ENVIRONMENTAL IMPACT ASSESSMENT and

THE HABITATS DIRECTIVE: RECENT DEVELOPMENTS

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1. The EIA Directive (85/337 as amended) and the Habitats Directive (92/43) have provided ample opportunities for those seeking to challenge decisions to grant planning permission.
2. In this paper I do not attempt to set out a comprehensive assessment of the relevant law. I seek to draw attention to recent developments.

Environmental Impact Assessment

3. Despite the fact that all practitioners are very familiar with the prohibition on granting planning permission or subsequent consent without considering environmental information[1], challenges based on a failure to comply with the requirements of the EIA Directive[2] are still commonplace.
4. I will first consider the screening stage, second the adequacy of the environmental, then strategic environmental assessment[3].

The Screening Stage

5. The decision to be taken at the screening stage is likely to involve two issues, is the development proposed Schedule 1 or Schedule 2 development? and/or is the development Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size, or location[4]? It is the second issue which appears to cause the greater number of problems.
6. In Chetwynd v. South Norfolk DC [2010] EWHC 1070 (Admin) Collins J held that a liberal approach should be adopted to ensure where possible that developments which would be

[1] Regulation 3(2) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 EIA Regulations"). A similar provision is to be found in the regulations which implement the EIA Directive in other fields.
[2] 85/337/EEC as amended by 97/11/EC and 2003/35/EC
[3] As required by Directive 2001/42/EC
[4] See the definition of "EIA development" in regulation 2(1) of the 1999 EIA Regulations

likely to have a negative impact on the surrounding environment are properly investigated[5]. In that case, which concerned a development of four fishing lakes, the Court appeared to be prepared to stretch the meaning of the words in Schedule 2 when the judge held "*And it seems to me that ' infrastructure' can cover a development which changes the characteristic of a piece of land by providing something enabling a particular use to be carried out in that land."* The only conclusion to be drawn is, that if in doubt as to whether a project falls within schedule 1 or 2, consider screening.

7. In R (Co-operative Group Limited) v Northumberland County Council [2010] EWHC 373 (Admin) the court held that the local planning authority had insufficient information available to enable it to adopt a negative screening opinion. That case is a reminder to those who request that a local planning authority adopt a screening opinion should provide sufficient information as to the possible effects of the proposed development on the environment[6].
8. In Morge v. Hampshire County Council [2010] PTSR 1882 the claimant challenged a negative screening opinion adopted by a county council in respect of a 4.7km long bus route. The Council was both developer and planning authority. The Court of Appeal held that the question of whether the development proposed was likely to have significant effects on the environment by virtue of its size nature or location was a matter of planning judgment or opinion involving consideration of the chance of any effect occurring and also the consequences were it to occur[7]. Despite the weight of the evidence the Court held that the decision was not irrational and therefore the challenge failed on this ground. The challenge was based on other grounds including an alleged breach of regulation 3(4) of the Conservation (Natural Habitats &c) Regulations 1994 ("the 1994 Habitats Regulations") (now regulation 9(5) of the Conservation of Habitats and Species Regulations 2010 ("the 2010 Habitats Regulations") and Article 12(1)(b) of the Habitats Directive. Although permission to appeal was granted on the Article 12(1)(b) point it was not granted on the EIA screening point.
9. In R (Save Britain's Heritage) v. Secretary of State [2010] EWHC 979 (Admin) the court rejected the contention that demolition (not being demolition as part of a wider scheme) came within the scope of the EIA Directive. This question of whether demolition falls within

[5] At paragraph 21
[6] See regulation 5(2)(b) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999
[7] Ward LJ at paragraph 80

the scope of the directive is also a question raised by the Commission in the proceedings in the CJEU in Commission v. Ireland c-50/09 : that case has yet to be determined by the court.

10. R (Mageean) v Secretary of State [2010] EWHC 2652 (Admin) opens up the possibility of a new series of challenges. That case concerned the issue of circumstances in which a decision maker is required to reconsider a screening opinion. The question to be considered is whether the change in circumstances could rather than would affect the screening decision[8]. If the planning application has been appealed and is to be determined by an inspector he or she will have to consider whether to refer the question of screening back to the Secretary of State, as only he has the power to cancel or vary a screening direction[9].
11. In R (Birch) v. Barnsley MBC [2010] EWCA Civ 1180 the Court of Appeal dismissed an appeal against the judge's decision to quash a planning permission on the ground that the development proposed was EIA development and that the negative screening opinion was flawed. The approach taken in the screening opinion which stated that impacts should be controllable was held to be inadequate, and contrary to the underlying purpose of the regulations[10]. The conclusion to be drawn from Birch is that the likely effects of the development must be considered at the screening stage.
12. Although the Court of Appeal has re-affirmed that a decision on screening is an exercise of planning judgment which will only be quashed on *Wednesbury* grounds, it is clear that the courts will still intervene, particularly when a decision is based upon inadequate information.
13. I anticipate that those opposed to planning applications will seek to identify changes in circumstances which could affect the decision on screening, and ask inspectors to refer negative screening decisions back to the Secretary of State for reconsideration.
14. Those promoting development local planning authorities and the Planning Inspectorate too often fail to provide or require a sufficient degree of information at the screening stage. Use of the European Commission Guidance on EIA Screening (June 2001) and the associated checklist could avoid many of the problems which have been encountered.

The Assessment

15. In R (Brown) v. Carlisle City Council [2010] EWCA Civ 523 the Court of Appeal considered a challenge to a grant of planning permission based upon the contention that the ES was inadequate. The development proposed was a freight distribution centre adjacent to Carlisle

[8] Paragraph 38
[9] Paragraph 39
[10] Paragraph 22

airport. The developer entered into a section 106 agreement which provided that the freight distribution centre could not be built and occupied without works being carried out to repair or renew the main runway at the airport. The ES did not include an assessment of the effects of the works to the airport. It was held that the ES was deficient and as a result the grant of planning permission was unlawful.

16. It is essential that a developer preparing an ES, or a local planning authority considering whether an ES is adequate, pays careful attention to the requirement to assess the likely significant effects including secondary indirect and cumulative effects of the project. The European Commission publication 'Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions' (May 1999) continues to provide very useful guidance.

Strategic Environmental Assessment

17. In Cala Homes v. Secretary of State [2010] EWHC 2866 (Admin) Sales J held that revocation of a regional strategy amounts to a significant change and so will qualify as a modification of the relevant development plan, and as such will be subject to the requirements of the SEA Directive.
18. The Government has indicated that it is going to rely on legislation in the forthcoming Localism Bill to revoke regional strategies. For the purposes of the Directive, 'plans and programmes' includes those which are subject to preparation and/or adoption by an authority at national or regional level through a legislative procedure by Parliament[11]. It would appear that the Government will have to consider whether to conduct an environmental assessment of the decision to revoke the Regional Strategies before the relevant clause in the Localism Bill can be enacted. This may have an impact on the time required to bring the legislation into force.

Enforcement

19. Section 172 TCPA 1990 empowers a local planning authority to issue an enforcement notice when it appears to them that it is expedient to do so having regard to the provisions of the development plan and other material considerations.
20. The limits to the local planning authority's discretion were considered in R (Ardagh Glass) v. Chester City Council [2010] EWCA Civ 172. The facts of the case were somewhat unusual.

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[11] See Article 2(a) of Directive 2001/42/EC.

The developer constructed what was designed to be the largest glass container factory in Europe without first obtaining planning permission. Work began in October 2003 and the first glass was produced on 2nd May 2005. Planning permission was applied for in July 2004 when the plant was under construction. The applications were called in by the Secretary of State and permission was refused in January 2007. It was common ground that the development was EIA development.

21. The Claimant submitted that as the EIA Directive[12] requires that before consent is granted projects likely to have significant effects on the environment must be subject to environmental assessment the court and the local planning authorities were required to take enforcement action[13]. At first instance HH Judge Mole QC made a mandatory order that the local planning authorities issue an enforcement notice, and gave guidance as to the form of that notice. The judge held that retrospective planning permission could be granted, as long as the competent authorities pay careful regard to the need to protect the objectives of the directive[14]. The judge observed that a failure to take action, thereby permitting the glass works to achieve immunity from enforcement action would amount to a breach of the UK's obligations under the directive[15].
22. In the Court of Appeal the Claimant contended that the judge had erred in holding that planning permission could be granted retrospectively for EIA development and that the local planning authorities were not required to issue a stop notice in respect of the unauthorised EIA development[16]. The Court of Appeal affirmed the judge's decision that retrospective permission can be granted for EIA development. Given that conclusion, the court held that there was no substance in the submission that a stop notice must be issued[17].
23. The conclusions to be drawn from the Ardagh Glass case are that:
    a. A local planning authority is likely to be held to have acted unlawfully if it decides not to take enforcement action against unlawful EIA development and thereby allows that development to achieve immunity from enforcement action.
    b. There is no prohibition on granting retrospective planning permission for EIA development.
24. The relationship between the prohibition on granting permission for EIA development without first taking into account the environmental information and the immunity provisions

[12] 85/337/EEC as amended, article 2(1)
[13] [2009] EWHC 745 (Admin) at paragraphs 37-38
[14] [2009] EWHC 745 (Admin) at paragraph 111
[15] [2009] EWHC 745 (Admin) at paragraph 110
[16] [2010] EWCA Civ 172 at paragraph 12
[17] [2010] EWCA Civ 172 at paragraph 22

in the TCPA add a significant limitation to a local authority's discretion as to whether or not to take enforcement action.

25. The judgment in Ardagh Glass has the following significant consequences:
    a. If development takes place without the benefit of planning permission a LPA will have to consider whether it is EIA development.
    b. If the unauthorised development is EIA development the LPA must take action to prevent the EIA development achieving immunity from enforcement action.

Kobler Liability

26. In Cooper v. HM Attorney General [2010] EWCA Civ 464 the Court of Appeal considered an appeal against a preliminary ruling on a claim based on Kobler liability[18]. Three conditions have to be satisfied in order to establish Kobler liability namely:

    i) The alleged breach of Community law must be of a rule conferring rights on individuals.

    ii) The breach must be " sufficiently serious" .

    iii) There must be a direct causal link between the breach and the loss or damage sustained by the claimant.

27. The preliminary issue considered was whether breaches of Community law were sufficiently serious[19]. The breaches complained of arose as a result of decisions of the Court of Appeal on a renewed application or permission to bring judicial review proceedings and on an application for permission to appeal. The breaches of Community law relied upon related to decision made in judicial review proceedings challenging planning permissions for the White City development in west London. The error complained of was a finding that only outline planning permission could constitute development consent and therefore the obligation to undertake EIA could not arise at a later time (paragraph 90).
28. The Court held that in order to determine whether an error was sufficiently serious it must consider whether it was manifest (paragraph 67). The court held that the error was not sufficiently serious.
29. A high hurdle lies in the path of those seeking to establish Kobler liability.

[18] In case C-224/01 Kobler v. Republik Osterreich [2003] ECR 1 -10239 the CJEU created a new form of member state liability for violations of Community law.
[19] [2010] EWCA Civ 464 at paragraph 6

The Habitats Directive

Appropriate Assessment

30. It is the local planning authority or inspector (or Secretary of State) on appeal which is the competent authority within the meaning of regulation 61(1) of the 2010 Habitats Regulations. The first question for the competent authority to consider is whether the plan or project is likely to have a significant effect on a European site either alone or in combination with other plans or projects (the screening stage).
31. The approach to be followed is that set out in Waddenzee[20] at paragraph 45 of the judgment:

    45 In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.

32. If appropriate assessment is required the approach to be followed is to be derived from paragraphs 56 and 57 of the judgment in Waddenzee

    56 It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

    57 So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

33. It was established in R (Hart DC) v. Secretary of State[21] that mitigation can be taken into account at the screening stage; however the judgment in R (Helford Village Company) v. Kerrier DC [2009] EWHC 400 (Admin)[22] is a reminder that it is not enough to rely on mere hope and trust. The mitigation measures must be secured by an enforceable mechanism.
34. The prudent approach for developers and local planning authorities is to consult Natural England at an early stage, and to obtain their views on screening. If Natural England

[20] Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij [2005] Env. L.R. 14
[21] [2008] 2 P. & C.R. 16, at paragraph 76
[22] At paragraphs 39 and 40

conclude that a significant effect on a European site can be excluded, then the developer can have some confidence that appropriate assessment is not required. If Natural England do not so conclude the prudent course is for the developer to provide the competent authority with sufficient information to allow an appropriate assessment to be conducted. If mitigation is relied upon, such as the provision of SANGS in the Thames Basin Heaths, the provision of that mitigation should be secured by condition or planning obligation.

European Protected Species

35. Regulation 9(5) of the 2010 Habitats Regulations imposes the following duty:

> *(5) Without prejudice to the preceding provisions, a competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.*

36. Until the judgment in R (Woolley) v. East Cheshire Borough Council [2010] Env LR 5 it would be fair to say that the degree of attention paid to European Protected Species ("EPS") at the planning application stage was somewhat limited. Before the judgment in Woolley many had assumed that sufficient protection could be afforded to EPS by imposing a condition on a planning permission that no development take place until a licence had been obtained under the provisions of what is now regulation 53 of the 2010 Habitats Regulations.
37. In Woolley the submission that it was sufficient for a planning authority making a decision on a planning application to note the existence of the directive and the regulations and to note the existence of the EPS was rejected. The judge held that as LPA has to "engage" with the provisions of the directive. Judge Waksman QC held[23]:

> *"In my view that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is given. But it means that if it is clear or perhaps very likely that the requirements of the directive cannot be met because there is a satisfactory alternative or because there are no conceivable ''other imperative reasons of overriding public interest'' then the authority should act upon that, and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by*

[23] At paragraph 27

engaging in this kind of way that the authority can be said to have any meaningful regard for the directive."

38. The approach taken in Woolley to the duty imposed by regulation 9(5) of the 2010 Habitats Regulations was followed by the Court of Appeal in Morge v. Hampshire County Council[24]. In R (Hulme) v. Secretary of State [2010] EWHC 2386 (Admin) Frances Patterson QC held that there was no specific requirement to refer to the Directive and that a general reference to the effect on the EPS as sufficient to amount to engagement with the Directive[25].
39. The extent of the engagement required at the planning application stage is likely to be clarified by the Supreme Court when it delivers judgment in Morge.
40. The meaning and effect of Article 12(1)(b) and Article 12(1)(d) of the Habitats Directive was also considered in Morge. Permission to appeal to the Supreme Court was limited to the Article 12(1)(b) point, and in particular the meaning of "disturbance". The current position is that taken by the Court of Appeal, namely that in order to fall within the prohibition imposed by Article 12(1)(b) the disturbance must have a detrimental impact so as to affect the conservation status of the species at population level[26]. That approach may not stand following the decision of the Supreme Court or following a possible reference to the CJEU.
41. The practical approach to be followed by developers and local planning authorities is to ensure that any effect on EPS is considered at the planning application stage, and that a view is taken as to whether any of the prohibitions imposed by Article 12 apply, and if they do whether it is probable that Natural England will grant a licence under regulation 53 of the 2010 Habitats Regulations.

Enforcement

42. The Ardagh Glass case was not concerned with the Habitats Directive. However if the reasoning in Ardagh Glass is applied the following consequences would arise:
    a. If development takes place without the benefit of planning permission the LPA will have to consider whether that development (the plan or project) is likely to have a significant effect on a European site or a European offshore marine site (either alone or combination with other plans or projects) and is not directly connected with or necessary to the management of the site[27].

[24] [2010] PTSR 1882 at paragraphs 60 and 61
[25] [2010] PTSR 1882 at paragraph 83
[26] Ward LJ at paragraph 37
[27] Regulation 61(1) of the Conservation of Habitats and Species Regulations 2010

b. The approach indicated by the ECJ in Waddenzee[28] at paragraph 45 of the judgment is to be followed (see above).

c. If it cannot be excluded, on the basis of objective information that the plan or project will have a significant effect on a European site or a European offshore marine site, an appropriate assessment must be made.

d. If the Ardagh Glass approach is followed it is likely to be said that the obligation imposed by the Habitats Directive would not be complied with if a LPA allowed a development to achieve immunity from enforcement action.

e. As a result if an unauthorised development is likely to have a significant effect on a European site or European offshore marine site, the LPA is in the same position as the LPA in Ardagh Glass. If no planning application is made the LPA must issue an enforcement notice.

43. The effect of the provisions of the Habitats Directive is likely to cover a wider range of projects than those affected by the EIA Directive.

44. LPA's who have SPA's and SAC's in their areas should be particularly vigilant when considering whether to take enforcement action in relation to development carried out without the benefit of planning permission.

45. Those who are aggrieved by a LPA's failure to take enforcement action against unauthorised development should bear in mind the obligations imposed by European law. The duty under the Habitats Directive may prove a useful weapon to use to persuade a reluctant LPA that it should take enforcement action or might found an application for judicial review of a decision not to take enforcement action.

Discretion

46. The leading case on the exercise of discretion by the courts in EIA cases is still Berkeley v Secretary of State for the Environment [2001] 2 AC[29]. The obligation on national courts to ensure that Community rights are protected has led the courts to hold that any discretion not to quash a decision in cases where there is a breach of a requirement of Community law is very narrow.

[28] Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij [2005] Env. L.R. 14, at paragraph 45

[29] See Lord Bingham at page 608 and Lord Hoffman at pages 613-616

47. Discretion in relation to an appropriate assessment case was considered in Boggis, Eason Bavents Conservation v Natural England [2009] EWCA Civ 1061. Sullivan LJ[30] expressed doubt that the approach taken to discretion in EIA cases should apply to cases concerned with appropriate assessment, as the Habitats Directive does not require public involvement to the same way as is required under the EIA Directive.
48. The distinction between the exercise of discretion in a case founded on breach of the EIA regime and one based upon breach of the Habitats Regulations was considered in R (Hulme) v. Secretary of State for Communities and Local Government [2010] EWHC 2386 (Admin). Frances Patterson QC held:

> *97. The inspector had then substantially complied with the requirements of the regulations, albeit he did not attribute his conclusions to the letter of the regulations for the reasons I have set out earlier. The circumstances here are very different from an EIA case where the provision of an environmental statement is the cornerstone of that regime. There, the ES, including mitigation measures, is the basis of public consultation prior to a decision being made. Here there is a different statutory regime. The decision maker is not under a comparable consultation requirement based upon a single accessible compilation of the relevant information provided by the applicant at the start of the application process. He has to satisfy himself on the considerations set down in the regulations. Reading the decision letter as a whole, the inspector here did so.*
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> *98. In those circumstances, I do not have to go on to consider the issue of discretion but, for the sake of completeness, I deal with that matter and make it clear that, if I had had to consider it, I would have exercised it in favour of the defendants and upheld the planning permission.*
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> *99. In Berkeley v Secretary of State for the Environment [2001] 2 AC 63, Lord Bingham emphasised that the discretion of the court to quash a decision, even in the domestic context, was very narrow. In Bown v Secretary of State for Transport [2003] EWCA Civ 1170 Carnwath LJ emphasised that the speeches in Berkeley needed to be read in context. In Edwards v Environment Agency [2008] EKHL 22 Lord Hoffman agreed with that observation and considered that both the nature of the flaw in the decision and the ground for the exercise of discretion had to be considered. In the circumstances of Edwards when he carried out that exercise, Lord Hoffman agreed with the Court of Appeal and the judge below that it would be pointless to quash the*

[30] At paragraphs 39 and 40

pollution permit granted under the Pollution Prevention and Control Regulations 2000. Applying those principles here, the flaw in the decision would be one of form but not of substance. It would thus be another occasion where it would be pointless to quash the planning permission granted.

49. The issue of discretion was raised in Morge in the Supreme Court and further guidance may become available once the judgment/s are delivered.

Conclusions

50. Those opposed to development have achieved considerable success in the courts by placing reliance on breaches of European law when challenging decisions to grant planning permission.
51. The approach taken by decision makers when considering screening for the purposes of both EIA and appropriate assessment merits very careful scrutiny. Those promoting development should seek to provide sufficient information to allow an informed decision to be made. All parties should keep a negative screening opinion under review.
52. The UK has introduced a series of regulations to transpose the requirements of Article 12 of the Habitats Directive. The criminal law and associated licensing regimes bring the prohibition into effect. The requirement to have regard to the Habitats Directive when making decisions including those on planning applications introduces an additional layer of regulation – the extent of the duty at that stage will be clarified once the Supreme Court have made their decision in Morge.
53. At the planning application stage those promoting development must be careful to ensure that all the necessary information is provided to allow the environmental effects to be assessed. They must also ensure that decision makers have sufficient information to allow them to conduct an appropriate assessment if required, and to address the prohibitions imposed by Article 12 of the Habitats Directive and the prospects of derogation under Article 16.
54. The EIA Directive was designed to improve the quality of decision making and to ensure that environmental effects are taken into account. The aim of the Habitats Directive, as identified in Article 2, is to contribute to ensuring biodiversity through the conservation of natural habitats of wild fauna and flora. There is a danger that the Directives could provide to be more effective in encouraging litigation and favouring lawyers than maintaining or restoring to favourable conservation status natural habitats and species.

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