, there was no Partnership Agreement in existence. There were only proposals which had been announced by the Secretary of State. At a number of

stages (I shall return to this point) these had been prepared in consultation with the Commission's officials. Ultimately, they were embodied in a draft Partnership Agreement which was submitted by the Secretary of State to the Commission on 22 April 2014. It is a long, elaborate and highly technical document. We were referred to it in the form published on the United Kingdom government's website. The Commission was certainly aware of these proceedings and in general terms of the nature of the appellants' complaints, not least because according to Mr Eyres' evidence they lobbied the relevant commissioner about them. The Commission made a number of "observations" on the draft, which have not been disclosed because the Commission regards them as confidential. Finally the document was agreed by a Commission decision notified on 29 October 2014, shortly after this appeal was argued. I make these points not in order to suggest that the present issues are beyond the scope of judicial review in the English courts. The Secretary of State's proposals are amenable to judicial review like any other decision of the executive. If his proposals were unlawful, he may be obliged to reconsider them and if necessary to propose an amendment. I am prepared to assume that the Commission would adopt the amendment, as it has indicated that it is in principle willing to do if it is consistent with the objectives of the Funds. However, the Commission's involvement has a broader significance. It is, as I have pointed out, the main mechanism of compliance envisaged in the 2013 Regulation. The Commission is an expert administrative body at arms' length from the Secretary of State, with considerable experience of the economic and social issues involved. It is able to review the economic merits of the Secretary of State's judgments and if necessary substitute its own evaluation in a way that is beyond the institutional competence of any court, let alone a national court. The Commission is evidently satisfied that the Partnership Agreement complies with the 2013 Regulation. That does not rule out the possibility that it may be equally satisfied with some alternative proposal. But a national court should be extremely cautious before accepting that a proposal is inconsistent with the 2013 Regulation which the Commission charged with applying it has found to be consistent with it.

#### Grounds of review

25.

The appellants' case is that taking the Secretary of State's two decisions together, the allocation to Merseyside and South Yorkshire which resulted was unlawful. Mr Coppel QC, who appeared for them, submitted that the Secretary of State treated Merseyside and South Yorkshire differently from Northern Ireland and Highlands & Islands when they were for practical purposes in the same position, and in the same way as other English transition regions when they were in a materially different position. This, he said, was contrary to the general principle of equality in EU law as well as ordinary principles of English public law which require a decision-maker to have regard only to legally relevant considerations. He submits that to make his case good, it is enough to demonstrate that Merseyside and South Yorkshire were comparable to Highlands & Islands or different from the other English transition regions. The Secretary of State had no discretion or margin of judgment on that question. His discretion or margin of judgment related only to the question whether the discrimination was objectively justifiable, and according to Mr Coppel QC the Secretary of State has never set out to satisfy that test.

26.

Before turning to the Secretary of State's decisions, I should make it clear that I do not accept the rigid scheme of analysis by which Mr Coppel QC seeks to confine us. The general principle of equality in EU law is that comparable situations are not to be treated differently or different situations comparably without objective justification. This is not a principle special to the jurisprudence of the European Union. It is fundamental to any rational system of law, and has been part of English public

law since at least the end of the nineteenth century. As Lord Hoffmann pointed out when delivering the advice of the Privy Council in *Matadeen v Pointu*[1999] 1 AC 98, para 109:

“Is it of the essence of democracy that there should be a general justiciable principle of equality? ... Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational.”

Unequal treatment, Baroness Hale explained in *Ghaidan v Godin-Mendoza*[2004] 2 AC 557, para 132,

“is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions.”

27.

The two-stage process by which courts in discrimination cases distinguish between comparability and objective justification is a useful tool of analysis and probably indispensable in dealing with allegations of discrimination on ground of gender, race or other personal characteristics. More generally, a rigid distinction between the two stages was implicit in the four-stage test proposed by Brooke LJ in *Wandsworth London Borough Council v Michalak*[2003] 1 WLR 617, para 20, for cases arising under article 14 of the European Convention on Human Rights. But a tool of analysis should not be transformed into a rule of law. As Lord Hoffmann pointed out in *R (Carson) v Secretary of State for Work and Pensions*[2006] 1 AC 173, paras 29-31, the question whether two situations are comparable will often overlap with the question whether the distinction is objectively justifiable:

“If an ‘analogous situation’... means that the two cases are not relevantly different (no two cases will ever be exactly the same) then a relevant difference may be the justification for the difference in treatment ... [T]his division of the reasoning into two stages is artificial. People don't think that way. There is a single question: is there enough of a relevant difference between X and Y to justify different treatment? ... [T]he invocation of the ‘rational and fair-minded person’ (who is, of course, the judge) suggests that the decision as to whether the differences are sufficient to justify a difference in treatment will always be a matter for the judge.”

Baroness Hale, making a very similar point in *Ghaidan v Godin-Mendoza* at para 134, deprecated a formulaic approach for precisely this reason.

28.

The problem about Mr Coppel QC's scheme of analysis as applied to the allocation within a Member State of EU Structural Funds is that there is no clear measure of comparability, whether between different regions or between different ways of treating them. The appellants say that Merseyside, South Yorkshire, Highlands & Islands and Northern Ireland are comparable by virtue of being transition regions under the classification, and that they have been treated differently by virtue of receiving an allocation for 2014-2020 which represents a smaller proportion of what they received in 2007-2013 than the rest. But neither proposition is coherent in the context of this particular scheme. The four regions are transition regions only because they all have an average GDP per capita between 75% and 90% of the EU average. But that only means that they are all eligible to participate in the pool of money allocated by the Commission for United Kingdom transition regions. The mere classification by GDP per capita is consistent with significant differences in other respects which are

relevant to the allocation of EU Structural Funding. The criterion for the allocation is not GDP per capita but contribution to the EU's policy objectives as set out in article 9 and its incorporated instruments. To paraphrase Lord Hoffmann, there is only one question: is there enough of a relevant difference between Merseyside and South Yorkshire on the one hand and the remaining transition regions on the other to justify any difference in their treatment? The answer to that question may ultimately be for the court, but the nature of the question requires a particularly wide margin of judgment to be allowed to the decision-maker. That is partly because the questions posed by the 2013 Regulation, whether they come under the heading of comparability or justification, call for a complex policy judgment based on a broad range of economic and social factors which the court is not competent to carry out and could not legitimately carry out. And it is partly because the discretion allowed to Member States and the Commission by the 2013 Regulation is itself very wide, and the courts cannot confine it more narrowly. There are many solutions consistent with the Regulation, none of which is any more "right" than the next.

29.

It follows, in my opinion, that the appellants cannot succeed on this appeal simply by pointing to the classification of Merseyside and South Yorkshire as transition regions, and denouncing the outcome of the Secretary of State's two decisions as more burdensome to them than to others in the same category. They must show that there was something unlawful about the process or reasoning by which that outcome was arrived at. Against that background, I turn to the Secretary of State's two decisions.

The first decision

30.

The first decision was to allocate to each of the four countries comprising the United Kingdom 95% of what they had received from the Structural Funds in the previous funding period (at 2011 prices). Instead of applying the 5% reduction in the United Kingdom's national allocation to the United Kingdom as a whole, he applied it separately to each component country.

31.

The Secretary of State's reasons for this decision are explained in a witness statement of Dr Susan Baxter, a senior official in his department. It is clear from her evidence that Ministers' chief concern was that the radical reclassification of European regions in the current Regulation should not lead to an excessively abrupt change in the funding allocated to the United Kingdom's regions. Although the Commission had not disclosed how much it had allowed for each region when calculating its allocations to Member States, the department was able to estimate the Commission's regional figures from the formula in the 2013 Regulation. This revealed that if the Secretary of State were to allocate funds to regions according to the same GDP-based methodology as the Commission had used to allocate funds to the United Kingdom, England would have received an increase of 7% on its allocation for 2007-2013 (at 2011 prices), with the largest increases going to the south of England. The three other countries comprising the United Kingdom would have received substantially less than their allocation for 2007-2013: -22% in the case of Wales, -32% in the case of Scotland and -43% in the case of Northern Ireland. The Secretary of State considered allocating funds within the United Kingdom on this basis, but rejected the idea in order to protect the devolved administrations from "sudden and significant cutbacks to funding". His reasons were described by Dr Baxter as follows:

"41. Ministers were aware that the decision to equalise the cuts meant that there was proportionately less for England than the EU's notional calculation methodology would have rendered. Accordingly Ministers were fully aware that both (a) that this approach to the allocation of funds (rather than

allocation on the basis of the EU Commission's approach) would reduce the amount of money available for regions in England; and (b) that it would limit the funding available for distribution for the Transition regions in England and the allocation for Northern Ireland and Highlands & Islands regions would come out of the transition budget. However, this was seen in the context of an overall cut in the funding for Northern Ireland and Scotland.

42. There were a number of reasons for applying the cut equally as between the nations, including:

- Transparency - a decision that was easy for non-experts to understand;
- Simplicity - a single number applied to each Devolved Administration;
- Consistency - the same approach was taken to all four Devolved Administrations; and
- Balanced - it took account of the status of the Devolved Administrations under the UK's constitutional settlement.

43. The Government was not, at this stage, looking at the detailed effects at NUTS 2 level. Ministers were aware that increasing the funding for the Devolved Administrations would mean less for certain regions in England, as allocations had be [sic] made from a set budget category for each category of region. However, it was decided that this would be dealt with at the next stage of the allocation process and that only the big picture within the UK would be looked at when trying to distribute the cut fairly as between the UK nations."

In these passages, references to the English regions getting "less" mean less than they would have got if the Secretary of State had replicated the notional regional allocations which it was estimated that the Commission had made.

32.

In my opinion the Secretary of State was entitled to adopt this approach. The EU Structural Funds are primarily concerned with economic development, which is a devolved responsibility. It is true that the relevant entity in international law is the United Kingdom, and that, as regards the institutions of the European Union, the United Kingdom is the Member State. England and the devolved administrations of Scotland, Wales and Northern Ireland have no formal status in the EU legal order. But it does not follow that their status within the United Kingdom is irrelevant. EU law is not insensitive to the relationship between Member States and their internal federal or regional units of government and will not necessarily treat regional variations arising from the distribution of constitutional responsibility within a Member State as discriminatory. In (Case C-428/07) R (Horvath) v Secretary of State for the Environment, Food and Rural Affairs [2009] ECR I-6355, the Court of Justice was concerned with the Memorandum of Understanding between the United Kingdom government and the Scottish Government which assigned to the devolved administration of Scotland responsibility for the implementation of Community law concerning the common agricultural policy. The relevant EC Regulation empowered Member States to set minimum standards of compliance at national or regional level. Mr Horvath complained that regulations requiring the maintenance by landowners of public rights of way over agricultural land infringed the Community law principle of equality because equivalent obligations had not been imposed by the devolved administration in Scotland. The Advocate-General, in her Opinion, had advised that differences in the way that Community obligations were implemented by different devolved administrations could not be regarded as discriminatory because they "cannot be attributed to the conduct of the same public authority" (para 112). The Grand Chamber reached the same conclusion, but on a broader basis, namely that such differences

were inherent in the distribution of responsibility for implementing Community law among distinct territorial units of government within a Member State. They were therefore no more discriminatory than differences in the way that EU law was implemented by different Member States:

“48. As a preliminary point, it should be pointed out that, in conferring on Member States the responsibility of defining minimum GAEC requirements, the Community legislature gives them the possibility of taking into account the regional differences which exist on their territory.

49. It should be recalled that, when provisions of the Treaty or of regulations confer power or impose obligations upon the States for the purposes of the implementation of Community law, the question of how the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State (Joined Cases 51/71 to 54/71 *International Fruit Co and Others* [1971] ECR 1107, para 4).

50. Thus, it is settled case-law that each Member State is free to allocate powers internally and to implement Community acts which are not directly applicable by means of measures adopted by regional or local authorities, provided that that allocation of powers enables the Community legal measures in question to be implemented correctly (Case C-156/91 *Hansa Fleisch Ernst Mundt* [1992] ECR I-5567, para 23).

51. The Court has, in addition, held that, where a regulation empowers a Member State to take implementing measures, the detailed rules for the exercise of that power are governed by the public law of the Member State in question (see (Case 230/78) *Eridania-Zuccherifici nazionali and Società italiana per l'industria degli zuccheri* [1979] ECR 2749, para 34, and Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, para 48).

...

54. It must nevertheless be examined whether, in those circumstances, the mere fact that the rules establishing GAEC laid down by the regional authorities of the same Member State differ constitutes discrimination contrary to Community law.

...

57. Where, as in the main proceedings, it is the devolved administrations of a Member State which have the power to define the GAEC minimum requirements within the meaning of article 5 of and Annex IV to Regulation No 1782/2003, divergences between the measures provided for by the various administrations cannot, alone, constitute discrimination. Those measures must, as is clear from para 50 of this judgment, be compatible with the obligations on the Member State in question which stem from that regulation.

58. In the light of the foregoing, the answer to the second question is that, where the constitutional system of a Member State provides that devolved administrations are to have legislative competence, the mere adoption by those administrations of different GAEC standards under article 5 of and Annex IV to Regulation No 1782/2003 does not constitute discrimination contrary to Community law.”

The decision is significant not just for the answer that was given to the particular question posed by the High Court, but because it necessarily followed from the reasoning that the mere fact that the United Kingdom was a unitary state in international law did not mean that regional differences in the way that Community law was applied called for objective justification.

The present case differs from *Horvath*. The sole decision-maker was the Secretary of State. It was not the devolved administrations. However, this seems to me to be a largely formal distinction which avoids the substance of the matter. The 2013 Regulation requires a Partnership Agreement to be agreed between the Commission and the United Kingdom. Proposals for inclusion in that agreement are therefore necessarily prepared for submission to the Commission on behalf of the United Kingdom. But internally, the Secretary of State was entitled to give effect to the wishes of the devolved administrations in areas such as these where they would be constitutionally responsible for implementation, notwithstanding that that might introduce differences between the different countries of the United Kingdom. Article 5(1) of the 2013 Regulation provides that a Member State must “in accordance with its institutional and legal framework organise a partnership with the competent regional and local authorities”. Article 5(2) provides:

“In accordance with the multi-level governance approach, the partners referred to in para 1 shall be involved by Member States in the preparation of Partnership Agreements and progress reports and throughout the preparation and implementation of programmes ...”

34.

What the Secretary of State did when making his first decision was to treat the four countries comprising the United Kingdom as if they were separate entities for the purpose of implementation of the 2013 Regulation, and to divide the United Kingdom’s allocation from the Structural Funds between them on a consistent basis, *pro rata* to their allocations in the previous funding period. In my opinion, he was entitled to have regard in this way to the constitutional settlement of the United Kingdom, provided (i) that the basis on which he did so did not unjustifiably discriminate between the four countries, and (ii) that the financial implications for the individual regions of the United Kingdom were consistent with the 2013 Regulation.

35.

The Secretary of State’s first decision was in my opinion within his margin of judgment in both of these respects. There is no material before us to suggest that the relative positions of England, Wales, Scotland and Northern Ireland had changed so radically since the last funding period that a distribution between them proportionate to their previous allocations could be regarded as in itself discriminatory. The argument of Merseyside and South Yorkshire is directed entirely to the financial impact of the decision on individual regions within the four countries, in other words to the second of the two provisos which I have mentioned. But the first decision did not mean that English transition regions such as Merseyside and South Yorkshire would necessarily fare worse than Highlands & Islands or Northern Ireland. The appellants do not suggest that the first decision necessarily meant that Highlands & Islands and Northern Ireland would get a larger proportion of the United Kingdom’s transition region “pot” than they would have done if the 5% reduction, instead of being applied to the four countries separately, had been applied to the United Kingdom as a whole. That would depend on how the allocations to individual regions were dealt with in the second decision, both in Scotland and in England. Indeed, Mr Eyres, whose witness statements constitute the appellants’ evidence, says that Merseyside and South Yorkshire assumed in the light of the first decision that they would receive a similar degree of protection to that received by the devolved regions when it came to allocating funds among the regions of England at the second stage.

36.

The appellants’ evidence is not that the first decision reduced the total amount available for allocation to English transition regions below what it would have been if the 5% reduction had been applied across the United Kingdom as a single entity. It is that it reduced the total amount below what it

would have been if the Secretary of State had simply allocated funds between the regions in accordance with the notional regional allocations made by the Commission when calculating the allocation of the United Kingdom. But that could not possibly make the first decision unlawful. This is because under the 2013 Regulation the calculation of national allocations by the Commission depended on a precise formula based primarily on regional GDP per capita, whereas the allocation of the funds within a Member State are based on criteria that are qualitative and altogether wider. Developmental needs in the respects covered by the “thematic objectives” cannot be measured simply by reference to general measures of poverty such as GDP per capita. The Secretary of State cannot therefore have been obliged to replicate the methodology of the Commission or to employ some other GDP-based formula in his decision about how to allocate the funds among the regions of the United Kingdom, provided that he respected the thematic objectives and that his proposals were agreed by the Commission in the Partnership Agreement. It is not suggested that he failed to respect the thematic objectives, and the Partnership Agreement has been agreed by the Commission.

The second decision

37.

The appellants, as I have pointed out, recognised that the first decision did not prevent the Secretary of State from protecting them against a “sudden and significant cutback”. Their real target is the Secretary of State’s second decision in which he failed to do so. Their complaint is that it did not protect them against a “sudden and significant cutback” by comparison with the 2007-2013 allocations, because the selection of 2013 as the base year meant that their uplift was based on the year in which their funding in the previous funding period had been lowest. This was because under article 8.1 and Annex II, para 6(b), their funding had been tapered down by 2013 to the national average level for competitiveness regions. Moreover, the national average for competitiveness regions was exactly that, an average. It did not take account of the special needs of those competitiveness regions in the north and midlands of England which were below the average and had relatively low GDP per capita and high levels of deprivation. The appellants argue that in order to avoid unjustifiable discrimination the Secretary of State should, when making his second decision, have based the uplift of the English transition regions for 2014-2020 on their average allocations over the whole of the previous funding period. As it was, his decision to use 2013 as the base year discriminated against them, (i) by comparison with other English transition regions, which had had a flat annual allocations profile in the previous period, and (ii) by comparison with Highlands & Islands whose annual allocations for the new period were calculated by reference to the average of its annual allocations in 2007-2013 instead of just 2013.

38.

The Secretary of State did not overlook these factors. He considered that Merseyside and South Yorkshire were not comparable to other English transition regions or to Highlands & Islands. I shall deal first with the question of comparability to the other English transition regions.

39.

In her witness statement (at paras 47-55), Dr Baxter says that ministers considered four main options:

**Option A** was to replicate the notional regional allocations made by the Commission in arriving at the national allocation of the United Kingdom. This would have resulted in allocations which were proportionate to regional GDP per capita, but would have resulted in a significant shift of funding from the north of England to the south. They considered that there had been no fundamental change in the economic landscape in the last few years such as to justify a shift of allocations of this kind,



which would have reduced the funding available for the poorest parts of England. Officials consulted the Commission. The Commission said that it would be uncomfortable about the use of their methodology, which had been designed for the calculation of national, not regional allocations.

**Option B** was to apply a standard uplift to each region's allocations for 2013.

**Option C** was the same as Option B, but with the allocations of Merseyside and South Yorkshire being based on their average allocations over the whole of the period 2007-2013. (This was already the case for the other English transition regions, whose allocations profile had been flat over the previous funding period). Option C would have resulted in Merseyside and South Yorkshire receiving a higher allocation than under Option B, but it would have involved a reduction of 22% in the allocations of all English transition regions, including Merseyside and South Yorkshire, compared to 2007-2013. This was because the high cost of funding Merseyside and South Yorkshire on the basis of their allocations over the whole of the previous funding period would have had to come out of the pot available to transition regions generally. It was considered that for this reason Option C would be inconsistent with the thinking which lay behind the creation of the transition category for 2014-2020, and would have caused difficulty in agreeing the allocations with the Commission. This was because the transition category had been specifically introduced to provide enhanced levels of funding for regions at an intermediate stage of development notwithstanding the reduction of the total budget.

**Option D** was a hybrid scheme using the Commission's notional allocations for all transition regions combined with what is described as a "UK-specific" formula for more developed regions. For transition regions this would have been the same as Option A.

Ministers also considered a fifth method, which involved using a basket of economic indicators together with a suitable safety net. They thought that there was a "strong case" for this, but rejected it because, like Option A, it would have produced a large drop in funding for the midlands and north of England, in favour of the south.

40.

As Dr Baxter points out, no solution was wholly satisfactory from every point of view:

"48. Given the funding reductions to the overall programme, and the limitations imposed by the EU Regulations, there was no outcome possible which would not have resulted in funding reductions to some regions. The advantages and disadvantages of a range of options had to be considered and Ministers had to take a range of considerations into account in determining their preferred solution."

Ministers, she notes, "had to make difficult decisions":

"87. ... Officials presented them with a range of options after undertaking very detailed and comprehensive analysis and Ministers chose those options which they felt in sum were fairest to all. The available budget was set by the EU and so it was always unlikely that a single option would satisfy all regions. Giving Merseyside and South Yorkshire a larger allocation would have meant reducing the allocations to the other UK Transition regions. Decisions over the Transition allocations were particularly problematic as the negotiations in the European Council had resulted in significant cuts to the budget for Transition regions compared to the European Commission proposal. This level of reduced funding at EU meant that any decision was going to come as a disappointment for some."

41.

The Secretary of State chose Option B, fixing the uplift at 15.7%. His reasons are described as follows by Dr Baxter:

“54. A key aspect of the decision, of course, was the status of Merseyside and South Yorkshire as phasing-in regions for the 2007-2013 period, thus receiving additional payments in 2007, 2008, 2009, 2010 on a ‘specific and transitional basis’, as explained above. Ministers decided to make the allocations using 2013 allocations as a baseline because such a baseline:

- maintained higher levels of funding in the North of England, where need is greatest;
- avoided large drops in funding levels as between 2013 and 2014 (even in relation to South Yorkshire and Merseyside);
- treated all English Transition regions in the same way, whilst taking account of the ‘phased-in’ status of South Yorkshire and Merseyside by basing allocations on the jumping off point from the 2007-2013 allocation; and
- treated all More Developed regions in the same way.

55. Had allocations been calculated based on a 2007-2013 average or overall quantum, then Ministers felt that Merseyside and South Yorkshire would have been unduly advantaged in relation to other English Transition areas, in so far as their boosted allocations in the period 2007-2010 were expressly intended to be ‘transitional and specific’ rather than to be enshrined into future allocations.”

42.

In the light of this reasoning it is impossible to say that the Secretary of State’s decision was outside the broad range of decisions that he could lawfully make. Merseyside and South Yorkshire had already received additional funding over and above that available to other regions with a GDP per capita exceeding 75% of the EU average during the previous funding period. Article 8.2 and Annex II, para 6(b) of the 2006 Regulation had provided for the level of funding to taper down to the national average for competitiveness regions by 2011. Mr Eyres, the appellants’ witness, says that this had not been enough to lift Merseyside and South Yorkshire into the category of competitiveness regions (in the 2007-2013 categorisation) or the category of more developed regions (in the categorisation of 2014-2020). That is so, but it misses the point, which is that it was of the essence of the “transitional and specific” additional funding allowed by article 8 of the 2006 Regulation that it was temporary. Once it had expired, the 2006 Regulation envisaged in terms that the regions which had benefitted should be funded only at the national average aid intensity level for competitiveness regions. In the new categorisation for 2014-2020, these regions would be assisted by being included in the intermediate category of transition regions created for regions with a GDP per capita between 75% and 90% of the EU average. However, the budget for transition regions was tight. If the Secretary of State had based the uplift in 2014-2020 on the average allocations for the whole of the previous period, the effect would have been to continue the impact of the transitional additional funding provided for the years 2007-2011 into 2014-2020. This represented a very significant difference between Merseyside and South Yorkshire on the one hand and the other English transition regions on the other.

43.

In practice it is difficult to see what else the Secretary of State could have done. Unlike pay discrimination cases, where it is possible to level up to match the highest paid, the distribution of EU Structural Funds within each category of regions is a zero-sum game. One region’s gain is another’s loss. Since the fund available for transition regions is ring-fenced the additional cost of providing Merseyside and South Yorkshire with allocations based on the whole of the previous period would have had to come out of the allocations of the other English transition regions and would have left all

of them with 22% less than they had had in 2007-2013 instead of 15.7% more. The Secretary of State was entitled to take the view that this would be contrary to the purpose for which this intermediate category had been created. I do not find it in the least surprising that the Secretary of State anticipated difficulty in getting the Commission's agreement to such a scheme, and I can see no basis on which his judgment of the Commission's likely reaction can be challenged.

44.

Much of the evidence before the court is devoted to a technical and ultimately inconclusive dispute arising from Mr Eyres' assertion that if, hypothetically, Merseyside and South Yorkshire had been competitiveness regions in 2007-2013 rather than phasing-in regions, they would have received a higher allocation in 2013, and therefore a higher allocation in 2014-2020 as well. Dr Baxter challenges his methodology and produces alternative figures of her own, based on rerunning the original calculations made for 2007-2013 on Mr Eyres' hypothesis. The value of this exercise is diminished by the fact that both witnesses agree that if Merseyside and South Yorkshire had actually been competitiveness regions in 2013, the methodology used to calculate allocations in 2014-2020 would in fact have been different. They disagree about what the differences would have been. It is neither necessary nor possible for a court of review to resolve this issue. It is not in fact true that Merseyside and South Yorkshire were at the bottom of the transition category. At 80.14% of the EU average GDP per capita, Merseyside was the third poorest of the nine English transition regions, according to the government's figures, while South Yorkshire at 84.46% was somewhere in the middle of the range. But it is unquestionably true that the result of the allocations process was to inflict a very large reduction on two of the poorer regions of the United Kingdom. However, the only way that that problem could have been addressed on a common basis for all transition regions would have been to use a formula based on GDP per capita, as the Commission had done when calculating national allocations, or else some other formula more closely related to measures of poverty and deprivation. It is impossible for this court to say that the Secretary of State was bound in law to adopt some such formula. In the first place, under the 2013 Regulation allocations within Member States are not based on GDP per capita and are only to a limited extent based on other measures of deprivation. Secondly, the evidence is that the Commission when approached discouraged the use of their own methodology as inappropriate to an internal allocation. And, third, concentration on GDP per capita would have produced an overall shift of funding towards the south which the Secretary of State was entitled to regard as even more anomalous.

45.

I turn to the argument that the appellants' allocation was discriminatory by comparison with Highlands & Islands.

46.

It is correct that Highlands & Islands' funding was reduced by 5% (at 2011 prices) by comparison with 2007-2013, as against a much larger reduction for Merseyside and South Yorkshire, even though as a phasing-out region it had also received transitional additional funding on a tapered basis in the earlier period. Dr Baxter draws attention to three differences between former phasing-in regions like Merseyside and South Yorkshire and a former phasing-out region like Highlands & Islands. As a phasing-out region, Highlands & Islands had previously been funded under the convergence objective in recognition of its greater developmental challenges. Its tapering profile had been more gradual in 2007-2013. And its co-financing rate had been higher (75% against 50% for phasing in regions) so that allocations to it represented better value for money for UK taxpayers. I doubt whether the different tapering profile really differentiates Highlands & Islands from the two English phasing-in

regions. There may be more in the other two points. So far as the Secretary of State attached weight to these factors, it was very much a matter of judgment for him. In fact, however, the evidence suggests that the treatment of Highlands & Islands was not due to these factors. It was the combined result of the first decision, which treated Scotland as a separate territorial unit with its own 5% reduction, and of wishes of the Scottish Government, which naturally preferred to base Highlands & Islands' allocations on the average of its annual allocations in the previous period than to limit it to 95% of its 2013 allocation and spend the rest on its more developed regions. So far as it arose from the treatment of Scotland as a separate territorial unit, I have already explained why I regard that treatment as defensible. So far as the decision about Highlands & Islands arose from the preferences of the Scottish Government, it seems to me to be the natural and legitimate result of the decentralisation of the United Kingdom under its current constitutional settlement. No doubt if the 5% reduction had been applied to the United Kingdom as a whole, Highlands & Islands would have got less than in the event they did, and the saving would have left a bit more in the pot for the nine English transition regions. But there is nothing in the evidence to suggest that the dilemmas affecting allocations to English transitional regions, which I have already discussed, would have been any less acute or that the outcome for Merseyside and South Yorkshire would have been significantly better.

#### Proportionality

47.

The appellants advance an alternative case based on proportionality, which I can deal with quite shortly, for I agree with the Court of Appeal that it adds nothing to the case based on alleged discrimination. The appellants say that the effect of the Secretary of State's decision was to impose upon them a disproportionate burden. The problem about this submission is that it fails to answer the question: disproportionate to what? Proportionality is a test for assessing the lawfulness of a decision-maker's choice between some legal norm and a competing public interest. Baldly stated, the principle is that where the act of a public authority derogates from some legal standard in pursuit of a recognised but inconsistent public interest, the question arises whether the derogation is worth it. In this case the only legal standard by which the treatment of Merseyside and South Yorkshire can be regarded as disproportionately onerous to them is provided by the terms of the 2013 Regulation and the principle of equality. The two regions have no entitlement to support from the Structural Funds except what they can derive from these two sources. If the Secretary of State's decisions are consistent with both, as I consider them to have been, their treatment cannot be regarded as disproportionate.

#### Lord Mance's judgment

48.

I have naturally revisited my views in the light of the judgments of Lord Mance and Lord Carnwath. To some extent, the differences between us relate to the supposedly anomalous consequences of the first decision, in particular on the different treatment of Merseyside and South Yorkshire on the one hand and Highlands and Islands on the other. I do not feel that I can usefully add anything to what I have already said about the first decision, which I regard as justifiable. Two other differences do, however, call for further comment. The first concerns the purpose of the structural funds, which is central to the analysis of Lord Mance. The second is his analysis of the relationship between the allocations for 2014-2020 and those of the previous funding period.

49.

We may all agree that the distribution within the United Kingdom of EU structural funds must be consistent with their purpose. Where I part company with Lord Mance is that he appears to me to take too narrow a view of the purposes of the funds and the means by which those purposes may legitimately be achieved. The Social Fund is not directly concerned with the reduction of regional imbalances, but with the promotion of employment and geographical and occupational mobility. The Regional Development Fund is concerned with the reduction of regional imbalances, but not only by the direct improvement of GDP per capita and other measures of deprivation. The purpose of both funds is to support the action of the Union in these areas. The action of the Union is guided by the “targets and shared objectives” referred to in the three Council policy documents of 2010 identified in article 2.1, and summed up generally in the concept of “smart, sustainable and inclusive growth”. This concept runs through the whole of the 2013 Regulation, and the “thematic objectives” in article 9 are mainly directed to promoting it. They involve a wide range of economic criteria, which will not directly diminish regional divergences, even if they can be expected to do so indirectly in the long term. Lord Mance and Lord Carnwath both consider that the allocations to Merseyside and South Yorkshire were not based on their “actual needs”. But that is a conclusion which they appear to have reached solely by reference to standard measures of deprivation such as GDP per capita. This assumes that there must necessarily be a close correlation between these measures of relative deprivation and the distribution of EU structural funds. But since the reduction of such differences is only one purpose of the structural funds, and even that purpose may be achieved indirectly by promoting growth through the thematic objectives, that assumption is on the face of it unjustified.

50.

The second major difference arises out of Lord Mance’s rejection of the view of both the judge and the Court of Appeal about the justification for taking allocations for 2013 as the reference point for the uplift applied in 2014-2020. The same point appears to be implicit in the analysis of Lord Carnwath. In the absence of any complaint about the distribution of allocations in the previous funding period, and in the absence of any material change in the economic geography of the United Kingdom since then, the mere fact that allocations were made for 2014-2020 by reference to those in the previous period is unobjectionable. The objection is specifically to the choice of 2013 as the reference year. It is in my opinion clear that it was this decision which accounts for the differences between Merseyside and South Yorkshire on the one hand, and the remaining transition regions in the current funding period on the other. It was certainly not the decision to reduce the allocations to the four countries comprising the United Kingdom by a flat 5%. This first decision did not in fact, as Lord Mance suggests, “diminish the pot available for the nine English transition regions”. The government could have distributed the overall allocation to the English transition regions in such a way as to ensure that all of them received a flat 5% reduction on their total allocations for the previous period. It could have distributed them in such a way as to ensure that Merseyside and South Yorkshire received no more than a 5% reduction even if the others did not. Some such solution is what the appellants say that they hoped and expected would happen after the first decision had been announced. Their real complaint is that it did not happen. The reason why it did not is that the purpose of the 2013 Regulation in dividing the former competitiveness category into a “transition” category and a “more developed” category was to enable the former to receive an uplift. The reason why Merseyside and South Yorkshire did worse than that was that their uplift, although the same as that of the other transition regions, was based on the 2013 funding allocation and ignored the fact that they had been receiving tapered transitional funding between 2007 and 2011. The same problem would have existed, and would have been equally acute, if the 5% reduction in the total funds for distribution had been applied across the whole of the United Kingdom, instead of to each of the four countries separately. I have set out earlier in this judgment my reasons for agreeing with the courts below that disregarding the tapered

transitional funding was justifiable. Lord Mance disagrees (i) because he considers that the tapered transitional funding which they received under article 8 of the 2006 Regulation in that period should be regarded as no different in character from the rest of their funding in that period; and (ii) because the allocation for the previous period had tapered down to the average for allocations for competitiveness regions, and Merseyside and South Yorkshire were worse off than the average competitiveness region. The problem about the first of these points is that but for article 8 of the 2006 Regulation, they would have been competitiveness regions in 2007-2013. The tapered funding was a temporary increase in their allocations designed to ease their path from Objective 1 status in 2000-2006 to competitiveness status in 2007-2013. Its function could properly be treated as spent by 2013. The problem about the second point is one that I have already pointed out in another context, namely that it assumes a more precise correlation between relative deprivation and allocations than anything required by the 2013 Regulation.

Conclusion

51.

I would dismiss the appeal.

**LORD NEUBERGER:**

Introductory: the background and the issues

52.

This appeal arises out of a challenge to the decision of the Secretary of State relating to the distribution between various regions of the United Kingdom of money allocated by the European Commission to the UK. The money in question (“the UK allocated funds”) emanates from the European Structural Funds, and is payable in respect of the years 2014-2020, pursuant to Regulation (EU) 1303/2013 (“the 2013 Regulation”).

53.

The background to the appeal is set out by Lord Sumption in paras 2-19, 30-31 and 37-41, and by Lord Mance in paras 113-148 below, and it is unnecessary to repeat much of what they have said. In particular, the relevant provisions of the 2013 Regulation are explained by Lord Sumption in his paras 5 to 13.

54.

The Secretary of State for Business, Innovation and Skills decided to distribute the UK allocated funds by reference to a two-stage process. First, they were apportioned between each territory (for want of a better word) of the United Kingdom. This apportionment was effected on the basis that, for 2014, Northern Ireland (which was one region), Wales (which was divided into two regions), Scotland (which was divided into four regions) and England (which was divided into 30 regions) would each receive an annual sum which was 5% less than the they had received in the last year of the previous period, 2013. This was because the UK allocated funds for 2014 were 5% less than they had been for 2013 (in 2011 prices). Secondly, the distribution of the English portion between the 30 English regions involved each of the nine English regions designated under the 2013 Regulations as “transition” regions, (ie regions which have a GDP between 75% and 90% of the average of the 27 EU member states) receiving a 15.7% increase in their distribution over 2013. It is to be noted in this connection that, while there is practically no freedom to distribute funds allocated by the Commission for “transition” regions to other regions (and vice versa), there are no specific provisions in the 2013

Regulations as to how the funds allocated for “transition” regions of a member state should be distributed between those regions.

55.

The grounds upon which the decision of the Secretary of State is challenged can be expressed in a number of ways. I have found the most helpful approach to analyse the challenge as having four lines of attack, the first two of which are aimed at the procedure whereby the UK allocated funds were distributed amongst the 37 regions of the UK, and the third and fourth of which are aimed at the outcome. Each of the attacks has been advanced on the grounds of (i) breach of the EU principles of equality or proportionality and/or (ii) breach of domestic public law principles. However, the essence of each of the attacks is that the process adopted by the Secretary of State and/or the outcome of that process was unlawful on the grounds that it was (i) not in accordance with the 2013 Regulation, and/or (ii) so unreasonable as to be unlawful. In practice, these two grounds march together very closely, and it is hard to envisage circumstances in which only one of them was satisfied (cf *Kennedy v The Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, paras 51-56 in relation to domestic law and Human Rights law).

56.

The four attacks all effectively involve contending that the approach that the Secretary of State adopted to the distribution of the UK allocated funds wrongly failed to have proper regard to the relative economic stages of development of the 37 regions of the UK, or the nine “transition” regions of England. It may seem somewhat artificial to treat the attacks as having separate procedural and substantive aspects, but I have found it helpful to consider whether each of the two stages of the process was in accordance with the law as a matter of principle, before addressing the question of whether the outcome of those processes was in accordance with the law.

57.

If the procedure is not in accordance with the law, then it would be very difficult, but probably not inconceivable, for the outcome of the procedure to stand. On the other hand, if the procedure was lawful, it would nonetheless be quite possible for the outcome to be unlawful. After all, one could expect a person responsible for the allocation of such funds to consider, where appropriate, the outcome of the procedure which was proposed before finally adopting it. Such an exercise of distribution may frequently involve a degree of iteration in terms of determining a procedure, considering the outcome, and then adjusting the procedure if appropriate.

58.

The procedural attack on the first stage is based on the proposition that, in the light of the terms of the 2013 Regulation, there can be no justification for apportioning the UK allocated funds on the basis that the four territories, England, Scotland, Wales and Northern Ireland, should each suffer the same reduction in funding from 2013. Such a division, runs the argument, pays no regard to the disparities in the stages of development between individual regions, or groups of regions, and it is that with which the 2013 Regulation is concerned.

59.

The procedural attack on the second stage is based on the proposition that, by adopting a 2013 baseline for all nine English transition regions, the Secretary of State wrongly disregarded the status of Merseyside and South Yorkshire (regions which for convenience I will call “the appellants”) as “phasing in” regions in the previous, 2007-2013, period. Because of the tapering provisions applicable to such regions during that period, it is said that the appellants are significantly and unjustifiably

disadvantaged as against the other seven “transition” English regions, as those other regions had not been “phasing in” regions during the 2007-2013 period.

60.

The two attacks on outcome are founded on what are said to be indefensible discrepancies between the 2014-2020 payments to the appellants and those made to a number of other “transition regions” in the UK. The first such attack relies in particular on Highlands & Islands in Scotland (as well as on Northern Ireland) and essentially arises from the first procedural stage. The second attack on outcome focuses on the difference between the appellants and most of the other seven “transition” regions in England, and arises only from the second procedural stage.

The proper approach for the court to adopt

61.

The courts have no more constitutionally important duty than to hold the executive to account by ensuring that it makes decisions and takes actions in accordance with the law. And that duty applies to decisions as to allocation of resources just as it applies to any other decision. However, whether in the context of a domestic judicial review, the [Human Rights Act 1998](#), or EU law, the duty has to be exercised bearing in mind that the executive is the primary decision-maker, and that it normally has the information, the contextual appreciation, the expertise and the experience which the court lacks. The weight to be given to such factors will inevitably depend on all the circumstances. That is clear from a number of cases, including the decisions of this court in *Bank Mellat v Her Majesty's Treasury* (No 2) [2013] UKSC 39, [2014] AC 700, paras 20-21 and 68-76, and in *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60, [2014] 3 WLR 1404, paras 19-22, 67-68, and 111, where the judicial review and Human Rights aspects were considered. In the EU law context, the same sort of point was made in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394, para 200.

62.

The importance of according proper respect to the primary decision-making function of the executive is particularly significant in relation to a high level financial decision such as that under consideration in the present case. That is because it is a decision which the executive is much better equipped to assess than the judiciary, as (i) it involves an allocation of money, a vital and relatively scarce resource, (ii) it could engage a number of different and competing political, economic and social factors, and (iii) it could result in a large number of possible outcomes, none of which would be safe from some telling criticisms or complaints.

63.

Therefore, like Lord Carnwath, I agree with the Court of Appeal that the Secretary of State's decision under consideration in this case is in the “classic territory” where the courts afford the decision-maker “a wide margin of discretion” - [2014] EWCA Civ 1080, [2014] PTSR 1387, para 57. This is a particularly forceful factor in the present case, which concerns a decision which involves the distribution of funds between different parts of the United Kingdom, in respect of which the relevant legislation is very imprecise as to the criteria to be adopted. I am not so sure that I get much assistance from the test of “manifestly wrong” (although I acknowledge that it is used by the Court of Justice), unless the expression means that no reasonable government could have taken the decision.

64.

I agree with the thrust of what Lord Sumption says on this aspect in his paras 22-23, but, although there is obvious force in the passage which he quotes from Lord Hoffmann's speech, I think the issue



is susceptible to somewhat more subtle and discriminating analysis than might be inferred from reading that passage. To say that the “allocation of public expenditure ... is very much a matter for democratic decision” takes matters very little further at least in connection with a decision made by the executive. The fact that the legislature assigns such a decision to the executive does not alter the fact that it is the executive’s decision and not that of the legislature. In any event, the legislature will obviously have intended the rule of law to apply, so that such a decision, as with any executive decision, must be susceptible to judicial oversight.

65.

Nonetheless, a court should be very slow about interfering with a high level decision as to how to distribute a large sum of money between regions of the UK. But the degree of restraint which a court should show must depend on the purpose of the allocation, the legal framework pursuant to which the resources are allocated, and the grounds put forward to justify the allocation. The line between judicial over-activism and judicial timidity is sometimes a little hard to tread with confidence, but it is worth remembering that, while judicial bravery and independence are essential, the rule of law is not served by judges failing to accord appropriate respect to the primary policy-making and decision-making powers of the executive.

Some other preliminary points

66.

Particularly in the light of the differences of opinion in this court, I think it is right to mention that the statutory purpose of the distribution of the UK allocated funds does not appear to me to be by any means solely to reduce imbalances or inequalities between different UK regions. The 2013 Regulation refers in article 2.1 to three documents adopted by the European Council, which are identified by Lord Sumption in his para 11, and recital (3) states that the Structural Funds are intended to achieve economic growth, promote “harmonious development”, and “reduc[e] regional disparities”, which, according to article 89 are to be achieved through “strengthening [of the EU’s] economic, social and territorial cohesion” and the “delivery [of] smart, sustainable and inclusive growth”, by investing in “growth and jobs” and working towards EU-wide co-operation. Accordingly, while the reduction of inter-regional imbalances is an important factor when deciding on distribution, a point which is underlined by article 176 of TFEU (which is directed to cohesion), it is by no means the only factor – and it is a long term one. The 2013 Regulation is concerned not only with articles 174-176, but also article 162 (which is concerned with promoting employment), a point underlined by the thematic objectives in article 9 of the 2013 Regulations, which also demonstrate that economic convergence is simply one of the purposes of the Funds.

67.

Turning to the exercise of distributing the UK allocated funds for the 2014-2020 period, each of the two stages of that exercise was based on the distribution which had taken place in the previous, 2007-2013, period. This approach was apparently adopted partly for reasons of transparency, convenience and simplicity, but there were two further reasons. The first was to minimise the risk of a disruptive change in any region or territory in 2014, by ensuring that it did not receive a substantial reduction compared with the payment it received for 2013. The second reason was that the distribution for the 2007-2013 period had been effected by reference to a number of different indicators, and the Secretary of State’s view was that there had not been any significant change from 2006/2007 to 2013/2014 in the economic or other relevant differentials between the regions of the UK. It is significant that there has, rightly in my view, been no challenge to this approach as a matter of broad principle (although, for the reasons discussed below, the two specific stages, and their

consequences, are challenged). To take the payments for the previous period as the “baseline” may well not be the ideal basis for distribution of funds for the current period, but I find it hard to see how it could be said to be unreasonable, unless it can be shown to be so by reference to specific facts or reasons.

68.

Another point that should be mentioned is that, as Lord Sumption says, the Commission appears to be content with the Secretary of State’s distribution process, and has, we were told, adopted it. That is a point which has some traction, particularly in the context of a regulation which envisages (in articles 14-17) that a member state’s proposed distribution between its regions will be submitted to the Commission for the purpose of its entering into a “partnership agreement” with the member state, and that, before “adopting” the proposed agreement the Commission will “assess [its] consistency with this Regulation”. However, that does not alter the fact that the courts of this country have a fundamental constitutional duty to apply their view of the law to a decision or action of the executive, when it is challenged. In addition, of course, the attack made by the appellants is not only based on EU law, but also on domestic common law.

69.

Two other factors deserve comment. First, the absence of any prior consultation between the Secretary of State and individual regions (as opposed to the devolved governments). In my view, if such consultation had occurred and the Secretary of State had taken what had been said into account in a reasonable way (even if he had ultimately rejected it), that would have assisted his case. However, the fact that there were no such consultations does not undermine his case as a matter of principle, although it may, of course, in practice have assisted him in avoiding errors. In that sense, it makes it easier for the appellants to attack his decision, but in the end the decision has to be assessed on its own merits. In some circumstances, a failure to consult can of itself render a decision unlawful, but that will, at least normally, only be where there is a specific obligation or commitment to consult (see for instance *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755). However, it has not been suggested that such an argument could be advanced here.

70.

Secondly, it is clear from the evidence that a fair amount of thought was involved in the decision-making process and four options were considered in relation to the second stage – see paras 30-31 and 39-41 of Lord Sumption’s judgment. That is of some assistance to the Secretary of State, because (i) a considered decision deserves more judicial respect than a relatively unconsidered one, and (ii) it underlines the reasons why the court should be very reluctant to overturn the decision. However, it is not very likely to be a determinative point. The ultimate decision is either in accordance with the law or it is not. Furthermore, the fact that the process adopted is better than three others which were rejected merely shows that there are worse processes, not that the adopted process is acceptable.

The procedural attack on the first stage: distribution between the four territories

71.

The first stage of the Secretary of State’s decision involved distributing the UK allocated funds between the four territories in precisely the proportions which reflected their respective shares in 2013. Accordingly, as already explained, because the UK’s allocation in 2014-2020 was reduced by 5% from what it had been in 2007-2013, each territory’s share was reduced by 5%. This aspect of the decision is attacked by the appellants because (i) it was not based on consideration of the relative economic and development demands and needs of individual regions, or even of the four individual

territories, and (ii) it limited the Secretary of State's freedom of manoeuvre so far as distributions to individual regions were concerned.

72.

The concern of the appellants, as English regions, is easy to understand. It is not really in dispute that, if the approach of the Commission to the assessment of the UK allocated funds had simply been reflected by the Secretary of State when effecting the distribution of those funds between the four territories in 2014-2020, England as a whole would have seen an overall increase of about 7% over 2007-2013, whereas Scotland, Wales and Northern Ireland would respectively have seen decreases of around 32%, 22% and 43%. However, these percentages have been arrived at by retrospective, informal analysis of the sum allocated. The Commission has been anxious to emphasise that the basis upon which each member state's allocation was fixed should not be disclosed and that any guesses as to how the allocations were fixed should be avoided.

73.

In my view, the appellants' objection to the first stage adopted by the Secretary of State should be rejected. In the first place, it is inappropriate to equate the function of the Secretary of State, when deciding how to distribute the UK allocated funds among the regions, with the function of the Commission, when deciding how to allocate the funds among the member states. The terms of the 2013 Regulation, and the documents to which it refers, are obviously relevant when considering the Secretary of State's approach to distribution. However, in contrast to the position relating to the assessment of the funds to be allocated to a member state, the 2013 Regulation includes no formula as to how those funds should be distributed among the regions of a member state.

74.

Thus, Annex VII to the 2013 Regulation sets out a detailed "Allocation Methodology" governing the allocation of funds by the Commission among member states. The allocation is assessed by aggregating a sum for each region, which sum is assessed on a per capita basis, with the per capita amount being greatest for regions with less than 75% of the EU average GDP per capita and least for those with more than 90%, with the "transition" regions being in the middle (see paragraphs 1-4 of the Annex). However, this rather precise methodology does not apply to the distribution of those funds within member states. And the fact that the Commission refuses to say how a member state's allocation was determined serves to show that no specific approach by a member state to the distribution of its funds among its regions is encouraged in practice.

75.

There is no provision which expressly limits the freedom of a member state when deciding how to distribute its allocated funds between regions. It is true that article 176 TFEU refers to "redress[ing] the main regional imbalances" and "structural adjustments of regions whose development is lagging behind", but it does not require convergence and it has nothing to say about timing. Having said that, in the light of the terms of the 2013 Regulation, I accept that the level of economic development of each of its regions must be a point of real relevance when a member state decides how to distribute its allocated funds between them. Thus, if it could be shown that it was treated as irrelevant by a state, then the decision would be likely to be held unlawful. However, as I have sought to explain in para 66 above, it appears clear that a member state is not required to base the distributions of its allocated funds between regions solely by reference to their relative stages of economic development, let alone to their GDP per capita. Further, the "thematic objectives" referred to in article 9 of the 2013 Regulation have to be taken into account.

76.

The fact that, by contrast with the detailed directions with regard to allocation between member states, there are no express constraints on member states as to how they should distribute their allocated funds renders it difficult to justify a substantial degree of constraint as to the manner of distribution. While article 93 of the 2013 Regulation limits transfers between the three types of region, it does nothing to limit transfers between regions of the same type, which again suggests a relatively high degree of freedom when the state is deciding how to distribute allocated funds between regions with the same status. The fact that such transfers would be notional, as the Commission does not reveal the “split” between individual regions in its allocation, itself suggests that it cannot have been intended that member states were to be very limited in their scope for deciding how to distribute between regions.

77.

In the course of his impressive judgment, Stewart J said that, essentially for the reasons discussed in paras 73-76 above, the appellants’ attack on the Secretary of State’s decision to adopt what I have called the first stage “falls at first base” - [2014] EWHC 232, [2014] LGR 389, para 73. I agree that those reasons establish that the attack faces an insurmountable problem in so far as it relies on the point that the distribution of payments among the regions of the United Kingdom does not simply reflect their relative state of economic development. However, it can still be argued that the apportionment between the four territories is arbitrary and inconsistent with the purpose of the 2013 Regulation, because the UK allocated funds were a lump sum for the United Kingdom as a whole, and the apportionment between the four territories pays no regard to the relative claims of the 37 regions of the United Kingdom, and unjustifiably ties the hands of the Secretary of State in relation to the distribution of the funds between those individual regions.

78.

I accept that there is real force in that point, but the decision that the 5% reduction in the United Kingdom’s allocation should be visited equally on, or pro rata between, England, Scotland, Wales and Northern Ireland is very much a policy decision, or a politically based decision, which is therefore particularly difficult for a court to evaluate and therefore to criticise, and therefore to condemn. The decision reflects both the increasingly decentralised nature of UK administration and the political realities of the devolution process. As I see it, neither of those two features is an illegitimate factor for the Secretary of State to take into account, and neither is a factor whose importance a court is well-placed to assess, let alone to dispute. I agree with Lord Sumption that the decision of the Grand Chamber in (Case C-428/07) R (Horvath) v Secretary of State for the Environment, Food and Rural Affairs [2009] ECR I-6355 supports the notion that the first stage of the decision was justifiable under EU law.

79.

Apportioning the UK allocated funds between the four territories on this pro rata approach based on the 2007-2013 payments may not be a course which most people would expect, or even which many ministers would have adopted. But I do not consider that it can be said that it is contrary to the 2013 Regulation, particularly as it contains no express restriction as to how nationally allocated funds are distributed; nor do I consider that it could be said to be irrational. Indeed, I think that there is some force in the point that the Secretary of State’s view that each territory should be protected in the 2014-2020 period against a substantial overall reduction from the amount it received in the 2007-2013 period accords with the inclusion in Appendix VII of a ceiling on any increase (para 13),

and a floor on any decrease (para 16), in a member state's allocation in the 2014-2020 period as against the 2007-2013 period.

The procedural attack on the second stage: distribution between English regions

80.

The complaint of the appellants about the second stage of the distribution process is that they should not have been treated in the same way as the other seven English "transition" regions because, unlike the other seven regions, the appellants were "phasing in" regions in the 2007-2013 period. This means that, although the appellants will receive a 15.7% increase in 2014 on what they had received the previous year, they are due to receive in the 2014-2020 period around 61% less than they received over the previous 2007-2013 period, whereas the seven other "transition" regions will receive rather more in the 2014-2020 period than they received for the 2007-2013 period.

81.

The explanation for the fact that the appellants will receive a year-on-year increase between 2013 (the last year of the previous period) and 2014 (the first year of the current period), but a substantial overall aggregate decrease between the two periods, is that they were "phasing-in" regions for the 2007-2013 period. In other words they were regions, which during the 2000-2006 funding period had had GDPs per capita of below 75% of the average of the EU member states (and hence were "Objective 1" regions), but by 2007 were no longer in that category, but were "competitiveness regions" (ie regions having GDPs per capita of between 75-90% of the EU average), owing to their relative economic growth. This meant that during the 2007-2013 period their allocation of funds had started at a higher level than the other "competitiveness" regions, which had had GDPs per capita of 75-90% of the average of the member states during the 2000-2006 period (and therefore had been "Objective 2" regions in that period). However, as the name suggests, the level of funds allocated to "phasing in" regions in 2007 tapered down over the next four years, so that by 2011 it was at the national average level per capita as other "competitiveness" regions.

82.

By contrast, the seven other English regions were not only "competitiveness" regions during the 2007-2013 period, but they were effectively in the same category (namely "Objective 2" regions) during the 2000-2006 period, as they each had a GDP per capita between 75-90% of the EU average in 2000.

83.

In my view, the attack on the second stage should also be rejected. The appellants cannot logically invoke the fact that they received more in the 2007-2013 period than other "competitiveness" regions to justify their being treated more favourably than the other "competitiveness" regions for the 2014-2020 period. This is because the only reason that they were treated better in the earlier period was to smooth the passage from having been "Objective 1" regions in the 2000-2006 period to being "competitiveness" regions in the 2007-2013 period. From 2011, when the tapering stopped, the appellants received aid at the average rate per capita for "competitiveness" regions between 2011 and 2013, and there is no reason why the Secretary of State should be expected to treat them any differently for the 2014-2020 period. As Stewart J said in para 78(iii) of his judgment, if the Secretary of State had adopted the approach suggested by the appellants, it "would have unduly advantaged the [appellants] in relation to the other English transition regions".

84.

However, the appellants raise a separate argument based on the point that the annual payments for the 2007-2013 period made to the appellants, as “phasing in” regions, were, exceptionally and unlike the payments to other “competitiveness” regions, determined by the Commission rather than by the UK government. Accordingly, runs the argument, using the payment received in 2013 as the base for determining the 2014 payment for each “transition” region in England involved treating the appellants differently from the other seven English “transition” regions. There is undoubted force in this argument, particularly given that (reflecting the UK government’s distribution decision in 2006) the 2013 payments to the other “transition” regions in the north and midlands of England were increased above what they would otherwise have been, owing to the UK government’s decision to favour the north and midlands over the south, whereas this did not apply to the 2013 payments to the appellants.

85.

This point has force. None the less, given (i) the fact that it was a reasonable decision in principle to take the 2013 payments for each region as the basis for calculating the 2014 payments, (ii) the wide margin of discretion accorded to member states when deciding how to distribute allocated funds nationally, (iii) the large number of factors which are potentially relevant, (iv) the long term nature of the aims of the 2013 Regulation and its predecessors, (v) the fact that the Secretary of State appreciated and addressed the level of payment per capita received by the appellants, and (vi) the perceived desirability of maintaining a degree of continuity for each region, I have reached the conclusion that this point should also be rejected. The relevant Ministers and civil servants in the Department of Business, Innovation and Skills were aware of the fact that the proposed distribution would result in the appellants receiving a relatively low sum per capita when compared with other “transition” regions, they considered the possibility of increasing the appellants’ share of the UK allocated funds. However, they decided that such a course would be unfair on other “transition” regions, especially as the appellants had fared better than those other regions, as “competitiveness” regions, thanks to phasing, during the years 2007-2010.

The procedural attacks: summary

86.

For the reasons given in paras 71-85 above, I consider that the appellants’ attacks on the two stages adopted by the Secretary of State for deciding how to distribute the UK allocated funds in 2014-2020 fail, in so far as they are considered as a matter of principle. However, as explained in paras 56-60 above, the fact that the procedure adopted by the Secretary of State was defensible in principle is not the end of the matter. It is still necessary to examine the outcome in the light of the criticisms raised by the appellants.

The attack on outcome: Highlands & Islands and Northern Ireland

87.

The first attack on outcome is primarily based on a comparison between the appellants and the Scottish region of Highlands & Islands, and it largely results from the first stage. As explained above, although the appellants will receive a 15.7% increase in 2014 on what they had received in 2013, the total amount they are due to receive in the 2014-2020 period would be over 60% less than they received over the previous 2007-2013 period, whereas Highlands & Islands would suffer no decrease in the 2014-2020 period as against the 2007-2013 period. In actual euros per capita, Highlands & Islands will receive about three times as much as the appellants will receive (around €400 per capita as against around €130 per capita).

88.

The status of the appellants as “phasing in” regions in the period 2007-2013 is explained in para 81 above. The status of Highlands & Islands is slightly different. Like the appellants, it is a “transition” region under the current, 2014-2020, regime, but, unlike the appellants, it was a “phasing out” (rather than “phasing in”) region, during the 2007-2013 period. This meant that (i) like the appellants, it had been an “Objective 1” region, with a GDP per capita of below 75% of the average of the EU member states in the 2000-2006 period, and by 2007 it was no longer in that category, but (ii) unlike the appellants, its exit from the category arose not because of an improvement in GDP per capita, but because of the accession of ten new (and, on average, poorer) member states to the EU between 2000 and 2007. Accordingly, Highlands & Islands was subject to a rather different tapering regime under the allocation arrangements for 2007-2013, which only reached the level for “competitiveness” regions in 2013.

89.

On that ground, the courts below considered that it was simply inappropriate to compare Highlands & Islands with the appellants, and therefore that any attack by the appellants on the outcome of the Secretary of State’s decision based on the Highlands & Islands 2014-2020 payment was misconceived. That may be right, but, at least if one confines oneself to the reason for, and consequences of, the difference between “phasing in” and “phasing out” regions, I am not particularly impressed with that view, because all three regions were “competitiveness” regions, and any phasing had ended by 2013. However, the differences in co-financing (ie the extent of the domestic contribution, as briefly explained by the Judge in para 50(c) of his judgment) may conceivably justify the view taken by the courts below.

90.

It is unnecessary to decide that rather nice point: even if one assumes that it is relevant that Highlands & Islands had a different status from the appellants in the 2007-2013 period, the difference in outcome between its 2014-2020 aggregate payment and those for the appellants is striking. As already mentioned, the appellants will receive around €130 per capita, whereas Highlands & Islands will receive around €400 per capita. This follows from the combination of (i) the fact that Scotland was more favourably treated than England at the first stage, and (ii) the fact that Highlands & Islands is the only “transition” region in Scotland, and it was thought to be wrong to reduce its 2014 payment to bring it more into line with the English “transition” regions as that would benefit the other three, richer, regions in Scotland.

91.

A somewhat similar, if less forceful, point can be made by the appellants about Northern Ireland, also a “transition” region in 2014-2020, which is to receive around €260 per capita in 2014. Again, it is true that it was a “competitiveness” region in 2006-2013 period, and therefore was not strictly comparable with the appellants (or with Highlands & Islands), but I doubt that that point has much force (subject to the co-financing point referred to at the end of para 89 above). But, even if it does, the fact that in 2014 Northern Ireland receives twice the amount per capita that the appellants receive is rather striking.

92.

These disparities do give one pause for thought. Many people in the position of the Secretary of State might well have taken the view that the disparities such as those discussed in paras 90-91 above would have justified making adjustments as between the payments which would otherwise be made to each region, or even reconsidering the whole methodology. However, bearing in mind the wide margin

of discretion which should be accorded to the Secretary of State in the distribution of the funds, I do not consider that this justifies the conclusion that the distribution scheme which he adopted was unlawful.

93.

I start with the point that the disparities arise primarily from the first stage of the distribution process, which, as already mentioned, does not seem to me to be objectionable in principle. The first stage almost inevitably will result in a degree, and no doubt often a significant degree, of disparity between a region in one territory and a very similar region in another. The same sort of problem could arise between similarly developed (or undeveloped) regions in different member states. Particularly bearing in mind that the apportionment of the UK allocated funds between the four territories of the UK was based on a high level political decision which is lawful in principle, it would require a compelling case on the outcome before a court could rule the decision unlawful in practice. I do not consider that a compelling case has been made.

94.

When considering the disparities relied on by the appellants, it is a mistake to assume that, merely because a region has in 2014 and/or had in 2013 the same status as, or had reached the same stage of economic development as, another region, that the two regions should be accorded a similar level of distribution. The purpose of distributing the funds is not only to improve the growth, or relative growth, of poorer regions: it is also to achieve the multifarious “thematic objectives”. Accordingly, it is dangerous to focus, and inappropriate to focus exclusively, on GDP per capita when comparing different regions.

95.

The selection of a region’s GDP per capita figure as governing the appropriate level of payment may well reflect the Commission’s overall assessment of the UK allocated funds under the provisions of the 2013 Regulation. However, as already mentioned, (i) the Regulation has no such provisions in relation to the distribution of the UK allocated funds between individual regions, and (ii) the payments in 2007, on which the 2014 payments are based, were arrived at by reference to a basket of indicators, which were assumed to be equally valid in 2013, on the basis that there had been no significant shift in the social geography of the United Kingdom. To take obvious examples which are admittedly speculation on my part, Highlands & Islands with its low population density and its meteorological and geographical character must be a relatively expensive region to service, and Northern Ireland has unique social issues.

96.

The danger of focussing on GDP per capita can be demonstrated by comparing two sets of regions which were both English “competitiveness” regions in 2007-2013 and are both English “transition” regions in 2014-2020, and have very similar GDP per capita. First, Devon receives a payment for 2014-2020 of €67 per capita, whereas Cumbria receives €166; secondly, Lincolnshire receives €137 per capita, whereas Tees Valley & Durham receives €280 per capita. Given that these two examples do, on any view, involve comparing like with like, and that the 2014 payments are based on those for the 2007-2013 period, it underlines the point that the Secretary of State has not based his distribution, even within a territory, simply on the basis of a region’s GDP per capita. Indeed, that is clear from the Secretary of State’s evidence, which, as mentioned in para 67 above, explains that the distribution for the 2007-2013 period, on which the 2014 payments were based, (i) was not effected simply by reference to a region’s GDP per capita but was based on much more material, and (ii) was



intentionally loaded in favour of regions in the north and midlands of England as against those in the south (hence Devon's payment per capita is much lower than Cumbria's).

97.

Furthermore, as is clear from what I have just said and is discussed more fully in paras 100-103 below, it is not by any means necessarily the case that the appellants would have been treated better, or that Highlands & Islands or Northern Ireland would have been treated worse, than they have been treated, if there had been no first stage. There are many ways in which the distribution of the UK allocated funds could have been effected.

98.

Particularly in the light of these features, I consider that the Secretary of State was entitled to take the view that, whatever scheme he adopted would prove objectionable to some regions, and that if he adhered to the two-stage system he did adopt and made adjustments, that too would cause problems and give rise to complaints. Accordingly, he was entitled to decide that it was simpler and politically advisable to stick with the scheme and not make adjustments.

99.

This brings one back to the point that the Secretary of State's decision involved a substantial measure of political judgment. Accordingly, his decision to adhere to a distribution scheme which was clear, simple and transparent, rather than one which was nuanced, subjective and complex is one which it is difficult for a court to challenge - unless of course the outcome appears to be inconsistent with the 2013 Regulations or simply unreasonable. When one considers the figures mentioned in paras 90-91 above together with the reasons summarised in paras 94-98 above, it appears to me that it cannot fairly be said that the appellants have managed to establish either ground.

The attack on the outcome: the other English "transition" regions

100.

The second attack on outcome is based on a comparison between the 2014 payments to the appellants and the other seven English transition regions in the light of their relative stages of economic development. This attack is effectively based solely on the second stage of the distribution decision in relation to the 2014-2020 period. In my opinion, the attack should be rejected for very similar reasons to those given in paras 93-99 above. However, it is fair to say that the starting point, namely the nature of the decision in principle, is somewhat less of a formidable hurdle for the appellants. The decision how to distribute the UK allocated funds between the English "transition" regions was a more workaday, relatively less high level political, decision than the first stage decision. Nonetheless, as already explained, it was a defensible policy decision - at least in principle - and it must inevitably carry with it a degree of inevitable rough justice.

101.

However, although the initial hurdle may be lower for the appellants' attack on the outcome for English "transition" regions than it is in relation to Highlands & Islands and Northern Ireland, I consider that, when one examines the appellants' case on this fourth aspect, it should be rejected.

102.

In a nutshell, the principal criticism raised by the appellants is that, given that he based the 2014-2020 distributions on the distributions in the previous period, the Secretary of State should have assessed the allocation for the English transition regions by reference to the average annual distribution which they received for the 2007-2013 period rather than the 2013 distribution which

they received. On the face of it, at least, I do not consider that the Secretary of State's decision on this point can be criticised. The difference arising from the choice of the 2013 distribution only affects regions which were phasing-in regions during the 2007-2013 period, and the appellants are the only English regions which can claim to suffer in this way. However, there is, at the very least a real argument that it would be wrong to take the benefit of their "tapering" payments for the years 2007-2013, into account when assessing their 2014 distributions, given that these payments were intended to soften the blow of their having become "competitiveness" regions, a softening which was intended to be spent by 2013, and therefore, a fortiori, by 2014.

103.

Quite apart from this, as already mentioned, it is apparent that there is no direct or simple correlation between the level of economic development of an English "transition" region and its 2014 payment, and there is no clear reason to think that the appellants would be better off under another scheme.

104.

The relevant figures for the nine English "transition" regions are set out in para 55.4.2 of Stewart J's judgment, and I have already discussed some of the figures in para 96 above. More specifically, the appellants, each of whom receive around €130 per capita during 2014-2020 (€123 in the case of South Yorkshire, and €135 in the case of Merseyside), fare better than Devon (€67 per capita, as already mentioned), but worse than five of the other six English "transition" regions, if one looks simply at the payment per capita and the level of the region's GDP per capita. Ignoring Devon, the other six English "transition" regions received between (i) slightly more than the appellants, Lincolnshire at €137 per capita, and (ii) a little more than twice as much as the appellants, Tees Valley & Durham at €280 per capita. Ignoring the two "outliers", Devon and Tees Valley & Durham, the figures vary between €137 per capita for Lincolnshire and €167 for Shropshire & Staffordshire. Lincolnshire's GDP per capita is lower than either South Yorkshire's or Merseyside's, whereas Shropshire & Staffordshire's is a little lower than South Yorkshire's and somewhat higher than Merseyside's.

105.

Ignoring Devon, which receives less per capita because it is in the south (see paras 84 and 96 above), it is noteworthy that Lincolnshire (which in terms of GDP per capita is somewhat worse off than either of the appellants), receives a payment which is very similar on a per capita basis to that of the appellants, whereas Tees Valley & Durham (which in terms of GDP per capita is only slightly lower than Lincolnshire) receives twice as much. On the other hand, Cumbria (which is richer than any other English "transition" region) receives a payment per capita significantly more than Lincolnshire.

106.

Thus, the figures demonstrate that there is no reliable correlation between payment per capita and GDP per capita for 2014-2020, even for English regions which were ordinary (ie not "phasing in" or "phasing out") "competitiveness" regions in 2013 and "transition" regions in 2014. That does not mean, of course, that any level of payment for the appellants would be justified. However, the important point for present purposes is that, on a GDP per capita basis, (i) the appellants plainly fare better than one region, Devon, and, more significantly, fare consistently with another region, Lincolnshire, and (ii) there is nothing like a precise correlation with the 2014 payments per capita.

107.

This analysis of the distributions to the other English "transition" regions thus leads to the conclusion that criticism of the outcome of the Secretary of State's method of distributing the UK allocated funds is not soundly based, if it rests on the presumption that each English "transition" region (or even each

“transition” region in the north and midlands) should get the same payment per capita, or the same payment per capita adjusted to take account of the region’s 2014 GDP per capita. Indeed, as mentioned in para 96 above, that conclusion is consistent with the Secretary of State’s evidence, which states that the 2014 payment for “transition” regions was arrived at by a fixed percentage uplift on the 2013 payment, which itself had been arrived at by reference to a number of different indicators in 2007.

108.

Furthermore, it appears to be very difficult, at least on the evidence in these proceedings, to assess what difference it would have made if the appellants’ 2014-2020 payments had been determined by reference to what they would have received in 2013, or in the period 2007-2013, had they been ordinary “competitiveness” regions, rather than “phasing in” regions.

Conclusion

109.

In these circumstances, I have come to the conclusion that this appeal fails. I must, however, confess that I have reached this conclusion with some hesitation. Although I do not agree by any means entirely with the approach adopted by Lord Mance (who places more emphasis than I do on the criteria and limits imposed by the 2013 Regulation on the Commission, when considering a member state’s freedom of movement when distributing allocated funds) or by Lord Carnwath (who considers that the Secretary of State has a greater duty to justify his distributions between individual regions than I believe is mandated by the 2013 Regulation), I see force in much of their reasoning, and indeed I was at one time persuaded that they had reached the right conclusion.

110.

While I would dismiss this appeal, it is right to re-affirm the court’s duty to declare that decisions of the executive, whether relating to the distribution of funds or otherwise, are unlawful if they are insufficiently justified or do not accord with the lawful aims or requirements pursuant to which the distributions in question are made. I appreciate that the decision under consideration in this case was difficult and potentially complex, and that it involved many competing factors, political and social as well as economic. However, with the expertise and information available to the Secretary of State, one would have hoped for a more sophisticated and considered, and a more consultative, approach to the question of how to apportion such a large sum of money between different regions of the United Kingdom. I note from the evidence put in by the Secretary of State that it does appear that a much more careful approach was adopted in relation to the distribution for the 2007-2013 period.

111.

In summary, then, while the decision as to how to distribute the UK allocated funds between the 37 regions of the United Kingdom may have been unimpressive in some respects, it was not unlawful.

**LORD CLARKE:**

112.

I have read the other judgments in this appeal with great interest (and no little admiration). I have throughout been inclined to agree with Lord Sumption. It does seem to me that the court should be very reluctant to interfere with decisions of the kind under scrutiny here because they raise questions of policy which are essentially matters for the executive. I recognise that in an appropriate case it is the duty of the court to interfere. However, I agree with Lord Neuberger at para 66 that the decisions under review involved a range of different policy considerations and that it cannot fairly be said that

the choices made by the Government were unlawful. Like Lord Neuberger I have had some doubts in the course of the argument, especially in the light of the judgment of Lord Mance. However, again like Lord Neuberger, I prefer the reasoning of Lord Sumption to that of Lord Mance. I do not detect any significant difference between the reasoning of Lord Sumption and that of Lord Neuberger. I agree with them and Lord Hodge that the appeal should be dismissed.

**LORD MANCE: (with whom Lady Hale agrees)**

Introduction

113.

The European Union (“EU”) has a set of structural and investment funds (the “ESI” funds), of which the three main elements relate to the Common Agricultural Policy, the Cohesion Fund and the Structural Funds. The Structural Funds, defined by article 1 of Council Regulation (EC) No 1303/2013, consist of the Regional Development Fund (“ERDF”) and the somewhat smaller Social Fund (“ESF”). The ERDF is established under article 176 TFEU, and the ESF under articles 162 to 164 TFEU. The EU makes available the Structural Funds on the basis of its overall assessment of each Member States’ regional development needs, but their allocation within each Member State is, subject to limits, the responsibility of that State. The EU operates on the basis of seven year budgets, each of which determines the Structural Funds available for the next seven year period. The budget for the years 2014-2020 was thus agreed in 2013.

114.

On this appeal various local authorities in the Merseyside and South Yorkshire regions challenge the defendant Secretary of State’s allocation of the Structural Funds within the United Kingdom during the EU budgetary period of 2014-2020. The challenge focuses on two successive decisions taken by the Secretary of State. The first was to allocate the funds received in respect of the period 2014-2020 between the individual territories or nations of the United Kingdom (that is England, Scotland, Wales and Northern Ireland) in the same proportions as in the previous seven year period 2007-2013. The second was to base the allocations for English “transitional” regions in the period 2014-2020 on the amounts each such region received in 2013 under the scheme in place during that previous seven year period. These decisions, taken individually or in combination, are alleged to have affected Merseyside and South Yorkshire in a manner which, it is submitted, is not supported by the relevant EU Regulations and involves anomalies and inequalities of treatment which cannot be and have not been justified.

115.

Structural funding is made available by reference to the NUTS level 2 (“NUTS 2”) regions. NUTS 2 regions are second-tier regions corresponding broadly to large counties in the United Kingdom. They are defined by the Nomenclature of Territorial Units for Statistics (NUTS 2006/EU27) (“NUTS”) established pursuant to article 1 and Annex I of regulation (EC) 1059/2003. There are 30 NUTS 2 regions in England (including Merseyside and South Yorkshire), 4 in Scotland and 2 in Wales while Northern Ireland is a single NUTS 2 region. For the purposes of structural funding, the EU also identifies categories of NUTS 2 regions. It determines the total funding which each Member State receives from the ERDF and ESF by reference to its own assessment of regional development needs within each such category. The categorisation adopted has changed from seven-year period to seven-year period, as has the extent to which the relevant regulations define at an EU level the amount which each region is to receive, or leave this to the relevant Member State to determine. All

Structural Funds funding has to be co-financed or matched by domestic investment in a defined percentage.

116.

The broad purposes for which the Structural Funds are made available are defined in article 174 TFEU in the case of the ERDF and article 162 in the case of the ESF. Article 174 is part of a title consisting of articles 174-178, headed “Economic, Social and Territorial Cohesion”. It provides:

“In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.

In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.

Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions.”

Article 176 further provides that the ERDF

“is intended to help to redress the main regional imbalances in the Union through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions.”

117.

Article 162 provides that the ESF is established:

“In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living”

and that

“it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.”

118.

Articles 164 and 178 provide for the European Parliament and Council to adopt implementing regulations relating to, respectively, the ESF and the ERDF, while article 177 confers further more generally worded power to make regulations defining the tasks, priority objectives and organisation of such funds.

2000-2006

119.

During the period 2000-2006 regions were classified in three categories, which have been described as Objectives 1, 2 and 3. Objective 1 (the most needy) contained five UK regions, namely Cornwall and the Scillies, West Wales and the Valleys, Highlands & Islands, Merseyside and South Yorkshire, plus the whole of Northern Ireland.

2007-2013

120.

During the period 2007-2013, Regulation (EC) No 1083/2006 provided for a different categorisation. The most needy and the least needy regions were the two main categories, and have been described as respectively convergence and competitiveness regions. But in between them, under articles 8.1 and 8.2 of the regulation, were two sub-categories to which support was allocated on a “transitional and specific basis”, and these have been described as phasing out and phasing in regions.

121.

Regulation No 1083/2006 determined the precise amounts allocated to particular regions falling within the convergence and the two transitional categories. All that was left to the United Kingdom was to determine the allocation between competitiveness regions of the funds allocated by the EU to United Kingdom competitiveness regions. There was no scope for any transfer of funds between categories. The allocation between competitiveness regions was done on a basis which, because of the use of NUTS 1 as distinct from NUTS 2 criteria and a safety net limiting any reduction by reference to the prior period of 2000-2006 to 6.7%, did not necessarily correspond precisely with but nonetheless reflected (in the words of counsel for the Secretary of State, Mr Jonathan Swift QC) “an approximation of” each such competitiveness region’s economic needs. The indicators and safety net used by the Government to determine regional allocations within the competitiveness category also had the intended effect of channelling relatively high levels of funding to northern regions, compared with southern regions with similar economic profiles.

122.

Under article 8, read with para 6 of Annex II, of Regulation 1083/2006, the transitional support for phasing out regions was

“80% of their individual 2006 per capita aid intensity level in 2007 and a linear reduction thereafter to reach the national average per capita aid intensity level for the Regional competitiveness and employment objective in 2013.”

For phasing in regions, it was

“75% of their individual 2006 per capita aid intensity level in 2007 and a linear reduction thereafter to reach the national average per capita aid intensity level for the Regional competitiveness and employment objective by 2011.”

123.

The purpose of transitional support was thus to smooth the relevant regions’ movement from the most needy category to full competitiveness by the linear reduction of funding. However, the final figure, based on “the national average per capita aid intensity level” for competitiveness regions was necessarily aspirational. In other words, whether or not any phasing in or phasing out region actually achieved the same level of development as the average for all competitiveness regions was something that could only be determined with time. There was no guarantee that any of such regions would do so.

124.

In the case of the United Kingdom the convergence regions (those with less than 75% of the GDP of the 25 EU member states) were Cornwall and the Scillys and West Wales and the Valleys. The only phasing out region (ie with more than 75% of the GDP of the 25 EU member states, but less than 75% of the GDP of the 15 member states) was Highlands & Islands. The only phasing in regions (those

which had been old Objective 1 regions, but with GDP now exceeding 75% of the average of that of the 25 EU Member States) were Merseyside and South Yorkshire.

125.

The linear reduction prescribed by the regulation led both phasing out and phasing in regions to receive a flow of funds tapering sharply downward during the seven-year period. The tapering extended in the case of phasing out regions over the full seven-year period, but took in the case of phasing in regions only four years, leading to the receipt of monies based on “the national average per capita aid intensity level” for competitiveness regions during each of the last three years, 2011-2013. Taking rounded figures, Merseyside thus received some £161m in 2007, £129m in 2008, £95m in 2009, £60m in 2010 and £23m in each of the three years 2011 to 2012, while South Yorkshire received some £142m in 2007, reducing each year to £52m in 2010 and then remaining stable at £21m in each of the last three years. The phasing out regions only received monies based on “the national average per capita aid intensity level” for competitiveness regions in the last year, 2013.

2014-2020

126.

For the period 2014-2020, Regulation (EU) No 1303/2013 applies. This is expressed to have been made with particular regard to article 177. Recital 1 records that article 174 TFEU provides

“that, in order to strengthen its economic, social and territorial cohesion, the Union is to aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands ...”

Recital 77 recites that “in order to promote the TFEU objectives of economic, social and territorial cohesion, the investment for growth and jobs goal should support all regions” and that

“to provide balanced and gradual support and reflect the level of economic and social development, resources under that goal should be allocated from the ERDF and the ESF among the less developed regions, the transition regions and the more developed regions according to their GDP per capita in relation to the EU-27 average.”

127.

The regulation states both common or general principles (article 1) and thematic objectives (article 9) which are to apply to all ESI funds and “fund-specific,” “general rules governing” the two Structural Funds and the Cohesion Fund (articles 1, 2(4) and 4 and Part 3). In relation to the Structural Funds, article 89 (the first in Part 3) identifies one “mission” and two “goals” to be pursued for the purpose of that mission. The mission is stated in article 89(1):

“89(1). The Funds shall contribute to developing and pursuing the actions of the Union leading to strengthening of its economic, social and territorial cohesion in accordance with article 174 TFEU.

The actions supported by the Funds shall also contribute to the delivery of the Union strategy for smart, sustainable and inclusive growth.”

The goals are defined as follows:

“89(2). For the purpose of the mission referred to in paragraph 1, the following goals shall be pursued:

(a) Investment for growth and jobs in Member States and regions, to be supported by the Funds; and

(b) European territorial cooperation, to be supported by the ERDF.”

128.

The thematic objectives which under article 9 all ESI Funds should support do not alter or detract from the fund-specific mission and goals identified in the case of the Structural Funds in Part 3. On the contrary, article 9 makes clear that they are introduced

“in order to contribute to the Union strategy for smart, sustainable and inclusive growth as well as the Fund-specific missions pursuant to their Treaty-based objectives, including economic, social and territorial cohesion ...”

They represent, in short, ways in which the fund-specific mission and goals may be promoted. They are identified as strengthening research, technological development and innovation; enhancing access to, and use and quality of ICT; enhancing the competitiveness of SMEs and of the agricultural, fishery and aquaculture sectors; supporting the shift towards a low-carbon economy; promoting climate-change adaptation, risk prevention and management; preserving and protecting the environment and promoting resource efficiency; promoting sustainable transport and removing bottlenecks in key network infrastructures; promoting sustainable and quality employment and supporting labour mobility; promoting social inclusion, combating poverty and any discrimination; investing in education, training and vocational training for skills and lifelong learning; enhancing institutional capacity of public authorities and stakeholders and efficient public administration. Article 9 concludes by stating that these thematic objectives are to be “translated into priorities that are specific to each of the ESI Funds and are set out in the Fund-specific rules”.

129.

Article 91 provides that, for the purposes of the mission identified in article 89(1), the resources available for the Structural Funds and the Cohesion Fund are some €322,000m in 2011 prices, 96.33% (some €313,000m) of which is under article 92(1) for the growth and jobs goal, while only 2.75% is under article 92(9) for the territorial cooperation goal.

130.

Critically, for present purposes, article 90 introduces a new three-fold categorisation for the period 2014-2020. This is quite different from the categorisation used in the prior period 2007-2013. It identifies less developed regions (those with less than 75% of the GDP of the now 27 Member States), transition regions (those with GDP between 75% and 90% of the average of the 27 Member States) and more developed regions (those with more than 90% of the average GDP of the 27 Member States). Article 90(4) provides for the Commission to decide which regions fall within each category, by a list valid for the whole period 2014-2020.

131.

Further, a fixed percentage of the total resources of €313,000m available for the growth and jobs goal is under article 92(1) allocated to each of the defined categories of region - viz 52.45% for less developed regions, 10.24% for transition regions and 15.67% for more developed regions (with 21.19% also going to the Cohesion Fund and 0.44% for additional funding for outermost regions). The fixed nature of these allocations is identified in article 93.1:

“The total appropriations allocated to each Member State in respect of less developed regions, transition regions and more developed regions shall not be transferable between those categories of regions.”



Article 93.2 gives Member States a very limited possibility of altering these fixed allocations. It allows the Commission “in duly justified circumstances which are linked to the implementation of one or more thematic objectives” to accept a Member State’s proposal “to transfer up to 3% of the total appropriation for a category of regions to other categories of regions”.

132.

Annex VII prescribes the allocation method for each Member State’s entitlement in respect of less developed, transition and more developed regions (basically, in each case, the sum of allocations or shares calculated for each of its individual NUTS level 2 regions, on bases taking into account specified factors including GDP). The total allocated to the United Kingdom for less developed regions was some £2.118 billion, for transition regions some £2.3266 billion and for more developed regions some £5.126 billion. The Commission’s calculations of individual regional needs are not published (though the parties have been able to work out what they approximately were), and they have no domestic application.

133.

The overall funds allocated to the United Kingdom for the period 2014-2020 were (after allowing for inflation) reduced by 5% compared with 2007-2013. The Secretary of State was under article 93.2 permitted to transfer to the two less developed regions in the United Kingdom, that is Cornwall and the Scillys and West Wales and the Valleys, 3% of the budget which the EU had assigned to transition and more developed regions, and to split the amount so transferred between these two regions, achieving thereby an equal 16% cut in funding compared with the prior seven-year period.

#### The Partnership Agreement

134.

Within the above parameters, it is for the United Kingdom to adopt national rules on the eligibility of expenditure (see Recital 61), by preparing a Partnership Agreement, to be approved by the Commission. “Partnership Agreement” is defined in article 2 as:

“‘Partnership Agreement’ means a document prepared by a Member State with the involvement of partners in line with the multi-level governance approach, which sets out that Member State’s strategy, priorities and arrangements for using the ESI Funds in an effective and efficient way so as to pursue the Union strategy for smart, sustainable and inclusive growth, and which is approved by the Commission following assessment and dialogue with the Member State concerned.”

135.

Article 4(4) and 5 provide:

“4(4). Member States, at the appropriate territorial level, in accordance with their institutional, legal and financial framework, and the bodies designated by them for that purpose shall be responsible for preparing and implementing programmes and carrying out their tasks, in partnership with the relevant partners referred to in article 5, in compliance with this Regulation and the Fund-specific rules.

...

5(1). For the Partnership Agreement and each programme, each Member State shall in accordance with its institutional and legal framework organise a partnership with the competent regional and local authorities. The partnership shall also include the following partners:

(a)

competent urban and other public authorities;

(b)

economic and social partners; and

(c)

relevant bodies representing civil society, including environmental partners, non-governmental organisations, and bodies responsible for promoting social inclusion, gender equality and non-discrimination.”

136.

Any Partnership Programme prepared for the purposes of articles 4(4) and 5(1) must self-evidently comply with, and be prepared on the basis of considerations relevant to, the fund-specific mission and goals of the regulation. It must also comply with more general principles of European and domestic law, including those of equality and rationality. The present challenges were brought at a stage when the programme submitted by the United Kingdom to the Commission had not yet been approved. The Commission was kept informed about the challenge, but regarded it as an internal issue for the United Kingdom to resolve. It stated that, if this Court’s ruling required the United Kingdom Government to review the Partnership Agreement after it had been adopted, this could be done through the mechanism of article 16 of the regulation. Article 16(4) enables a Member State to propose an amendment, whereupon the Commission will carry out a (re-)assessment and, where appropriate, adopt a decision within three months. In the event, the Commission has, since the oral hearing, issued a decision dated 29 October 2014 approving the Partnership Programme proposed by the United Kingdom. Given the Commission’s stance, the United Kingdom Government also, successfully, resisted a claim for disclosure of the communications between it and the Commission about the Partnership Agreement, as “not relevant to any issue in this appeal”.

137.

No submission has been made to the Supreme Court at any stage that the Commission should be regarded as the judge of the present challenge made to the Secretary of State’s decisions, or that any decision that the Commission might make, or has now made, approving the Partnership Programme in its present form has or could have any effect on the challenge, if otherwise valid, to such decisions. Lord Sumption’s statements in paras 10 and 24 of his judgment that the Commission “is the mechanism of compliance envisaged in the Regulation” is not based on any argument which was or could in the circumstances fairly be put before the Court. I am also unable to accept the further assertion that the Commission “is able to review the merits of the Secretary of State’s value judgments in a way that is beyond the institutional competence of any court”. There is no information at all whether or how the Commission has looked into the subject matter of the present challenges. The suggestion that it is beyond the institutional competence of “any court, let alone a national court” to review the merits of the Secretary of State’s value judgments furthermore begs the question whether the appellants’ present challenges are to “value judgments”. Courts, national and international, have a significant role in reviewing the conformity of administrative decisions with the legislative framework within which they are made. It is their role to consider the relevance of the considerations on the basis of which such decisions are taken, and their compliance with fundamental principles of equality and rationality. The Secretary of State and the Commission were both fulfilling administrative functions, the former at the national, the latter at a supranational level.

The issue in detail

138.

The critical issue on this appeal is whether the Secretary of State's decisions were in conformity with the legislative framework. The appellants' case on this falls under three heads: (i) the Secretary of State was obliged when making such decisions to take as their basis the relative economic needs and disparities of the regions, but in fact reached the decisions on a different basis; (ii) the decisions were in breach of the general EU principle of equality; (iii) the decisions were in breach of the general EU principle of proportionality.

139.

In relation to (i), the Secretary of State accepts that "the underlying purpose of Structural Funds is to reduce development disparities between regions" and the Court of Appeal was, in my view correctly, "content to assume that the objective of reducing economic disparities was a mandatory relevant consideration and that the Secretary of State was therefore required to have regard to the relative economic needs of the transition regions" (para 88). The fund-specific mission of the Structural Funds is under article 89(1) of the regulation the strengthening of economic, social and territorial cohesion in accordance with article 174 TFEU. This is to be pursued overwhelmingly through the goal of investment for growth and jobs (articles 89(2)(a) and 92(1) of the regulation) with reference to the specified thematic objectives set out in article 9 of the regulation.

140.

In relation to (ii), the Secretary of State accepts that the principle of equality applies. The Court of Appeal stated the position before it as follows (para 65):

"65. The equal treatment principle requires that 'comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified': see, for example, the Arcelor Atlantique case [2008] ECR I-9895, para 23. Justification is not in issue in this case. Accordingly, the only question is whether there was a failure to treat like cases alike and unlike cases differently."

Later, in para 82, the Court of Appeal again noted that "the Secretary of State does not rely on justification", but added:

"We acknowledge that, as a matter of legal analysis, there is a clear distinction between the fact of differential treatment and its justification. But in the circumstances of this case, as is clear from the evidence of Dr Baxter the dividing line is not easy to maintain."

I will revert to Dr Baxter's evidence later in this judgment.

141.

In relation to (iii), the Secretary of State submits and the Court of Appeal agreed that proportionality can add nothing to a challenge based on the principle of equality or rationality, in the absence of some specific legal standard in the light of which it can gain greater content. This seems to me correct, and I shall proceed on that basis.

142.

With regard to the two principal grounds which are therefore open to the appellants, the Secretary of State submits that both the challenged decisions involved complex evaluative judgments, which can only attract what may be described as a "light" standard of review. Referring to its previous decision in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394, the Court of Appeal said (para 70) that:

“In principle, the more complex and the more judgment-based the decision, the greater the margin of discretion [that] should be afforded to the decision-maker.”

That too is a proposition which I accept as relevant, in any context where different institutions of the State, the administration and the courts, have different institutional competence and the courts are asked to review the administration’s decision-making in an area which is within the administration’s particular competence. But that does not apply to, or exclude closer review of, a decision which is based on irrelevant considerations or fails to treat like cases alike. Further, the lack of prior consultation with the appellants, or with Merseyside and South Yorkshire, and the informality of the process by which the Secretary of State made his decisions, take this case outside the most extreme category of cases in which courts have expressed reluctance judicially to review public funding decisions.

The first decision

143.

Against this background, it is necessary to examine more closely the Secretary of State’s two impugned decisions. The first arose as follows. During the period 2014-2020, the only less developed regions are the two former convergence regions. Transition regions include not only the three former phasing out and phasing in regions, but also eight former competitiveness regions, including Northern Ireland. The total EU funding for the ERDF and ESF was divided between the three categories of region as follows. The total allocated to the United Kingdom for less developed regions was some £2.118 billion, for transition regions some £2.3266 billion and for more developed regions some £5.126 billion.

144.

The overall funds allocated to the United Kingdom for the period 2014-2020 were (after allowing for inflation) reduced by 5% compared with 2007-2013. The Secretary of State was under article 93.2 permitted to transfer to the two less developed regions in the United Kingdom, that is Cornwall and the Scillies and West Wales and the Valleys, 3% of the budget which the EU had assigned to transition and more developed regions, and to split the amount so transferred between these two regions, achieving thereby an equal 16% cut in funding compared with the prior seven-year period. The Secretary of State then took the amounts allocated to each of the four territorial units making up the United Kingdom - that is England, Wales, Scotland and Northern Ireland - in the period 2007-2013 and determined that each such territorial unit should receive the same amount as in that period, less a 5% reduction.

145.

At this stage, Dr Baxter confirms in her first witness statement, that

“Ministers did not consider the split of funding within Scotland or England”

and that Ministers

“were aware that increasing the funding for the Devolved Administrations [ie in comparison with that which would have resulted from a region by region assessment] would mean less for certain regions in England, as allocations had to be made from a set budget category for each category of region. However, it was decided that this would be dealt with at the next stage of the allocation process and that only the big picture within the UK would be looked at when trying to distribute the cut fairly between the UK nations.”

146.

The first decision was taken after the Department of Business Innovation and Skills had calculated that an allocation to all United Kingdom regions on a basis similar to that used by the Commission to arrive at the figures set out in para 132 above would lead to England receiving £439m more than in the period 2007-2013, while Wales, Scotland and Northern Ireland would receive, respectively, £494m, £272m and £216m less.

147.

As a result of the first decision:

(a)

Northern Ireland, a unit consisting of one transition region which had previously been a competitiveness region, received the same as it had received both in 2013 and (because it had been receiving monies on a flat line basis) in each year during the period 2007-2013 less 5%.

(b)

Highlands & Islands received the yearly average of its total receipts during the period 2007-2013, less 5%. This was effectively inevitable. The only other regions in Scotland were competitiveness regions, and the Secretary of State was not likely to (and after discussion with the Scottish Ministers did not) increase their allocation in order to reduce that of Highlands & Islands.

(c)

The allocation for West Wales and the Valleys was set as described in para 144, with the effect of allocating to the one remaining Welsh region, East Wales, a more developed region, the whole of the remaining amount allocated to Wales.

The second decision

148.

The second decision arose as follows. Within England there are in all nine transition regions. Seven of these are former competitiveness regions, and two are former phasing in regions, Merseyside and South Yorkshire. The Secretary of State determined that, taking the amount that each region has received in the year 2013 (not the annual average it had received over the whole period 2007-2013), each should receive a 20% uplift, reduced by 4.3% for technical assistance and for funding of the national offenders' programme, making a final uplift of 15.7%. Regions in the more developed category received a 5% uplift, reduced again by 4.3% making a 0.7% uplift, while Cornwall and the Scillys received a 16% reduction.

The effects of the two decisions

149.

The combined effect of the two decisions was that, while Northern Ireland was guaranteed an allocation based, albeit not exactly, on an assessment of its actual needs during the prior period and while Highlands & Islands would receive an allocation based on the average of its receipts as a transitional region over the whole of the prior period, Merseyside and South Yorkshire received an allocation which was, in contrast, not referable to any assessment of its actual needs or its average receipts during the prior period, but based on the average of the aid which had been estimated as required by competitiveness regions in the prior period (since that was the basis of Merseyside's and South Yorkshire's receipt of aid in the year 2013).

150.

By any measure of development and need, however, Merseyside and South Yorkshire still fall well below the average for competitiveness regions. The indicators of economic development selected by the Government itself for allocating funding in 2007-2013 were per capita business expenditure on research and development, start-ups, qualifications, GVA per workforce job, percentages of working age population unemployed or inactive, percentages of working age population without qualifications and with NVQ level 1 qualifications. Applying such indicators, Merseyside and South Yorkshire are ranked third and sixth most deprived out of the total of 34 regions not falling into the convergence and phasing out categories in 2007-2013. Using the Commission's methodology, Merseyside and South Yorkshire would have received about £315m and £236m respectively, while on the Government's current approach, they would receive only £202m and £178m respectively, in each case for the whole period 2014-2020. It is common ground that, even on the basis of the calculation most favourable to the United Kingdom Government that the Secretary of State has been able to support, Merseyside and South Yorkshire would, if their entitlement during the period 2014-2020 were computed as if they had then been competitiveness regions, receive at least £10.3m and £24.1m more than they would be under the Government's present intended allocation. They submit that the figures would be much greater. GDP is not of course the only possible measure of any region's entitlement, and Lord Neuberger has identified variations in funding even between regions whose funding was arrived at on a comparable basis. But the use of inconsistent bases to arrive at the level of funding is on its face likely to lead to distortions, unless it can be justified by considerations relevant under Regulation 1303/2013. The combined effect of the two decisions was in my view to preclude this.

151.

The further combined effect of the two decisions is that Merseyside and South Yorkshire will as transition regions receive funding calculated, as a matter of substance, on a different basis from that received by other English transition regions which were formerly competitiveness regions. First, by taking the year 2013 as the base for the seven former English competitiveness regions, the Secretary of State was taking as his base for those seven regions funding which applied in each of the years 2007-2013 and was calculated on a basis with a relationship to each such region's needs and characteristics. Second, the 2013 base reflected in the case of the seven former competitiveness regions the Government's deliberate policy of favouring northern regions over southern regions, which it was free to adopt in the period 2007-2013 in relation to regions which fell in that period into the competitiveness category.

152.

In contrast, the 2013 base taken for Merseyside and South Yorkshire was derived from an average for United Kingdom competitiveness regions, which these two regions do not match. Secondly, their 2013 base was pre-determined by the EU by Regulation (EC) No 1083/2006. It was not a figure which was (or could have been) uplifted to cater for the United Kingdom Government policy of favouring northern over southern regions. Yet on the evidence Merseyside and South Yorkshire are among the neediest of northern regions.

153.

In the light of the above, the appellants are therefore right, I consider, when they observe that (a) the first decision committed a significant part of the transition funding to two particular transition regions (Northern Ireland and Highlands & Islands) on a basis which continued to give, subject only to a 5% reduction, the average level of funding received throughout the whole of the prior seven year period, (b) it did this without regard to the extent to which this would impact on the funding available for the new range of English transition regions (including seven former competitiveness regions) formed by

the Commission's re-categorisation of regions for the period 2014-2020 and (c) in reality there would be an adverse impact, since effectively preserving the pot for Northern Ireland and Highlands & Islands (less 5%) was bound to diminish the pot available for the nine English transition regions, including not only Merseyside and South Yorkshire, but also seven former competitiveness regions now entitled to enhanced funding as transition regions in the period 2014-2020. Lord Sumption's contrary view in paras 35 and 50 ignores the reduced size of the pot for the new category of transition regions embracing seven former competitiveness regions, once the previous allocation to Northern Ireland and Highlands & Islands was effectively ring-fenced (less 5%), compared with the average funding they received throughout the whole prior seven-year period, by the Secretary of State's first decision. As to the second decision, the appellants are also right, in my opinion, in submitting that this allocated monies to Merseyside and South Yorkshire on a basis which, although superficially similar, was in fact fundamentally different from that applied to other English transition regions, as well as Northern Ireland and Highlands & Islands.

154.

In her first witness statement, Dr Baxter identified the reasons for dividing the United Kingdom's Structural Fund allocation between the four territories constituting the United Kingdom. She stated that they were transparency, simplicity, consistency and a balance taking account of the status of the devolved administrations under the United Kingdom's constitutional settlement. However, none of these reasons relates directly to the fund-specific mission of strengthening economic and social cohesion and the reduction in that connection of development disparities between regions or indeed with delivery of the Union strategy for smart, sustainable and inclusive growth or the thematic objectives introduced to contribute thereto (see paras 126-128 above). On the contrary, they involve an initial four-way division, essentially for political reasons, which operates irrespective of the position in individual regions, and potentially and actually to the detriment of one or more English regions. Dr Baxter's witness statement effectively accepts this (para 145 above). Regional disparities, and consideration of the mission and goal identified in article 89 of Regulation 1303/2013 were displaced by territorial and political considerations deriving from the United Kingdom's devolution settlements. In so far as she goes on to suggest that any adverse effect would or might be addressed at the second stage of decision-making, I have already noted in para 153(c) that this would not have been practicable and in any event it was not done.

155.

The Secretary of State seeks to make good this approach by reference to his view that there had been no significant change from the years 2006-2007 to the years 2013-2014 in the economic or other relevant differentials between different United Kingdom regions. Lord Sumption endorses this response in para 35, as does Lord Neuberger in para 67. But the response could only have been relevant, had the categorisation of and treatment of regions introduced by Regulation No 1303/2013 remained the same as it was in the previous period 2007-2013 under Regulation No 1083/2006. This was not the case. A division of total available funding between the four territories of the United Kingdom in the period 2014-2020 in the same totals (less 5%) as had applied throughout the whole period 2007-2013 was bound to lead to anomalies in the light of (a) the re-categorisation of regions under Regulation No 1303/2013, (b) the recognition of seven former competitiveness regions as meriting enhanced treatment as transition regions, along with Merseyside and South Yorkshire, and (c) the different bases and levels of funding which different transition regions would necessarily enjoy in the period 2014-2020 compared with the period 2007-2013. The "consistency and balance" involved in giving each devolved administration the same amount (less 5%) were in fact bound to lead to inconsistency and imbalance. Two unlike situations (those existing in the periods 2007-2013 and

2014-2020) were treated alike, in a manner and with results that none of Dr Baxter's four reasons justifies.

156.

Reference was made in argument to the Court of Justice's decision in (Case C-428/07) R (Horvath) v Secretary of State for Environment, Food and Rural Affairs [2009] ECR I-6355. But that decision turned on the constitutional settlement involved in devolution. It was of its essence that the devolved administrations had under the relevant devolution arrangements the primary responsibility for implementing the common agricultural policy, and on that basis the Court of Justice held that "divergences between the measures provided for by the various administrations cannot, alone, constitute discrimination" (para 57). In para 56 the Court distinguished "discrimination ... resulting from a measure adopted by that Member State implementing a Community obligation", referring in this regard to its decision in Joined Cases 201/85 and 202/85. Further, the relevant measure expressly required and permitted Member States to "define, at national or regional level, minimum requirements" for funding support, a provision which the court interpreted as expressly recognising "the possibility for the Member States, to the extent authorised by their constitutional system or public law, to permit regional or local authorities to implement Community law measures", by defining such minimum requirements.

157.

The present case is critically different. The Structural Funds are allocated to the United Kingdom, primarily to strengthen its social and economic cohesion. The Secretary of State retains responsibility for the internal allocation of the Structural Funds within the United Kingdom. That he consulted with the devolved administrations in relation to the decisions which he took does not affect this, or alter his duty to avoid discrimination between those affected by his decisions. If he chose to divide up the total funding available between territories of the United Kingdom, he was obliged to do so in a way which was consistent with the fund-specific mission of cohesion and the goal of growth and jobs set by Regulation No 1303/2013, and would lead to like cases being treated alike, and unlike cases differently, across the whole United Kingdom. The mathematical division between the four territories of the funding allocated to the United Kingdom for the period 2014-2020 was, as noted in para 155 above, bound to lead to discrepancies detrimental to cohesion, in particular when arrived at in disregard of the re-categorisation of regions effected by Regulation No 1303/2013.

158.

The appellants' challenge to the Secretary of State's decisions, on the basis of the discrepancies to which they lead between the bases of allocation to Merseyside and South Yorkshire and to other regions within the United Kingdom is, I consider, also made good. All transition regions must in my view be regarded as comparable, and on this basis differences in treatment between them require to be considered and justified. The Secretary of State appears to have foregone any case of justification in the courts below, but, even if justification is treated as a live issue or an issue which is in the present context inextricably linked with comparability, I do not consider that the difference in treatment has been shown to be legitimate.

159.

Merseyside and South Yorkshire were given an allocation which took as relevant funding they received in 2013 by reference to an average for competitiveness regions, which clearly did not reflect their position or needs. Highlands & Islands on the other hand received funding based on the average of the tapered funding they received over the whole 2007-2013 period. They were both transitional regions. Their funding reduced in each case to the same level in 2013. Highlands & Islands was



admittedly a phasing out region, of whom it could be said that in 2006 their GDP had been less than 75% of that of the original 15 EU Member States. This could not be said of Merseyside and South Yorkshire and they were only transitional regions because they had been Objective 1 regions in the period 2000-2006. But, nevertheless, funding in the period 2007-2013 was in each case arranged on the basis that it reduced to the average for competitiveness regions by 2013. There was no reason to assume, without analysis, that the needs of Highlands & Islands merited a complete preservation (subject only to a 5% reduction) of their average funding in the period 2007-2013, whereas Merseyside and South Yorkshire required no more than the preservation with a 15.7% uplift of their very low level funding in the year 2013, based on an average which did not on any view reflect their actual position. There is (with respect to Lord Sumption's comment in para 42 about "additional funding") no basis for concluding that Merseyside and South Yorkshire received (but Highlands & Islands did not) some sort of uncovenanted bonus through the higher early funding allocated to them during the prior period 2007-2013 which should now be carried forward as a form of debit to their account in respect of the period 2014-2020. Differences in the co-financing received in the period 2007-2013 between phasing out regions (which had only to find 33.33p for every pound of EU funding) and phasing in regions (which had to match EU funding pound for pound) play against rather than for continuing to award Highlands & Islands funding on a more favourable basis than Merseyside and South Yorkshire during the period 2014-2020 when both are now transition regions.

160.

Lord Sumption's reference to "additional funding" and much of paras 20, 28, 37 and 42-44 of his judgment are focused on a case which was originally advanced by the appellants that Merseyside and South Yorkshire should, like Highlands & Islands, have received funding by reference to an average of what they had received in the period 2007-2013. However, save to highlight the obvious disparity with the funding of Highlands & Islands, the appellants in their case before the Supreme Court focused on the disparity arising from the use of the base year 2013. In that respect, in my opinion, the appellants have made good their challenge to the Secretary of State's decisions. There was no good reason for awarding funding on the basis of the same 15.7% uplift over the 2013 level both in relation to English transition regions which had been competitiveness regions and to Merseyside and South Yorkshire which had not been, but whose funding in 2013 had been based on an average which did not reflect their actual position. Contrary to Dr Baxter's statement in para 54 of her first witness statement, the result was not to treat "all English Transition regions in the same way", since the nature of the 2013 base differed significantly between them.

161.

Dr Baxter states, in her first witness statement, para 49, that attention was given to the possibility of using, indeed that "Ministers did see a strong case for using", a basket of indicators based on the latest economic data to determine the allocations within England during the period 2014-2020, together with applying a suitable safety net. She says that this option was rejected because it would have led to too great a shift of resources from north to south, and would have had to be countered by a safety net which, she suggests, would have taken one back to the present position. But an assessment of actual development needs would have avoided the use of 2013 allocations as a base for transition regions, and would have meant that Merseyside and South Yorkshire would have been treated on the same basis as other English transition regions. Further, in circumstances where, as a matter of general policy, a shift in funding from south to north was desired, that could and would then have been given effect in relation to all English regions, including Merseyside and South Yorkshire. The actual basis of allocation fails to give Merseyside and South Yorkshire the benefit of any such

policy. Any additional safety net could also have been applied on a basis which affected all English transition regions in like fashion.

162.

In proceeding as he did, therefore, the Secretary of State in my view gave priority to irrelevant considerations (the maintenance in the period 2014-2020 of similar funding, less 5%, for each United Kingdom territory to that which obtained in the period 2007-2013, when the re-categorisation of regions during the current period makes the comparison inappropriate), failed to treat like situations alike (although all were transition regions, Merseyside and South Yorkshire were treated quite differently from Northern Ireland and Highlands & Islands) and treated unlike situations alike (by taking 2013 as an appropriate base for funding for all English transition regions, although it had been arrived at in the case of Merseyside and South Yorkshire on a quite different basis bearing no relationship to their actual needs, in contrast to the basis on which it had been arrived at in the case of other transition regions). Whether the matter is viewed under EU law or at common law, these are manifest flaws which are neither problems of value judgment nor fall within the margin of discretion undoubtedly due when value judgments are in issue.

163.

I would only add that, even if I had arrived at a different view with regard to the legitimacy of the first decision, the discrepancy in the bases on which funding was allocated to different English transition regions would still have led me to conclude that the second decision was illegitimate.

164.

I have also had the benefit of reading the judgment prepared by Lord Carnwath, who reaches the same conclusions as I do and with whose reasoning in paras 176-187 I find myself in substantial agreement.

165.

It follows that, in my opinion, the appeal should be allowed, and the Secretary of State required to reconsider and re-determine the allocations between all the transition regions within the United Kingdom in the light of the guidance given in this judgment.

#### **LORD CARNWATH:**

166.

I agree with Lord Mance that this appeal should be allowed, substantially for the reasons given by him. While I agree also with much of Lord Sumption's analysis, I am not persuaded that he provides an adequate answer to the essential complaints made by Mr Coppel QC. In the circumstances I will confine myself to some comments on the correct general approach, and a short explanation of my reasons for disagreeing with the majority.

#### **General approach**

167.

Equal treatment and proportionality are of course well established principles of EU law, but they are not the starting point. Whether under European or domestic law, such general principles have to be seen in the context of the legislative scheme in question. I agree with the Court of Appeal (para 57) that these decisions were concerned with matters of broad economic, social and political judgment, for which the objectives were widely defined. As they said, it is "classic territory" for affording the decision-maker a wide "margin of discretion" (or "appreciation"), where the court should only

interfere if satisfied that the decisions were “manifestly inappropriate or manifestly wrong”. On the other hand, the lack of formality in the decision-making process distinguishes the case, for example, from domestic authorities where public funding decisions have been subject to review in Parliament, and the courts have accordingly a very restrictive view of the scope for judicial review (see *R v Secretary of State for Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521).

168.

The Court of Appeal referred to the exhaustive review of the relevant European and domestic authorities by all three members of the Court of Appeal in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2012] QB 394. The term “manifestly inappropriate” in European jurisprudence was traced back by Arden LJ (para 115ff) to *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023, a case relating to decisions implementing the Common Agricultural Policy. She showed that it has been treated as applicable also in appropriate cases to decisions of national legislatures or other decision-makers (para 129).

169.

I do not find it necessary to analyse the differences of emphasis between the three judgments in that case, nor to enter into discussion about different formulations of the test. I agree with Lord Neuberger of Abbotsbury MR (para 200):

“The breadth of the margin of appreciation in relation to any decision thus depends on the circumstances of the case and, in particular, on the identity of the decision-maker, the nature of the decision, the reasons for the decision, and the effect of the decision. Further, because the extent of the breadth cannot be expressed in arithmetical terms, it is not easy to describe in words which have the same meaning to everybody, the precise test to be applied to determine whether, in a particular case, a decision is outside the margin. It is therefore unsurprising that in different judgments, the same expression is sometimes used to describe different things, and that sometimes different expressions are used to mean the same thing.”

As the Court of Appeal said of the present case, the context is one where the treaty and the regulation together confer a wide area of policy choice on both the Commission and the member states, within the objectives set by them. Further, since responsibility is shared between the European and national agencies, there is no reason for any material differences in the approach of the courts to their respective decisions.

170.

For similar reasons, it is unhelpful in the present context to look for a clear-cut distinction between issues of comparability on the one hand and justification on the other. As the regulation makes clear (and as Mr Coppel QC ultimately accepted), the Secretary of State had a wide discretion as to the factors he could properly take into account in comparing the various regions for the purpose of allocating funds. This exercise cannot be equated to a simple comparison (as in *R (Chester) v Secretary of State for Justice* [2014] AC 271) between prisoners and non-prisoners, or the issue of equality between men and women (specifically addressed in article 7 of the regulation).

171.

None of the cases relied on by Mr Coppel QC seems to me sufficiently close to the present context to advance his argument for a more stringent test. For example he cites *Franz Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung* (Case C-313/04) [2006] ECR I-6331 para 33, for the proposition that the general principle of equality “requires that

comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified". The case itself related to the narrow issue of where applications for butter import licences should be lodged, and provides no assistance in the present case.

172.

The highpoint of his argument perhaps is in *Société Arcelor Atlantique et Lorraine v Premier Ministre* (Case C-127/07) [2008] ECR I-9895, where the equal treatment principle was treated by the European court as applicable to a scheme for trading in greenhouse gas emission allowances. The issue was whether that principle had been breached by a scheme which applied to the steel sector but not to the plastics or aluminium sectors (para 24). The court accepted that the emissions from all these activities were in principle "in a comparable situation", since they all contributed to greenhouse emissions and were capable of contributing to the functioning of a trading allowance scheme (para 34). It went on, first, to accept that the different treatment had caused disadvantage to the steel sector (paras 42-44), but, secondly, to hold that it was justifiable (not "manifestly less appropriate than ... other measures"), taking account of the broad discretion allowed to the Commission (paras 57-59), and the difficulties of managing a "novel and complex scheme" with too great a number of participants (paras 60ff).

173.

The case offers some help to Mr Coppel QC's argument, to the extent that even in an area of broad policy discretion the court adopted a three stage analysis - comparability, disadvantage, justification. The margin of discretion was applied only at the last stage. However, there the issue of comparability turned on a narrow view of the purpose of the scheme, which applied equally to all industrial emissions whatever the form of the industry. There is no parallel with the much more varied objectives of the present scheme, which allow a broad discretion at all stages, and make it impossible to draw a meaningful distinction between comparability and justification.

174.

The Secretary of State no doubt needed to adopt rational and consistent criteria for his allocations, within the objectives set by the regulation, and he needed to be able to justify those criteria and their application as between the regions. But nothing is gained for this purpose by treating justification as a separate stage in the legal analysis. The court must look at the reasoning as a whole to decide whether it was affected by legal error, or otherwise "manifestly inappropriate". Issues of equal or unequal treatment and proportionality may play a part in that assessment, in both European and domestic law (see *Kennedy v Charity Commission* [\[2014\] UKSC 20](#), [2014] 2 WLR 808, para 54, per Lord Mance).

175.

The danger of the formulaic approach advocated by Mr Coppel QC is that it may make it more difficult to separate the wood from the trees, and distract attention from the ultimate question, under EU law or domestic law: whether something has gone seriously wrong with the decision-making process such as to justify the intervention of the court.

The two decisions

176.

It is unnecessary to repeat Lord Sumption's description of the two decisions. The essential complaint against the first decision is simply stated. The decision to start by dividing the UK allocation between the four jurisdictions had the effect of limiting the Secretary of State's options to achieve fairness at

the second stage, in a way which was not justified by anything in the scheme or objectives set out by the regulation.

177.

The complaint against the second decision turns on the adoption of 2013 as a base for all transition regions. The appellant authorities from the two regions say that, by taking the 2013 figure as a base for all, the Secretary of State was not comparing like with like. In the previous round all the other transition regions had been competitiveness regions, but their allocations had been determined by reference to their relative economic and social circumstances, rather than the application of a single formula, and the allocations were constant throughout the period. By contrast the allocations of the two regions, as phasing-in regions, had been determined, not by reference to their relative circumstances, but by a special formula set by the regulations; the last year was based on the national average for all competitiveness regions throughout the UK (regardless of relative strength). That meant that their last year did not reflect either their own circumstances relative to the other transition regions, nor in particular the extra funding allowed to the north in the previous period, to reflect its greater development needs - a balance which had not changed in the interim.

178.

This is explained most clearly in the evidence of Mr Eyres (para 33). Although the precise methodology for calculating allocations to the competitiveness regions in the previous period had not been disclosed, the government had confirmed that it took account of the greater development needs of the North and Midlands, and, as he understood, it had used a “basket of indicators” reflecting the relative deprivation of those areas. Had the allocations for 2013 been calculated on the same basis as the neighbouring regions they would have been allocated far in excess of the amounts resulting from the phasing in formula. He adds (para 50(3)):

“The Secretary of State seems to assume that the additional, transitional funding was awarded between 2007-2010, leaving the funding for 2011, 2012 and 2013 as the ‘correct’ funding allocation for Merseyside and South Yorkshire. Yet this ignores the fact that the funds allocated in 2011, 2012 and 2013 were significantly below the level for Competitiveness regions in the North and Midlands, which had no protected status. This is because the allocation for 2013 was based on the ‘national average’ for Competitiveness regions and takes no account of the GDP and high levels of deprivation within individual Competitiveness regions in North and Midlands, including within Merseyside and South Yorkshire themselves (which the Government did take into account when making 2007-2013 allocations to Competitiveness regions).”

179.

In short, the appellants’ case can be reduced to two apparent anomalies which required explanation:

(a)

Alone of all the transition regions in the UK (including Highland & Islands, which had been also subject to a “tapered” funding regime in the previous period), the two regions were given no protection from a substantial reduction in funding (65%) as compared with the previous period taken as a whole;

(b)

Alone of all the English transition regions, their funding was fixed by reference to a base which had taken no account of their relative economic and other circumstances in the previous period.

I will take them in turn.

180.

The first, as respects the comparison with Highlands & Islands, was in large part attributable to the prior decision to adopt a two-stage process. In itself there could be no objection to the Secretary of State taking account of the territorial divisions and governance arrangements within the UK. The provisions of the regulation confer a wide discretion on member states to take account of local structure at all levels. Although the decisions on funding were not themselves devolved, the devolved administrations had a clear interest in the process, both as partners, and (presumably) as possible sources of co-financing.

181.

I note also that no objection was taken on behalf of the two regions to the two-stage process at the time of the first decision. On the contrary Mr Eyres records (para 40) that the Mayor of Liverpool, as Chair also of the Liverpool partnership, wrote to the minister welcoming the decision to “amend the EU formula to provide a 95% safety net for devolved areas” provided the same principles were applied in England.

182.

However, the judge was wrong with respect to treat this as a “socio-economic decision” by the Secretary of State which thereby absolved him of the need for further comparisons between different parts of the UK (para 72). That would in my view be contrary to the scheme of the EU regulation (and indeed to the devolution settlement), which gives him responsibility for the fairness and consistency of the distribution as between all the regions in the UK, so far as not predetermined by the Commission. Rightly, that was not how the case was argued by Mr Swift QC in the Court of Appeal or before us. As has been seen, his submission, in substance accepted by the Court of Appeal, turned on lack of comparability between phasing in and phasing out regions.

183.

I agree that there were significant differences of detail between the two categories, as explained by Dr Baxter, although it is not clear why some of them were reasons for less favourable treatment for the two regions. For example, the fact that the co-financing regime was more onerous for them seems on its face a point going the other way. However, none of these points addresses the main complaint. The reasons which led the Secretary of State to include Highlands & Islands in the 95% safety-net by reference to the 2007-2013 funding as a whole, were apparently no less applicable to the two regions. That indeed was the point made by the Mayor of Liverpool at the time. Conversely, the main reason which led the Secretary of State to treat the two regions differently in this respect from the other English transition regions (that is, the higher funding for 2007-2013 overall, tapered down to the average competitiveness level) was in principle no less applicable to Highlands & Islands.

184.

As Dr Baxter indicates, the Secretary of State was aware of this apparent discrepancy, but as far as Scotland was concerned he felt constrained (in practice if not in law) by the “overall budget envelope that had already been set” (para 62 of her witness statement). The idea of a safety-net for the two regions was rejected because of the “negative impact” on the other transition regions. That with respect is little more than a statement of the obvious. If I take from Peter to give to Paul, it will no doubt have an “adverse impact” on Peter, but that says nothing about the balance of fairness as between the two.

185.

Similar issues arise in respect of the second decision. Viewed by reference simply to a comparison with the other English transition regions (and ignoring Highlands & Islands), he was entitled to take account of the different funding regime in the previous period. Since the overall funding for the two regions in that period had been on a more generous basis than for the others, and since that was by definition special and transitional, there was no reason to carry it forward into the exercise for 2014-2020. Furthermore, if their figure for 2013 had been related in some way to their own circumstances (as was the case with the other transition regions), it might have formed a suitable base for the subsequent period. However, that was not the case. The 2013 figure for the two regions (as for Highlands & Islands) reflected the average of all the former competitive regions, a category which had included even the most prosperous regions (that is, those now categorised as “more developed”).

186.

The Secretary of State was faced with a difficulty in that the transition regions were a new intermediate category, encompassing a relatively wide range of relative development (between 75% and 90% of the EU average). Had his distribution been based, as in the previous period, on a comparison of economic or other factors, within the scope of the regulation, it would have been very difficult to challenge. It is perhaps understandable that he preferred a more simple “blanket approach” to the new category, particularly as his view of the general economic balance had not changed. However, that could only be justified if he took steps to ensure that the two regions were dealt with on a comparable basis. His principal reason for his not doing so was, not a view as to the relative needs of the two regions as compared to the others, but again the negative impact for them of a 22% cut where they (and probably the Commission) had expected enhanced levels of funding. This, by implication, assumed a finite budget for England, in effect predetermined by the first decision.

187.

I conclude that the criticisms made by the two regions of the decision-making process, including both decisions, have not been satisfactorily answered. I do so with some hesitation in view of the risk of over-simplification of some very complex issues and material. It matters not, in my view, whether this is expressed as an issue of unequal treatment or lack of proportionality under European law, or inconsistency and irrationality under domestic law, the anomalies are in my view sufficiently serious to have required explanation which has not been given, and which renders the resulting decisions “manifestly inappropriate” under EU and domestic principles.