

EIA Seminar: The tricky issue of in-combination effects



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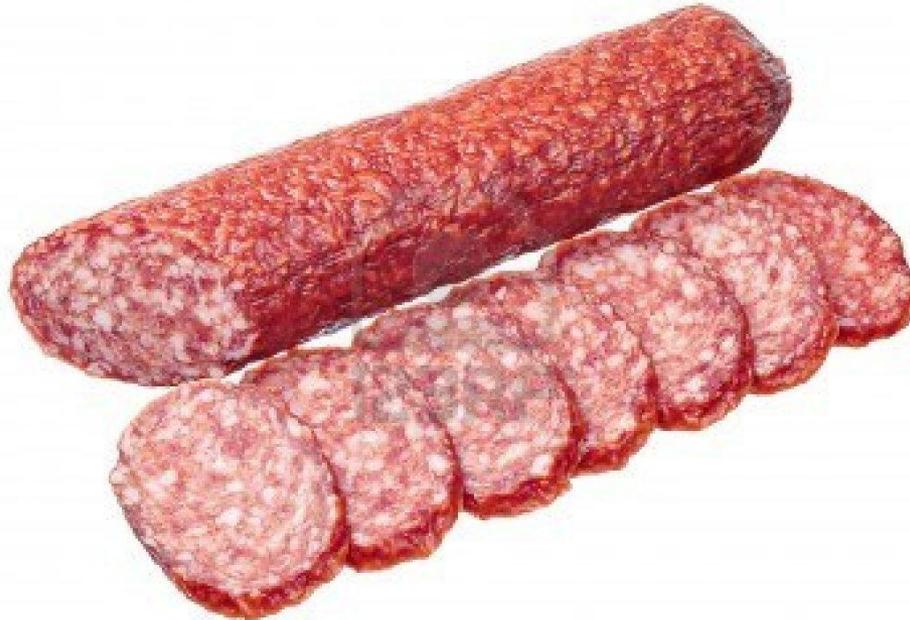
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Topics to be covered



- Defining the scope of the “project” for the purposes of EIA where there are two or more interlinked developments which are the subject of separate planning applications
- Assessing cumulative effects of separate projects
 - When is it needed?
 - What does it involve?
 - Practical tips

PART 1: THE SCOPE OF THE “PROJECT”



“The objective of the EIA Directive cannot be circumvented by the splitting of projects. Where several projects, taken together, may have significant effects on the environment within the meaning of Article 2(1), their environmental impact should be assessed as a whole. It is necessary to consider projects jointly in particular where they are connected, follow on from one another, or their environmental effects overlap.” – AG Kokott, Case C-142/07 *Ecologistas*.

The EIAD & Regs



- Art 5 EIA Directive: EIA must describe and assess “*the project*”
 - Defined as “*the execution of construction works or of other installations or schemes [or] other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources*”
- The EIA Regs refer to the need to describe and assess “*the whole development*” (Schedule 4 Part 1)
- Begs the question: what about cases where there are two or more interlinked developments which are the subject of separate planning applications – are they a single “*project*” / part of the “*whole development*”?

The various formulations of the test $\frac{L}{C}$

- AG Kokott's test in ***Ecologistas***: are the proposals “connected, follow on from one another, or their environmental effects overlap”
- CJEU in ***Ecologistas***: “the purpose of the directive cannot be circumvented by the splitting of projects and the failure to take into account the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment.”
- Simon Brown J. in ***R v. Swale BC ex p. RSPB*** [1991] 1 PLR 6: “The proposals should not be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate on the language of the Regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter.”
- ***R (Burridge) v. Breckland DC*** [2013] EWCA Civ 228: the ***Swale*** test was met here because the two devpts “were functionally interdependent...”

Case study 1: Burridge



- Concerned two interlinked planning permissions for which an EIA had not been required, owing to a conclusion by the local planning authority that they would not have any likely significant environmental effects.
- One application was for a biomass renewable energy plant and the other was for a combined heat and power plant about 1.1km away.
- They were to be connected by an underground gas pipe to carry the fuel between the two sites.
- Considered by Council's planning committee on the same date and the officer reports on each application cross-referred to the other.
- Held: a single project for the purposes of EIA.

Case study 2: Brown v Carlisle



[2010] EWCA 523

- Two planning applications submitted for development at Carlisle Airport comprising (1) works to the airport and (2) a new freight storage and distribution facility.
- The in combination effects the airport works and freight distribution facility were not assessed “*because there was no, or no significant, functional link*” between them
- Sullivan LJ: there may be a cumulative effect notwithstanding the absence of a functional link
- No evidence that the Planning Officer or Committee ever address their mind to whether this was one overall project, applying the **Swale** test
- Therefore there had been a breach of the EIA Regs.

Case study 3: Bowen-West v. SSCLG [2012] EWCA Civ 321



- A challenge to the SSCLG's decision to allow an appeal against the refusal of an application for permission to dispose of low-level radioactive waste ("the LLW Application") at a landfill site which already had permission to be used for hazardous waste disposal until August 2013.
- Before the SSCLG's decision, the site operator had decided to seek further permission for an extension of the landfill site and for its operation to proceed until 2016. No decision had been taken as to the nature of the waste that would be stored at the extended facility, if permitted.
- B-W contended that the EIA of the LLW Application should have assessed both proposals together as a single "project" or assessed the cumulative effects of the LLW application in combination with the landfill extension application.
- Rejected on the basis that the SSCLG's Inspector had been entitled on the facts to conclude that the LLW application "*was not part of a piecemeal project or an integral element of a comprehensive scheme*" but was "*a stand-alone proposal*" (see para. 14 of the judgment).

Other case studies



- ***BAA plc v Secretary of State*** [2003] JPL 610:
 - Two separate applications for stages of a link road.
 - SoS had erred in law in failing to consider the whether the interrelationship between the applications meant that they were a single project (which was sufficient for the claim to succeed).
 - Had he done so, only rational view would have been that they were a single project.
- ***Candlish v SSCLG*** [2005] EWHC 1539 (Admin):
 - Application for spine road to be followed by application for residential development
 - Spine road had no function without the subsequent development
 - Davis J: the EIA Regs “*are geared to the actual application for development consent*”; even though here was a very strong factual pointer that there was a wider project in contemplation, there was no legal reason why the application should not be self-standing for the purposes of EIA.

Other case studies (cont'd)



- Must now read ***Candlish*** in the light of the CA's subsequent judgment in ***Burridge***, in which Davis LJ was himself one of the judges. See para 78:

“For the reasons I sought to give in *Candlish* , if I may be permitted to say so, I think there are strong grounds for not requiring planning authorities to look behind the particular application for development before them (or, in the words of Swale , to look for “any development contemplated beyond that”). There are, as it seems to me, formidable objections in requiring a planning authority to have regard to some possible further development in contemplation, but not yet specified, or effectively in point of practice obliging a planning authority to consider all such applications on a case by case basis: when the 1999 Regulations are plainly designed to contrary effect. But the present case is different. Here, revised application 1372 and application 0445 were *specifically* linked. Not only, as the judge inevitably found, were the two applications “functionally interdependent”: they were also, in my view, and with all respect to the judge, to be regarded as part of the same substantial development.”

Unresolved questions



- What is the relevance (if any) of:
 - the applicant for proposal A and the applicant for proposal B being separate entities?
 - proposal A and proposal B being different forms of development (e.g. a road and a residential development)?
- Is it necessary to show a deliberate attempt at avoidance / splitting?
- Is the scope of the “project” a question of precedent / jurisdictional fact for the court or a planning judgment reviewable only on **Wednesbury** grounds?
- Some and possibly all these issues will be considered by the Court of Appeal next week in **Larkfleet v. South Kesteven DC**.

PART 2: ASSESSING THE CUMULATIVE EFFECTS OF SEPARATE PROJECTS



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The EIAD & Regs



- EIAD Annex IV, footnote 1: EIA *“should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project”*.
- Transposed by Schedule 4 Part 1 para. 4 of the EIA Regs.
- No definition of what “cumulative” effects means.
- NB Directive 2014/52/EU will amend the EIAD to add reference to *“the cumulation of effects with existing and/or approved projects”* (whilst keeping the above passage too)

When is cumulative assessment needed?



- See the Commission's *Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions* (May 1999) :
 - “impacts that result from incremental changes caused by other past, present, or reasonably foreseeable actions together with the project”
 - “In setting the future time boundary it is suggested that, in general, beyond 5 years there is too much uncertainty associated with most development proposals”
- **R (Catt) v. Brighton Hove City Council** [2013] EWHC 977 (Admin) per Lindblom J: the LPA “does not need to resurrect the past or speculate about proposals the future may bring”
- **R (Hockley) v. Essex CC** [2013] EWHC 4051 per Lindblom J: no need for “conjecture about future development on other sites that might or might not act with the development in question to produce...cumulative effects”

When is cumulative assessment needed? (cont'd)



- **Commercial Estates Group Ltd v. SSCLG** [2014] EWHC 3089 (Admin): Stuart Smith J suggested that the question was “*whether it would be reasonable to foresee that another development would occur*”
- **Oldfield v. SSCLG** [2014] EWCA Civ 1446 per Maurice Kay LJ: “*It is important that an assessment is made in the light of what is known and what is reasonably predicible or ascertainable at the time*”.
 - The future potential development in that case required a CPO the issue of which remained unresolved and no planning application was yet forthcoming. In those circumstances it was permissible for the SSCLG to conclude that there were at that point no cumulative effects.

What does the cumulative assessment involve? Current issues:

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- Article 5(3) EIAD requires the ES to provide “*the data required to identify and assess the main effects which the project is likely to have on the environment*” – read together with Annex IV footnote 1, this suggests that sufficient information must be provided about any other scheme which is anticipated to have cumulative effects in combination with the development under consideration.
- An issue to be considered by the CA next week in ***Larkfleet***.
- Where an application takes a long time to be determined, need to keep an eye on whether new cumulative development has emerged on the horizon in the meantime.
 - See ***Newry Chamber of Commerce’s application for JR*** [2015] NIQB (judgment of last Friday)

Practical tips for ES preparation



- Err on the side of caution.
- Where EIA required and cumulative effects scoped in, ensure that every subject matter covered by the ES is addressed from a cumulative perspective (even if only briefly).
- If cumulative effects grappled with, a court is unlikely to entertain a challenge to the level of scrutiny of that assessment provided that the mandatory minimum information in Article 5(3) is included (cf. Commission v. Spain [2004] ECR 8253 which AG Poires Maduro described the Art (3) factors as “*the minimum information to be provided by the developer*”).
- Keep an eye out for changing scenery if the application takes a long time to be determined.

Landmark

CHAMBERS