EIA & SEA Update

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EIA

The new EIA Regulations

- Entered into force on 16 May 2017
- Transitional position (reg. 76): 2011 Regulations continue to apply:
  - Where the ES was submitted before 16 May 2017
  - Where a scoping opinion was requested before 16 May 2017
  - Parts 1 and 2 of the 2011 Regulations also continue to apply to screening opinions, screening directions and requests for the same made before 16 May 2017

The new EIA Regulations

- Key changes:
  - Reg. 4(2): list of environmental factors to be considered as part of the EIA process now includes "*population and human health*"; also "*biodiversity*" rather than "*fauna and flora*"
  - New requirement in reg. 4(4) to consider, where relevant, the expected significant effects arising from the vulnerability of the proposed development to major accidents or disasters

The new EIA Regulations

- Reg. 6(2)(e): expressly provides that the information submitted with a request for a screening opinion may address *"any features of the proposed development or any measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment"*
- Reg. 18(3): an ES must include *(inter alia) "(d) a description of the reasonable alternatives studied by the developer, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment"*

The new EIA Regulations

- Reg. 18(4): where a scoping opinion/direction has been issued, the ES must be based on the most recent scoping opinion/direction issued, so far as the proposed development remains materially the same as the proposed development that was subject to that opinion/direction
- Reg. 27(1): where a HRA is required as well as an EIA, the LPA / SoS must *"where appropriate"* ensure that the HRA and the EIA are *"co-ordinated"*
- Reg. 29(2)(b)(i): decision to grant planning permission for an EIA application/appeal must include the *"reasoned conclusion"* of the LPA/SoS on the significant effects of the development on the environment

Birchall Gardens

R (o.a.o. Birchall Gardens LLP) v Hertfordshire CC

[2016] EWHC 2794 (Admin) – 4 November 2016

- Challenge to a grant of planning permission for an inert waste recycling facility
- First ground of challenge is that the screening opinion is unlawful, because the LPA failed to comply with its obligation under reg. 4(7) of the 2011 EIA Regulations to give clearly and precisely its full reasons for its opinion that the proposed development does not constitute *"EIA development"*
- Argument rejected by Holgate J:

Birchall Gardens

- [66] – [67]: discussion of the context in which the screening decision sits: ***Bateman*** continues to apply (see ***Mackman***)
- [84] In line with ***Save*** and ***Porter***, the principle remains that the level of detail required in a screening opinion depends upon the complexity, or otherwise, of the issues to be considered in the instant case, so that the test is whether the reasons given are adequate in relation to the particular application before the authority. Accordingly, in some cases it is acceptable for the reasoning to be brief (see ***Mackman***)

Birchall Gardens

- It is also necessary for the court to have in mind the legal context. The planning authority is not issuing a decision letter in a planning appeal, which needs to resolve "*the principal or important controversial issues*", but is issuing a screening opinion for the narrower purpose identified in ***Bateman*** and ***Mackman***

- "[86] …as Sales LJ pointed out in [***Mordue*** at [27]], …**it is sufficient to take the court to the reasons given in the instant case… without any need for exegetical comparison with reasons given in relation to other planning decisions.** That is to be discouraged."

Birchall Gardens

- [87]: The application of relevant Schedule 3 criteria depends upon the judgement of the LPA. **Where the LPA deals with only some of the criteria listed in Schedule 3 (or in the PPG), it should not be inferred without more that it has disregarded other criteria** (see ***Mackman*** and ***Mordue***)

- [97]: draft emerging local plan policies that simply identify potential to be allocated for housing do not qualify as "*cumulative development*" falling within Schedule 3

Leckhampton

R (o.a.o. Leckhampton Green Land Action Group Ltd) v Tewkesbury BC

[2017] EWHC 198 (Admin) – 9 February 2017

- Challenge to the grant of planning permission for the construction of 377 dwellings
- Is argued that the ES and the LPA unlawfully failed to treat the proposal as part of a larger *"project"*, namely the whole of the A6 strategic allocation
- Argument rejected by Holgate J:

Leckhampton

- Discussion of ***Bowen-West***:
  - The scope of an EIA is essentially a matter of judgement
  - *(Obiter)*: the intensity of review in relation to the scope of EIA is the conventional ***Wednesbury*** approach, the exercise being concerned with fact-finding and not with issues or functions involving any consideration of proportionality
- "Single project" argument rejected
  - Proposed development is capable of being developed as a freestanding scheme irrespective of whether the Cheltenham borough part of the A6 allocation is developed

Leckhampton

- No <u>functional interdependence</u> suggested
- The development proposed for the Cheltenham part of the allocation has in any event also been the subject of EIA
- [130]: "**The mere allocation in the draft JCS policy of the overall A6 area for development does not support a conclusion that only the development of the whole of that area could be treated as a "project" for the purposes of EIA, and not some part of that area**"
- Note also [136] to [138]: **planning committee members do <u>not</u> have to read (for themselves) the whole of the ES and the other *"environmental information"***

PNRAG

Preston New Road Action Group v SSCLG

[2017] EWHC 808 (Admin) – 12 April 2017

- S.288 challenge to grant of planning permission for exploratory fracking
- Is alleged that the ES is defective because it fails adequately to assess the following cumulative impacts:
  - The potential for continued use of the well pad and associated surface works for gas extraction in the future
  - The impact of greenhouse gas emissions arising from a period of extended flow testing after the initial gas flow testing and flaring

PNRAG

- Argument rejected by Dove J:
  - On potential continued use: the application had to be addressed on its own terms and was for permission for exploration and appraisal of the potential gas resource for a period of six years: thus, strictly limited in time and for a sole purpose
    - Any further gas extraction beyond that would have to be the subject of a new planning application (either s.70 or s.73 TCPA 1990) and a new ES would have to be prepared
  - On the period of extended flow testing: para. 120 of the Planning Practice Guidance on Minerals is <u>not</u> incompatible with the EIA Directive:

PNRAG

"[128] …there is and was **no evidence** to support any suggestion that the provision of gas from the application site to the grid, and thereby to residential or industrial users, will lead to **any increase in the consumption of gas and therefore the generation of greenhouse emissions in the UK**. It is in my judgment a perfectly sensible assumption, on the basis of the evidence that was before the decision-taker and, for that matter, the Court that any gas provided to the grid during the extended flow phase will simply replace gas that would otherwise be consumed by residential and industrial users supplied by the grid, and thus there is **no evidence that there would actually be any increase in gas usage and or greenhouse gas emissions**. Thus, there were no indirect, secondary or cumulative effect of the kind suggested arising from the exploration phase which required inclusion within the ES."

PNRAG

"…There is a clear distinction to be drawn between the position at the stage of the extended flow phase when the wells would be connected to the grid, and the flaring which would occur during the initial flow testing phase. The flaring plainly gives rise to the burning of gas and generation of greenhouse gases that would not otherwise arise and which, therefore, is properly the subject of assessment within the ES."

Headcorn

R (o.a.o. Headcorn PC) v SSCLG

[2017] EWHC 970 (Admin) – 2 May 2017

- Lang J rejects JR challenge to (i) negative screening direction from SoS and (ii) subsequent grant of planning permission for up to 220 dwellings
- Sole ground of challenge is that SoS failed to take into account a material consideration, namely the concerns expressed about the cumulative impact of traffic by Kent County Council's Corporate Director (Mrs Cooper) in correspondence with the Borough Council
- Lang J holds that Mrs Cooper's correspondence concerned **the emerging Local Plan** and that KCC had never opposed the allocation that included the relevant site on traffic grounds

Headcorn

"[60] Applying the legal principles in ***Loader, Bateman, Evans*** and ***Hockley*** … I consider that the Secretary of State was entitled to base his screening assessment upon the material before him which did relate to the Site, and **to disregard as irrelevant the issues raised in the correspondence from Mrs Cooper which did not relate to the Site. Since KCC had submitted detailed comments on this particular application, the Secretary of State was entitled to assume that these comments represented KCC's views.** He was not under any legal obligation to launch a speculative investigation into whether KCC might also be concerned that development in Headcorn could have a cumulative environmental impact on the A274 corridor in the south eastern sector of Maidstone, when there was no objective evidence to support this suggestion."

Stadt Wiener Neustadt

Case C-348/15 *Stadt Wiener Neustadt v Niederosterreichische Landesregierung*

CJEU – 17 November 2016

- Consent granted for an increase in capacity of a fuel processing plant. EIA should have been undertaken but was not

- Under Austrian law the consent cannot be annulled after the expiry of a three-year time limit and the consent is deemed to be lawfully granted

Stadt Wiener Neustadt

- CJEU:
  - It appears that the Austrian provision in question does not satisfy the conditions for exclusion of a project from EIA that are laid down by Article 1(5) of Directive 85/337 ([26] to [34])
  - "A national provision under which projects in respect of which the consent can no longer be subject to challenge before the courts, because of the expiry of the time limit for bringing proceedings laid down in national legislation, are purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment … **is not compatible with** [the EIA] **directive**"
  - However:

Comune di Corridonia

Joined Cases C-196/16 and C-197/16 *Comune di Corridonia v Provincia di Macerata*

CJEU – 26 July 2017

- "[43] …in the event of failure to carry out an [EIA], EU law, on the one hand, requires Member States to nullify the unlawful consequences of that failure and, on the other hand, **does not preclude regularisation through the conducting of an impact assessment, after the plant concerned has been constructed and has entered into operation**, on condition that:
  - national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and
  - an assessment carried out for regularisation purposes is not conducted solely in respect of the plant's future environmental impact, but **must also take into account its environmental impact from the time of its completion**."

Bund Naturschutz in Bayern e.V.

Case C-645/15 ***Bund Naturschutz in Bayern e.V. v Freistaat Bayern***

CJEU – 24 November 2016

- CJEU judgment on the proper interpretation of the EIA Directive in relation to road projects and the concept of "*construction*"

Landmark CHAMBERS

SEA

Stonegate Homes

R (o.a.o. Stonegate Homes Ltd) v Horsham DC

[2016] EWHC 2512 (Admin) – 13 October 2016

- Challenge to the Henfield Neighbourhood Plan
- Patterson J: the assessment of reasonable alternatives within the SEA process was flawed and the making of the HNP was incompatible with EU obligations. The LPA's decision to make the HNP was thus irrational

Stonegate Homes

- Alternative "Option C" dismissed in the SA/SEA report and in the HNP because *"*any further significant development in that area which lies furthest from the village centre would place unsustainable pressure on the local road system*"*
- Patterson J: question is whether "such evidence as there was, based upon local opinion and […] "what the community felt", was sufficient to meet the standard required under the SEA Directive?"
- No: [74]: "The problem here is that the absolute nature of the rejection of Option C is **unsupported by anything other than guesswork**. At the very least, …the parish council could have contacted the highways authority to obtain their views on the capacity of the broader local highways network in the western part of Henfield. There is no evidence that that was done"

RLT

R (o.a.o. RLT Built Environment Limited) v The Cornwall Council

[2016] EWHC 2817 (Admin) – 10 November 2016

- Hickinbottom J

"[46] …SEA is purely procedural in nature: it does not seek to drive or influence underlying policy, but only to require the proper assessment of (and, thereafter, consideration of) the potential environmental effects of a particular plan or programme before its adoption. "Reasonable alternatives" have to be seen through that, environmentally-focused, prism. Therefore, whilst the Court of Appeal in ***Ashdown Forest*** made clear that **"reasonable alternatives" include options which are potentially environmentally-equal** to the preferred option – in that case, options which, like the preferred option, eliminated the relevant risk – **the SEA regime does not require consideration of alternatives that are environmentally-inferior**."

RLT

"The SEA Directive is designed to ensure that **potentially environmentally-preferable options that will or may attain policy objectives** are not discarded as a result of earlier strategic decisions in respect of plans of which the development forms part. The discarding of environmentally-inferior options is not its concern."

DLA Delivery

R (o.a.o. DLA Delivery Ltd) v Lewes DC

[2017] EWCA Civ 58 – 10 February 2017

- Lindblom LJ

"[72] The court must **avoid an overly stringent approach to a "screening" decision** under regulations 5 and 9 of the SEA Regulations …Of course, the "screening" analysis will sometimes be so perfunctory or superficial as to be legally flawed. And there will be cases where the court has no choice but to find a "screening" decision unlawful… see, for example, the decision of this court in *R (Friends of Basildon Golf Course) v Basildon District Council [2011] Env LR 16* , in particular para 62, per Pill LJ (with whom Carnwath and Rimer LJJ agreed). But the court must remember that, as Richards LJ put it in *R (Larkfleet Homes Ltd) v Rutland County Council [2015] PTSR 1369* , para 41, "**documents of this kind are to be read as a whole and with a degree of benevolence**": see also, for example, *R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157* at [20], per Moore-Bick LJ."

DLA Delivery

- Breach of the reg. 9(3) requirement to give reasons is identified (together with breach of the Habitats Regulations)
- CA decides to exercise its discretion against granting relief:
  - No real prejudice to the claimant or any other party in withholding a remedy
  - By contrast, "considerable prejudice" both to good administration and to the interests of the community in Newick (needless delay and uncertainty) if remedy is granted
- "[76] …in any event it is, in my view, inconceivable that the outcome of the SEA "screening" exercise …might now be any different if the "reasons for the determination" given in the scoping reports were amended and amplified. The "screening" decision itself was perfectly clear, not opposed by the "consultation bodies", and …well within the bounds of reasonable planning judgement."

Hoare

Hoare v The Vale of White Horse DC

[2017] EWHC 1711 (Admin) – 7 July 2017

- John Howell QC (Sitting as a Deputy High Court Judge)

"[138] It is inevitable that there may be disputes about the extent of the information reasonably required for [SEA] and that the information which a published report contains may be deficient in certain respects. **The legislation governing environmental assessment recognises that the information provided may be inaccurate, inadequate or incomplete by providing for there to be consultation with other authorities and the public on the report which may serve to remedy any deficiencies in the information it contains**…

Hoare

…If the process of environmental assessment is to be treated as fatally flawed on the basis that the information in the published report is deficient, therefore, in my judgment **any such deficiencies must be such, that the published report cannot reasonably be described as an environmental report containing the information which,** given that process of assessment, **any reasonable authority would have thought was reasonably required**, taking account of the specified matters, **in order to identify, describe and evaluate the likely significant effects on the environment of implementing the plan and any reasonable alternatives**: cf *R (Edwards) v Environment Agency [2008] UKHL 22, [2008] Env LR 34* , per Lord Hoffmann at [38] and [61]."