Environmental Impact Assessment

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Background

1) Environmental impact assessment (or EIA as it is normally known) is an increasingly important feature of planning control. It has moved from a position of relative obscurity when introduced in 1988, to a field of law which can scupper major development projects. Planning applications and inquiries have been disrupted whilst, where it is possible to do so, EIA errors are corrected. More dramatically planning consents have been quashed by the Courts on grounds relating to EIA. In the last few years these have included a football stadium, industrial buildings, a gas-fired power station, town centre regeneration proposals, farm buildings and several major housing projects. EIA has become a significant weapon for those seeking to challenge unwanted development and there is no reason to suppose it will become any less. The recent judgments of the ECJ in relation to the need for EIA for reserved matters approval have opened up a new area of difficulty.

2) EIA is designed to ensure firstly that planning decisions involving significant effects on the environment are taken by bodies with full information as to the relevant factors. A further purpose is to ensure public scrutiny of major schemes and democratic participation in decisions about such schemes. In the words of Advocate General Elmer of the European Court of Justice; “however misguided and wrongheaded the public’s views may be, they must be given an opportunity to express their opinions on the environmental issues arising from a project”¹. The UK Government has put it more eloquently

“The general public’s interest in a major project is often expressed as concern about the possibility of unknown or unforeseen effects. By providing a full analysis of the project’s effects, an environmental

statement can help to allay fears created by lack of information….One of the aims of a good environmental statement should be to enable readers to understand for themselves how its conclusions have been reached and to form their own judgment on the significance of the environmental issues raised by the project.\footnote{2}

3) As befits these lofty aims the remit of the relevant EC Directive and the UK implementing regulations\footnote{3} is intended to be wide in their scope. The Courts have responded accordingly. Since the House of Lords decided the landmark decision, \textit{Berkeley No. 1}, in 2000, the Courts have taken an increasingly inventive and rigorous approach to the Regulations\footnote{4}. EIA generates more new cases than other areas of environmental or planning law. The key aspect is perhaps that of discerning where the role of the courts in supervising the exercise of the planning authority’s discretion begins and ends in each case.

4) The main principles of the EIA regime are set out below, together with a reference to the relevant case law. The most recent cases are covered in more detail in Annex 1.

Screening

5) The screening process is aimed at determining whether or not a project requires EIA. It is therefore fundamental to the safeguards which the Directive is intended to afford. The two issues that the local planning authority must address at the screening stage are;

\footnote{2} Environmental assessment; a guide to the procedures HMSO 1989
a. whether a project falls within one of the categories of development in Schedules 1 or 2 of the Regulations; and 

b. if within Schedule 2 (as will most often be the case) to decide whether the project is likely to have significant effects on the environment by virtue of its nature, size and location.

6) Whether a development falls within the classes in Schedules 1 or 2 is regarded by the Courts as a question of law and not one of judgement for the reasonable assessment of the local planning authority. The Courts will therefore intervene more easily; *Goodman*\(^5\)

7) Minor environmental effects do not bring a development within the scope of the EIA regime. The question of whether environmental effects are significant is, as the courts have repeatedly affirmed one of judgment for the planning authority and the Courts tend to adopt a “hands off” approach to decisions taken. This is on the basis that it involves an exercise of judgment or opinion, a detailed knowledge of the locality and an expertise which planning authorities but not the courts possess\(^6\).

8) Decisions – if soundly based – will therefore be successfully reviewed only if the planning authority has gone beyond what constitutes reasonable judgment into the realm of absurd, irrational behaviour. This is a high hurdle for those seeking to get the courts to intervene in the decisions of local authorities.

9) Nonetheless there are numerous examples of planning authorities which have gone wrong in the process. The following cases highlight the traps developers and authorities can fall into.

a. Lack of formality in the procedures, so that no formal screening opinion exists: *Lebus*\(^7\). The Regulations require a written statement

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\(^5\) See R(Goodman) v Lewisham LBC [2003] EWCA Civ 140. See also R(Horner) v Lancashire County Council and Castle Cement Ltd [2005] EWHC 2273 where Ouseley J considered the interpretation of the threshold in Schedule 2 of 1,000 m\(^3\) of new floorspace (in relation to a change or extension to an existing cement works).


of the local planning authority’s decision that an EIA is not required which must be placed on the planning register. In *Lebus* this was not done.

b. Decisions taken by a local authority planning officer lacking formal delegated authority: *Walton*\(^8\). The Regulations require ‘the local planning authority’ to decide whether an application requires an EIA. The decision in *Walton* was taken by the Council’s planning officer without any formal delegation of authority.

c. Failure of the local planning authority to ask itself whether it has enough information to make a proper decision as to whether an EIA is necessary - *BT*\(^9\) - In *BT* the court noted that it is quite easy for officers to slip into the trap of focusing on particular areas suggested to them by the developers rather than making an independent assessment.

d. Asking whether the proposed development had significant *adverse* effects on the environment instead of whether it had significant effects. *BT*.

e. Taking a ‘global’ view that overall the project is likely to have net beneficial effects and so discounting negative effects: *BT*. There is no principle in the legislation that justifies significant adverse effects being ignored or treated as nullified in some way on the grounds that they are outweighed by the environmental benefits of the project.

f. Failure to consider the aggregated effects of separate applications which are in substance a single project: *BAA*\(^{10}\). It is now clear that the cumulative effect of separate projects must in any event be

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specifically considered\textsuperscript{11}. However the Courts will not insist on aggregation of phased schemes where there is no question of the developer seeking to avoid or circumvent EIA by splitting up a project Candlish\textsuperscript{12}. Where an application relates to a small project below the thresholds in Schedule 2 of the Regulations, the fact that some time in the future the small project will form part of a larger project does not mean that the cumulative effects of the larger project has to be considered in the current application. The assessment of whether an application relates to a Schedule 2 application or not is to be decided by reference to the application for development consent applied for and not any development contemplated beyond that.

g. In deciding that EIA is not necessary, taking into account possible measures to mitigate environmental effects where those measures are uncertain in their efficacy or may themselves have significant effects: Gillespie \textsuperscript{13}. A local planning authority is entitled to envisage the operation of standard conditions and a reasonably managed development so not all remedial or mitigating measures need to be ignored. In some cases the remedial measures will be modest in scope or so plainly and easily achievable that it would be proper to hold that the project could not have significant effects on the environment. However if prospective remedial measures are not plainly established and not plainly uncontroversial, the case calls for an EIA.

h. Misconstruing the descriptions of development in Schedules 1 and 2 of the Regulations: Goodman \textsuperscript{14}. This is particular problem given the potential breadth of some of the descriptions in Schedule

\textsuperscript{11} Annex III screening criteria in the Directive.
\textsuperscript{12} R(Candlish) v Hastings Borough Council [2005] All ER (DO 178 (Jul)
\textsuperscript{13} Gillespie v. First Secretary of State [2003] EWCA Civ 400; [2003] JPL 1287. See also R(Anderson & Others) v City of York Council [2006] EWHC 1531
\textsuperscript{14} R (Goodman) v. Lewisham London Borough Council [2003] EWCA Civ 140; [2003] JPL 1309
2. The Courts regard getting this wrong as an error of law which they will intervene more readily to correct.

Environmental statements

10) Whilst the screening process has proved a major focus for legal challenges to development, in many cases developers are choosing to submit an environmental statement in preference to running the risk of a legal challenge for the absence of one. The Planning Inspectorate is becoming more active in requiring environmental statements at an early stage in the appeal process, so as to avoid the difficulties which have arisen in some cases through the need for EIA only being identified at or after the opening of the inquiry. Thus there are many cases where the challenge is to the sufficiency of the environmental statement.

11) The information required to be included in an environmental statement is set out in Schedule 4 to the Regulations. It must include such of the information referred to in Part I of the Schedule as it reasonably required to assess the environmental effects of the development and which the applicant can reasonably be required to compile; in any event it must include at least the information referred to in Part II of the Schedule.

12) The ES does not have to contain every scrap of environmental information\textsuperscript{15}. The Courts have recognized that if the ES did contain everything it would be voluminous and there would be a real danger of the public/local planning authority “losing the wood for the trees”\textsuperscript{16}. It only need cover the “main effects” or “likely significant effects”\textsuperscript{17}. 

\textsuperscript{15} Harrison J in R v. Cornwall County Council, ex p. Hardy [2001] Env LR 473; [2001] JPL 786. See also R(on the application of Kent) v First Secretary of State [2004] EWHC 2953


\textsuperscript{17} See Humber Sea Terminal Limited –v – Secretary of State for Transport [2005] EWHC 1289 (Admin); [2006] Env LR 86. Compensatory measures omitted from an EIA (recharge and flooding schemes to create new mud flat habitat) would not
Determining what effects are significant has to be considered in the context of the kinds of development that are included in Schedules 1 and 2 of the Regulations. Although each application will turn on its facts, examples taken from the case law as to what will be significant include demolishing or other changes to listed buildings and 46 deliveries of waste to a site every day. On the other hand, details of landscaping in an application for outline planning permission may be “significant” from the point of view of neighbouring householders and thus subject to reserved matters approval but they are not likely to have a significant effect on the environment in the context of the Regulations.

As with screening, the decision as to whether the information is adequate to meet these requirements is pre-eminently one for the planning authority and the courts will only interfere where something has gone wrong with that process. There may well be gaps in the information available, but provided these are not such as to affect the ability of the authority to determine that any effects are not likely to be significant, they will not vitiate the decision: see PPG 11. Nonetheless, as with screening, the following cases show that there are plenty of ways in which it is possible to go wrong:

a. A bare outline planning application, with no description at all as to what the development comprised or its final form is unlikely to provide an adequate basis for an environmental statement: Tew. This is likely to still be the case even though the European Court of Justice has ruled that EIA can be required at the reserved matters stage of an application (see below). The way to avoid this difficulty is for the developer to provide appropriate details of the development and for the local planning authority to ensure that

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these are given force by way of planning condition or section 106 obligations. The effect is that the proposed development stays within the parameters of development assessed in the environmental assessment: Milne and Portland Port. This may also be a way, should the developer/local planning authority wish to, to avoid the need for another EIA at a later stage in the project (see further below).

b. If the authority lacks a vital piece of information to assess whether significant effects are likely, it has been thought that it cannot leave that matter to be ascertained under a condition after planning permission has been granted: Hardy. Where preliminary surveys had identified the possible presence of bats (a European protected species) and nature conservation authorities had recommended further surveys, the local planning authority could not conclude there were no environmental effects until further surveys had been done. (See also Hereford Waste Watchers).

However this position may need reassessing in light of the recent ECJ judgments which allow an EIA to be carried out at reserved matters stage of the planning process. Part of the Court’s reasoning in Hardy was that protecting the bats could not be left to the reserved matters stage because no EIA would be possible.

c. Whilst it is not necessarily the case that an environmental statement must be a single document (indeed they often comprise many thick volumes), the public may not be expected to engage in a “paper chase” to piece an environmental statement together: Berkeley. Thus for example, if a developer chooses to submit

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24 paras 69 – 72
further information having put in an environmental statement, it will be important to ensure that it is properly integrated with the previous information and that the non-technical summary reflects this.

d. Provided the EIA sets out the parameters within which the likely significant effects of the development can be assessed, the detail can be left for subsequent consideration, whether by way of a planning condition or as part of an environmental pollution permit process Kent^{26}

e. A failure to comply with the procedural requirements for consultation may not be fatal to the decision. Wembley Fields Ltd^{27}. In Wembley Fields the decision to grant planning permission was taken a few hours before the consultation period closed. However there had been substantial compliance with the provision and no prejudice had been suffered as no representations had been received after the decision.

Other aspects of planning

15) The Regulations were framed with applications for planning permission in mind but EIA requirements can and have been applied to other aspects of the planning system.

16) The key issue is whether the approval in question constitutes a “development consent” in terms of the Directive; that is to say “the decision of the competent authority or authorities which entitles the

^{26} R(on the application of Kent v First Secretary of State [2004] EWHC 2953. Concerned a proposed waste disposal development. The generic waste types were set out in the EIA. Detailed consideration of the waste types was left to be dealt with by way of planning condition and the environmental permit (PPC) process. See Annex 1 for more detail.

^{27} R(Wembley Fields Ltd) v Brent LBC [2005] EWHC 2979 (Admin). See Annex 1
developer to proceed with the project.” The European Court of Justice has made clear that “development consent” is to be determined according to EC law. The following areas have given rise to difficulty:

a. the approval of conditions on old mining permissions is a grant of development consent, as further mining would be a breach of planning control if new conditions were not applied for and approved. *Brown* and *Wells*²⁸

b. Applications for the modification of planning conditions under section 73 of the Town and Country Planning Act 1990. These applications are now regarded as being for development consent: see *Prokopp* and *Hautot*.²⁹ Care is still needed however in establishing what exactly is being authorised and hence what its environmental effects are.

c. Applications for planning permission for development carried out previously, under section 73A of the 1990 Act.

d. Crown land. The European Court of Justice found the UK in breach of its obligations under Directive 85/337/EEC in Case C-37/05 Commission v. United Kingdom (January 12, 2006). The Commission had alleged that the UK had incorrectly transposed Articles 2(1) and 4 of the Directive in failing to provide that Crown Land was subject to the Directive’s requirements. The UK accepted that it was necessary to transpose those measures by way of binding legislation, and not by an administrative practice, and committed itself to taking the necessary legislative action.

e. Applications for approval of reserved matters pursuant to outline planning permission (dealt with below)

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²⁸ C-201/02 R(on the application of Wells) v Secretary of State for Transport, Local Government and the Regions
²⁹ R (Prokopp) v London Underground Limited [2003] EWCA Civ 961

The Court of Appeal held that a section 73 application involves the grant of planning permission and is a development consent. In *R (Hautot) v London Borough of Wandsworth* [2003] EWHC 906, comment at [2003] J.P.L. 935 contrary to the first instance finding, it was accepted on appeal that section 73 applications engaged EIA.
Outline planning applications and reserved matters – Barker and the new style “Multi-stage” Environmental Impact Assessment

17) Outline applications for planning permission may be made with certain defined matters being reserved for subsequent applications, a procedure which enables a decision in principle for example, as to whether a certain type of use, on a particular site would be appropriate. It is a particularly valuable procedure for projects are expected to evolve over many years. Outline applications come in many forms and contain varying levels of detail.

18) The position under UK law is that, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an EIA may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage.

19) The European Court of Justice has however given judgment recently to the effect that a ‘multi-stage’ EIA can be required at both the outline planning application stage and the reserved matters stage of an application for planning permission. The UK is in breach of EC law (Cases C-508/03, Commission v United Kingdom and C-290-03 Barker v London Borough of Brent)

20) The ECJ held that outline planning permission and the decision approving reserved matters together constitute multi stage development consent. This is because under UK law, until a developer has reserved matters approval his project is not entirely authorised. The Directive requires that projects likely to have significant environmental effects are assessed before development consent is given. As a result, the competent authority is, in some circumstances, obliged to carry out an environmental
impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved if it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue \textit{inter alia} of its nature, size or location. This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.

21) The implications of these judgments are potentially quite widespread. They include;

\begin{itemize}
\item[a.] \textbf{Legislative Change} With the advent in EC law of the concept of “multi-stage” EIA, domestic legislation and guidance needs to be amended to incorporate the concepts. It also alters the premise underlying much of the case law. Given the EIA Directive had direct effect \textit{(Huddleston)}, local planning authorities may be at risk of challenge if they wait for legislative change and should therefore consider making the necessary changes to EIA procedure as soon as possible.

\item[b.] Developers and local planning authorities will need to prepare for the possibility that a ‘second stage’ EIA will be required at the reserved matters stage. Local planning authorities will have to screen reserved matters applications for likely significant effects, as an obligation to carry out EIA cannot be avoided by failing to consider whether EIA is necessary: \textit{R(Goodman) v London Borough of Lewisham}. Although unpalatable, this may extend to a review of any initial screening decision that EIA is not required.

\item[c.] \textbf{Scope of reserved matters EIA} The scope of the second stage assessment is not clear. It will need to cover all aspects of the project which require a fresh assessment due to changes in circumstances during the lifetime of the project. The circumstances
need not arise however from the project itself. It may be for example that a nearby piece of land is designated as an SPA after the outline planning application or a housing development creates cumulative impacts which need to be assessed. More controversially, it may also need to cover aspects of the project which have not yet been assessed. In cases where no EIA was carried out at the outline stage, this could in effect seek to reopen earlier decisions that no EIA was necessary. The domestic view is that this violates the principle of legal certainty (See R (the Noble Organisation) v Thanet District Council)\(^\text{30}\). However the ECJ has shown little sympathy for the principle and rejected the Government’s arguments to this effect in the recent cases.

d. **Effect on outline planning applications** Following the *Tew* and *Milne* decisions a fair degree of detail has had to be fixed in outline planning permissions to enable EIA to be carried out and to prevent the final development departing from the significant effects assessed in the EIA. Some of the rigour has been imposed because it has not been possible to carry out EIA at a later stage. As that is no longer the case, some reassessment of the English case law is required. The ECJ does require effects to be assessed at the outline application stage, where possible, although the ability to identify effects depends, in part, on the detail of the scheme which has been provided. It is uncertain whether outline planning permissions will in practice be able to be less detailed than they are at present. A clear explanation will need to be provided to show why issues can be deferred to a reserved matters EIA. It may now be the case that, unlike in *R –v- Cornwall County Council ex p*  

\(^{30}\) R(Noble Organisation Ltd) and Thanet District Council [2005] EWCA Civ 783. The Court of Appeal held that the challenge to a decision by the authority not to require an EIA at reserved matters stage was in reality an impermissible collateral challenge to decisions several years earlier to grant outline planning permission. If the time has passed for challenging administrative acts then they stand notwithstanding that the reasoning on which they are based may have been flawed. See Annex 1 for more detail.
**Hardy**, where an authority lacks a vital piece of information to assess whether significant effects are likely, it can leave the matter to be dealt with under a condition after planning permission has been granted, with the option of an EIA if the new information indicates the effects will be significant. However, in domestic law reserved matters cannot be refused because matters approved in the outline planning permission are now considered unacceptable. Any EIA issues deferred to a later stage should not be ‘show stoppers’ which relate to the outline permission.

**e. Conditions/section 106 agreements**  Approval of details under conditions might require EIA where those details are likely to have significant effects. The conditions will need to prevent the carrying out of all or part of the development if details are not approved. There may be circumstances in which a planning obligation becomes part of the development consent, requiring EIA of variations or approvals under it.

**f. Objectors:** The door is now open for longer for those seeking to challenge projects with no or inadequate EIA. Objectors may now be able to use the reserved matters stage to re-open what they consider to be a defective EIA or no EIA at the outline application stage.

**g. Prudent practice** Given the significant degree of uncertainty surrounding the scope of reserved matters EIA, it may be prudent practice for local planning authorities and developers who wish to avoid the risk of a second stage EIA to continue with current safe practice post *Milne/Portland Port*. This is where appropriate information is provided at the outline stage and conditions/s106 agreements are used to ensure that future development stays within the parameters of development assessed in the EIA at outline stage.
Future Elephant Traps

22) Future elephant traps for developers and local planning authorities could include;

a. **Outline applications and reserved matters EIA.** The nature of the EIA required at outline and reserved matters stage could cause some initial difficulties as developers and local planning authorities grapple with the implications of the recent ECJ judgments.

b. **Alternatives** The information that must be included in an EIA includes an outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects. It is not clear whether the requirement to consider alternatives is mandatory or not. There has been little judicial scrutiny of the issue. In particular there has been no scrutiny of the issue of whether developers have to give adequate consideration to alternatives.

c. **Lawful development certificates and local authority enforcement** The ECJ has recently dismissed another EIA case taken by the Commission against the UK. The case concerned whether the UK was, in effect, by passing the requirements for EIA and development consent by virtue of its rules on; issuing lawful

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31 Department of the Environment Circular 2/99 on Environmental Impact Assessment suggests it is not whereas the leading commentators on EIA - Tromans and Fuller in Environmental Impact Assessment Law and Practice, characterise the requirement as mandatory.

32 The issue of alternatives in an environmental statement appears to have been the subject of detailed judicial ruling in only one reported case, **R –v- Secretary of State for the Environment Transport and the Regions ex parte Challenger** and the Court did not interpret the requirement over-onerously. However the project in question was a transport project (Thameslink) and the obligation to include the information on alternatives is contained in the Transport and Works (Applications and Procedures) Rules 1992. The obligation on alternatives is arguably different and less onerous than under the EIA Regulations.

33 Case C-98/04, Commission v United Kingdom. Case report available on the website of the European Court of Justice.
development certificates; time-limits for the taking of enforcement action against development; the failure of local planning authorities to take enforcement action in relation to illegal development. The ECJ dismissed the action on the basis the Commission had not put forward a coherent and detailed case. The issue has therefore gone away for the moment. Nonetheless the UK government had accepted in 2003 that a lacuna existed and undertook to adopt the measures necessary to remedy it. In the earlier domestic case of Prokopp 34 Schiemann LJ held that a decision not to take enforcement action where EIA development was concerned was capable of amounting to a development consent. Buxton LJ held to the contrary that a failure to take or decision not to take enforcement proceedings was not a development consent. Kennedy LJ agreed with them both, rendering it rather difficult to ascertain the ratio on this point.

d. **EIA for pollution control consents where planning permission has already been granted**35. In Edwards 36, the High Court rejected the argument that an EIA was required on the particular circumstances of the application for pollution consent. The Courts have yet to consider the point of principle as to whether an EIA can be required on the grant of a pollution control consent after planning permission has been granted. Edwards involved EIA arguments in relation to the use of substitute fuels at cement kilns, as did another case in 2005, Horner. In issue was the use of waste chipped tyres, which was the subject of a PPC permit. Lindsay J held that the use of tyres in this way could not be regarded as a “project”, and further the references to waste “disposal” in the Annexes to the Directive

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34 Prokopp concerned the proposed East London Extension and the demolition of the Bishopsgate Goods Yard.
35 Pollution control consents include pollution prevention and control authorisations, waste management licences or radioactive substances discharge authorisations
36 R (Edwards) v. Environment Agency [2005] EWCA 657; [2006] Env LR 56 involved the use of chipped tyres as substitute fuel in a cement kiln. The Court held that a change in the fuel of the kiln did not amount to a project within the meaning of the EIA Directive or a change to the existing project so as to require a fresh EIA.
were to be read as meaning disposal in the technical sense of the Waste Framework Directive, whereas the use of tyres for fuel was “recovery”. This approach was followed in *Horner*\(^{37}\)

\(^{37}\) Ouseley J in *R (Horner) v. Lancashire CC* [2005] EWHC 2273.)
ANNEX 1 – Selection of cases referred to in the text

Cases C-508/03, Commission v United Kingdom and C-290-03 R(Barker) v London Borough of Bromley

The cases arose out of proposed substantial developments at White City and Crystal Palace in London. In both cases the developers applied for outline planning permission, which was granted without an EIA being considered necessary. In both cases the developers subsequently applied, successfully, for reserved matters approval.

The European Commission argued that the UK was in breach of the Directive because domestic law provides that, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an EIA may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage.

Meanwhile Mrs Barker challenged the local planning authority’s approach to reserved matters in the Crystal Palace development. The House of Lords had doubts about the compatibility of domestic law with Community law on the reserved matters and EIA issue. It therefore stayed the proceedings to ask the ECJ whether an EIA needs to be carried out if, following the grant of outline planning permission, subject to conditions that reserved matters be approved, without an EIA being carried out, it appears when approval of reserved matters is sought that the project may have significant effects on the environment by virtue inter alia of its nature, size or location?

The issue turns on the central obligation in the EIA Directive that projects likely to have significant environmental effects must be assessed before development
consent is given. This in turn depends on how ‘development consent’ is to be interpreted.

The European Court rejected arguments that ‘development consent’ is to be interpreted according to national law. It repeated the principle, laid down in *Wells* (see below) that its meaning and scope are normally to be given throughout the Community an autonomous and uniform interpretation.

The Court then rejected the Government's argument that development consent is given when outline planning permission is granted and not when the reserved matters are subsequently approved. ‘Development consent’ is defined for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project. Under domestic law, a developer cannot commence works in implementation of a project until reserved matters approval has been obtained. Until such approval has been granted, the development in question is still not entirely authorised.

This then gives rise to what the ECJ termed ‘multi-stage’ development consent. Outline planning permission and the decision approving reserved matter together constitute ‘multi stage’ development consent. As a result, the competent authority is, in some circumstances, obliged to carry out an EIA in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved if it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location. This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.

In providing that an environmental impact assessment in respect of a project may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage, the UK is in breach of Articles 2(1) and 4(2) of Directive 85/337, as amended.
The facts took place in three stages; in 1997 the local authority granted outline planning permission for a business park. No EIA provided or required. In 2002 the authority granted outline planning permission for a leisure development on the business park site which left details such as siting, design, means of access, appearance and landscaping to reserved matters approval. The need for an EIA for the outline permission was considered, and a screening decision that it was not was given in 2000. In 2004 an application was made for reserved matters approval. In considering whether the Schedule 2 development required an EIA, the officers referred to the fact that outline planning permission had originally been granted for a business park, and to the fact that no EIA had been considered necessary for the grant of outline permission of the leisure park in 2000.

The claimant sought judicial review of the decision to grant approval of the reserved matters, on the basis that the decision not to require an EIA was unlawful because irrelevant factors had been taken into account, whereas as a matter of EC law, the authority should have looked behind the formal validity of the earlier planning and screening decisions and examined the adequacy of the consideration given in them to the need for an EIA.

In the Court of Appeal, Auld LJ found that, in considering whether an EIA was necessary at the approved matters stage, the local authority’s essential comparison had been with the leisure outline planning permission. It had been a matter for the planning judgment of the planning authority whether it had sufficient material before it at the outline planning stage to decide whether a proposed development would be likely to have such significant effects on the environment as to require an EIA. There had been no application for a Wednesbury challenge to the authority's decision not to require an EIA at the
outline permission stage, nor was there any basis for one. Neither had there been anything perverse about the local authority conducting a screening exercise at the reserved matters stage even though it had already done so at the outline permission stage and concluded that an EIA was not necessary; that decision had been eminently rational given the legal uncertainty over the necessity for an EIA at the reserved matters stage (the issue being one under consideration in the ECJ in *R. v London Borough of Bromley v Barker*).

It was clear that neither of the two outline planning permissions nor the screening decision in respect of the second of them could be challenged, directly or indirectly, and the challenge to the decision not to require an EIA at the approval of reserved matters stage was, in the way it had been formulated, an impermissible collateral challenge to those decisions. There was no scope for a challenge to the approval of reserved matters on the basis that it was a later decision adopting an earlier erroneous decision, because the local authority had simply taken the 2000 screening decision into account as a relevant factor, and had not relied on it.


Planning permission for the development of a waste treatment and recycling facility in Hereford was quashed by the High Court on the grounds that the local planning authority had failed to undertake environmental impact assessment properly prior to granting permission. The permission was made subject to a range of conditions including that “no development shall take place until…a report specifying the levels of all pollutants..is provided.”

The first ground for the application for judicial review was that the environmental statement failed properly and fully to provide relevant information (eg the report
on pollutants which was made the subject of the condition), so that the defendant had been unable to assess whether the effects were significant or not. It was alleged that the authority ought not to have granted permission subject to conditions without first having the material information available, and that by so doing they had potentially deprived consultees of the opportunity to be consulted about the environmental impact.

Elias J found that the grant of permission had been flawed in that the information which the planning authority required, and which it had stipulated should be made available prior to the development commencing, should have been made available prior to the planning permission being granted. It could not leave the matter to be covered by conditions at a later stage; even if that might otherwise be a satisfactory way of dealing with the problem, it frustrated the democratic purpose of the consultation process. The defendant authority had not found that there were no significant effects on the environment, but had made provision for further assessment of these through the imposition of conditions. Devising a condition which was capable of bringing the development below the relevant threshold of no significant effects did not necessarily lead to a decision that an E.I.A. was unnecessary. It might be that the information would confirm the assessment made by the developer, but the court could not properly make that assumption, and should not deny the claimant and any other potential consultees the possible opportunity to respond to whatever was forthcoming, such as proposed mitigation measures.

**R (on the application of Kent) v. First Secretary of State** [2004] EWHC 2953 (Admin)

The claimant sought to quash the grant of planning permission for a proposed waste disposal development at the Winsford Rock Salt Mine on two main
grounds: first, that the Environmental Statement had been inadequate in that it had not specified the types of waste to be deposited with sufficient particularity and had not included a quantitative risk assessment, and instead leaving the details of the waste types to be dealt with under the PPC permit application; and secondly, a condition requiring a monitoring scheme for airborne particulates was relied on as demonstrating that the inspector must have thought that there was a risk from airborne particulates which should have been dealt with as part of the EIA and should not have been left to the County Council by way of a condition.

Sir Michael Harrison dismissed the application. It was for the decision maker to decide whether the information contained in the document was sufficient. The document did not have to contain information about all the effects, only the "main effects" or "the likely significant effects". Both that decision and the judgment as to what was a "main effect" or a "likely significant effect" were for the decision maker, not the court. The important point in this case was that the generic waste types which formed the basis of the planning application and which were considered in the risk assessment in the environmental statement had been tied into the planning permission by a condition, so that the parameters had been set, within which the likely significant effects were assessed, and which were safeguarded by the relevant condition, leaving over subsequent matters of detail, including detailed consideration of waste types, to be dealt with by other planning conditions and by the PPC process. It was held that the monitoring of airborne particulates could also be left to the control of another authority, and had to be viewed in the context of the inspector's conclusion that he considered it to be a low risk consideration, in so far as it was relevant to planning considerations relating to the use of land, so that it had been lawful to deal with it by way of a monitoring condition in the planning permission.

38 There is a possible point of difficulty here, in that the test for EIA is the environmental effects stated in the Directive, which is not limited by the domestic concept of what is a “material consideration” in planning terms. It could of course be argued that given the obligations of the decision-maker to ensure effectiveness of the Directive, anything within the scope of the Directive must become material as a planning consideration.

The claimant submitted that the Council had erred in law in assuming that the subsequent steps in the planning process, including the imposition of conditions, would enable the elimination or successful mitigation of adverse environmental effects so as to justify negative opinions. The claimant also submitted that insufficient information had been available at the screening stage to decide properly that no EIA was required. Elias J dismissed the claim, finding that a screening opinion did not have to state exhaustively the reasoning of the officer involved and should not be read like a statute. On the issue of taking into account mitigation measures, the officer had been clear in the view that there would be no significant adverse environmental effects, but that it was desirable that there be some further consideration of the detailed proposals in order to minimise fully any adverse effects which there might be. This was compatible with the finding as to no adverse effects and it had been proper for the officer to rely on the fact that there would be mitigating measures. Whilst the position might be otherwise if such measures were unusual or novel, those in the present case had been tried and tested and commonly adopted for the difficulties in question.


The case concerned a challenge to a harbour revision order permitting Associated British Ports (ABP) to construct five roll-on, roll-off births at Immingham and its impact on the Humber Estuary special protection area (SPA). Amongst the issues for consideration was whether ABP’s environmental statement had been inadequate, giving insufficient details of the proposed compensatory measures, in respect which ABP had entered into an agreement
with English Nature and other bodies. On this point, Ouseley J held that a rigid
distinction should not be drawn between a project and the compensatory
measures to be taken in consequent of it. However, he found that there was no
evidence that the proposed compensatory measures (involving recharge and
flooding schemes to create new mud flat habitat) would be main or likely
significant effects of the project, in consequence of which the omission of some
of them from the ES did not prevent it from being an ES in law.

R (Candlish) v. Hastings Borough Council and Hastings and Bexhill
Renaissance Ltd (t/a Sea Space) [2005] EWHC 1539 (Admin)

A local resident, Ms Candlish, applied for judicial review of the defendant local
authority's decision to grant planning permission for Phase 1 of a two-phase
development project undertaken as part of the Millennium Communities
Programme. Phase 1 consisted of the development of a spine road, associated
mini-roundabout and surface water attenuation works. The planning application
for the Phase 1 acknowledged that a separate planning application was required
for the Phase 2 of the project, and that the Phase 2 would require an
environmental impact assessment, which would also include Phase 1. In granting
permission for Phase 1 the local authority took the view that no EIA was required.
The area of the works to which the application for Phase 1 related was less than
one hectare and no part of the development fell within a "sensitive area".
Essentially the claimant's case was that as Phase 1 was part of an overall
project, the application had to be treated cumulatively as part of that overall
project, so that Phases 1 and 2 combined were the EIA development for the
purpose of Schedule 2 of the Regulations.

Davis J disagreed, and held that the EIA Regulations were geared towards the
actual application for planning permission. There was no justification for treating
the word "development" in the Regulations as though it meant "project": Bund
Naturschutz in Bayern BV v Freistaat Bayern (1994) ECR I - 3717 was applied. The local authority’s decision that this was not an EIA development, by reference to the Phase 1 application alone, was in accordance with the wording of the Regulations, and the wording and purpose of the EIA Directive. It is important to emphasise here that it was accepted that there was no question of the developer having sought to avoid or circumvent the EIA requirements by splitting up or “salami-slicing” what was in reality a single project.

Case C-98/04 Commission v United Kingdom, in which the Commission had taken proceedings following a complaint concerning the practice in the United Kingdom of issuing Lawful Development Certificates (LDC) to confirm that a particular use of land (in this case a scrapyard) was lawful for development control purposes. The Commission argued that the issuing of LDCs effectively by-passed the development consent procedure and as a result the requirements of the EIA Directive. Advocate General Ruiz-Jarabo Colomer gave an Opinion on 14 July, 2005 that the UK is in breach of its obligations under the EIA Directive in relation to LDCs. As the Advocate General put it in para 27, Community law precludes implementation of such projects without prior authorisation and, if appropriate, without assessment of their impact, where implementation becomes irreversible with the passage of time. That, he held, was however precisely the effect of the United Kingdom system, which, as the case of the scrap yard over which the proceedings arose demonstrates, and as the UK accepted, allows action to be taken in breach of the Directive, without prior evaluation or impact assessment, and to be legitimised by the passage of time, so that the situation can no longer be remedied.

The Advocate General somewhat caustically remarked that the matter should have ended there, but that, “since the parties have become embroiled in a dispute as heated as it is pointless”, he felt obliged to clarify a few matters. The issue as the Advocate General saw it was not the status of the LDC, or the fact
that there were limitation periods for enforcement; rather it was the simple fact that a planning authority might decide not to take enforcement action against a development which would have required EIA if planning permission had been sought:

“33. If those responsible for monitoring the lawfulness of town planning do not react on learning that a facility is operating without an assessment of its effects on the environment having been carried out, or, where its scale is evident, do not require its assessment, they are tacitly consenting to it and, thereby, contravening the directive. The fact that, by reason of the passage of time and in the light of the principle of legal certainty, it was not appropriate to take enforcement action, does not make conduct which was previously on the margins of the law ‘lawful’; it merely precludes any reassessment of the past in order to safeguard the stability of legal relations, which is one of the pillars of our coexistence in society. That conclusion does not preclude those harmed by the unlawful conduct from obtaining compensation on other grounds such as the responsibility of the State in breach to safeguard property rights, which the position of the United Kingdom Government would undermine.”

**R (Horner) v Lancashire CC [2005] EWHC 2273**

The case raised the tricky issue of thresholds. In that case the challenge was to the grant of planning permission for the equipment (a silo, tanker off-loading area and pipework) to feed “animal waste derived fuel” into a calciner. The relevant threshold in Schedule 2 was 1,000 m³ of new floorspace (in relation to a change or extension to an existing cement works). The planning application stated the area of the site to be 1,000 m³, but the structures did not occupy the whole area. Ouseley J held first that the silo had “floorspace”, albeit not in normal
sense, and was below 1000 m\(^2\), and alternatively it did not have any “floorspace” so could not be above the threshold. There could be potential problems with this approach in relation to “changes” as opposed to “extensions”, given the fact that the ECJ has stressed that Member States are not entirely free agents in setting thresholds, but must act in accordance with the purpose of the Directive. Setting a threshold based on an area of new floorspace may be an acceptable approach to extensions to plants, on the basis that the government can be satisfied that an extension below that size could not individually or cumulatively have significant effects. However, a new floorspace threshold is not necessarily relevant to the likely impact of changes to an existing facility – an obvious example would be a new stack at a cement works or power station, which would not involve any new floorspace, but obviously might have significant environmental effects, whether visually or in terms of emissions.

In **R (Edwards) v. Environment Agency** [2005] EWCA 657; [2006] Env LR 56 the issue was the use of waste chipped tyres, which was the subject of a PPC permit. Lindsay J held that the use of tyres in this way could not be regarded as a “project”, and further the references to waste “disposal” in the Annexes to the Directive were to be read as meaning disposal in the technical sense of the Waste Framework Directive, whereas the use of tyres for fuel was “recovery”.

Finally, as a footnote on the subject of thresholds, it is worth noting the decision of the Sixth Chamber of the ECJ in **Case C-83/03 Commission v. Italy** (June 2, 2005). The Italian law on EIA, like the UK’s, set thresholds in terms of size for projects (in this case, marinas) but in a different way. Projects above the thresholds required EIA, whereas those below were to be subject to ad hoc assessment. In this case consent had been given for a marina project with mooring for 390 vessels within a special conservation area on the Abruzzo coast. The Court held that where in exercise of the power under Article 4(2) a Member State defines general rules on EIA, the infringement of those domestic rules will necessarily constitute an infringement of the Directive.
R (Probyn) v First Secretary of State [2005] EWHC 398 (Admin)

A planning application was made for the retention of a 25 metre high fume extraction stack at a chicken processing works. Local residents asked the First Secretary to make a screening direction under reg. 4(8) that EIA was required, despite the normal thresholds not being exceeded. The First Secretary decided not to make a direction, because in his opinion, taking account of the selection criteria, the development was not likely to have significant environmental effects. The challenge was on the basis that this amounted to no reasons, or inadequate reasons. The Court of Appeal had held on a renewed permission application in R v. Secretary of State of the Environment, Transport and the Regions, ex parte Marson that there was no obligation to give reasons. The claimant argued that Marson ought not to be followed in the light of subsequent European Court authority (Case C-87/02 Commission v. Italy and Case C-83/03 Commission v. Italy) and because it was a decision on a renewed application for permission.

On the first point, Burton J held that there was no decision of the ECJ which made it plain that Marson was wrong, though “… it is plain that the drift of the European Courts – or, at any rate, that of those arguing before the European Court – is flowing in the other direction from Marson.” That being so, he was obliged to follow Marson as a decision of the Court of Appeal; it was a reserved judgment delivered after full argument, by a 3-judge court. Accordingly, Burton J refused permission for JR, since any Administrative Court judge would be bound to follow Marson.

R (Wembley Fields Ltd) v Brent LBC [2005] EWHC 2978 (Admin)
The claimant was a company formed to bring the proceedings which sought to quash the grant of permission for development of a school and technology foundation, which included use by the school, and also residential and commercial accommodation, with a 28 storey tower block. The application fell within the scope of the EIA Regulations 1999, and the first ground of challenge was that the 21 day period required by regulation 19(7) for consultation on the Environmental Statement submitted had not been complied with. The decision to grant permission had been taken at 7.00pm on the 21st day, and it was agreed that the 21 day period had not actually expired until midnight on that day. Crane J referred to the fact that no prejudice had been alleged as a result of this breach, and that no further representations had been received after the decision. He found that the failure to comply with the letter of the Regulation was not necessarily fatal to the decision. There had been substantial compliance with the main purpose of the provision, which was to give an opportunity for representations to be made in relation to the further information referred to in the Regulation. Further grounds that it had been irrational to determine that a Health Impact Assessment was unnecessary as part of the environmental assessment, and that there were defects in the notice which had advertised the consultation process, and in the process itself, were also rejected.

In Condron v National Assembly for Wales [2005] EWHC 3007 (Admin), the Welsh Assembly had called in an application for planning permission for opencast mining and related operations in South Wales. The application was granted subject to conditions after a public inquiry. After an announcement that the Assembly's committee was minded to grant the permission, but before the actual grant by officers under delegated powers, as part of its making of bids seeking primary legislation, the Assembly proposed to request Westminster to enact primary legislation enabling the Assembly to set a 500 metres buffer zone between proposed opencast mining sites and residential settlements. The site in question in the present case was within 100 metres of some dwellings. After the
grant of permission, a local resident then brought the proceedings, which could be categorised under five headings: (1) the inspector had failed to take into account that the environmental statement had recommended a buffer zone and had acted unreasonably in failing to adopt the recommendation of a buffer zone; (2) the failure of the Assembly's committee to reconsider the grant of planning permission after a material supervening event (the proposal to Westminster) between announcing it being minded to grant, but before the actual grant vitiated the grant of planning permission; (3) the inspector failed to have regard to the existence and current operations of a landfill site adjoining the application site, and the cumulative effect of the odours from those sites; (4) the Assembly failed to have sufficient regard to submissions made by objectors after the Inspector's Report but before the grant of permission, concerning the existence of further undisclosed former landfill sites, and the findings of a study on dust emissions from opencast coal operations (the “Newcastle Study”); (5) the chairman of the Assembly's committee had been biased, in that there had been a possible pre-determination. This was alleged to arise from a conversation between a local resident and the chair where he had said that he was “going to go with the Inspector’s Report”, before the committee had met and deliberated. The Assembly's Commissioner for Standards had investigated the discussion and decided that the chairman had not been biased.

Lindsay J rejected the submissions under the first four headings, finding that: (1) properly read, the environmental statement had not recommended any particular buffer zone for the application site; (2) if the committee had reconvened to discuss the proposal to Westminster they would likely have considered that they already had the power to impose any buffer zone as appropriate for a particular case, and the Assembly’s discussions would not have made any difference to the committee’s view; (3) the odour from the neighbouring site had not precluded the inspector from arriving at his conclusion that the proposals would not raise any meaningful risk to the health or the amenity of local residents or that rendered his conclusion questionable on the grounds that a material consideration had not
been considered; (4) the requirement not to grant permission until the “environmental information” has been taken into account (under Regulation 3(2) of the EIA Regulations 1999), included any representations “duly made”. Relevant factors in determining whether a representation had been “duly made” included the materiality and importance of the late material, and the possibility of it having being brought to the decision-maker’s attention previously. The late representations in the present case had not been duly made. As to the fifth heading, the question was not whether there had been any actual bias, but whether the facts indicated a real possibility of bias. A fair-minded observer, hearing the words of the member, on learning that the minister was to be the chair of the PDC dealing with the applications, and recognising that the committee could be expected to follow the inspector’s report unless there were planning reasons not to, would conclude that there was a real possibility that the member had been biased. In cases of possible pre-determination it was usually appropriate to quash the decision, and, although it was a large consequence for a very small remark, there was no reason not to set aside the grant of planning permission.