JOINT PLANNING LAW CONFERENCE

NEW ORDERS, NEW RULES,
NEW ASSESSMENTS - IN PRACTICE

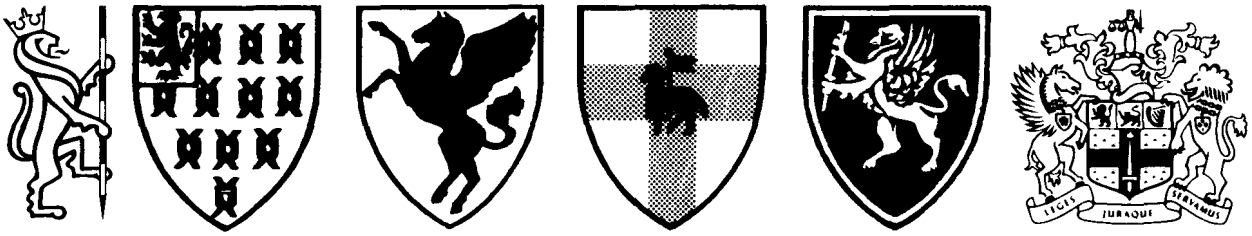
THE EUROPEAN COMMUNITY AND LAND USE - AN INCOMING TIDE?

by

C N A Haigh MA(Cantab)

15 - 17 September 1989 New College, Oxford

The Law Society
The Bar Council
The Royal Institution of Chartered Surveyors



When we come to matters with a European element the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforth to be part of our law....

Lord Denning Bulmer v Bollinger SA 1974 4 CH 401

I approach land use planning from an interest in environmental policy, but I recognise that as only one point of entry among many.

In Britain I take it that it was the desire to influence the distribution of the population and the location of industry, as well as amenity considerations, that provided the pressure that led to the birth of the planning system as we know it. The European Community (EC) has no land use planning system beyond that of its Member States, and were it ever to have anything deserving of that name it could as well be agricultural policy that provided the starting point, since that is the EC's biggest policy by far. Or it could be what the Single European Act portentously calls policies for 'economic and social cohesion' which I will discuss in a minute.

But let me start with environmental policy since that is the aspect of the EC that I know most about, and since it is environmental policy that has produced the first major entry by the EC into the development control side of planning.

The Treaty of Rome contained no reference to environmental policy at the time of the United Kingdom's accession in 1973. The EC, however, could not ignore the growing concern for environmental matters throughout the world that lead to the great UN conference on the human environment at Stockholm in 1972, and, not to be outdone by other international organisations, the Heads of State of Government accordingly declared that the EC should have an environmental policy. They convinced themselves that the Treaty was elastic enough to provide a basis for environmental legislation and called upon the Commission to draft a programme for action.

The first 'Action Programme on the Environment' was approved in 1973 and we are now a third of the way through the fourth. These documents are non-obligatory indications of what the Commission intends to propose in a period ahead. They are published in draft and provide an opportunity to debate the direction of EC policy. In Britain the House of Lords has been particularly assiduous in promoting discussion of EC policy and its scrutiny committee has taken evidence and published reports on these draft action programmes as well as on individual items of proposed legislation.

It was an entire coincidence that Britain joined the EC at the time it embarked upon this new policy. Since 1973 a vast quantity of EC environmental legislation has been adopted. Most of it relates to the control of pollution and protection of wildlife. In these areas the incoming tide is in full flood and I would go so far as to assert that the EC is now the source of a significant part of British environmental policy. EC policy is now also sufficiently comprehensive that it is providing a framework for national policies in all Member States, and indeed the weaker ones base their environmental legislation largely on EC texts.

The same is not yet true of land use planning and I have put the question mark in my title because I do not believe we can yet tell if it ever will be. What one can say with some confidence is that British land use planning, for the very reason that it is so comprehensive in its scope, will constantly find itself being impinged upon by EC legislation or financial measures forming part of other EC policies. I will touch below on those aspects of EC policy that have the potential to have such an effect.

But first let me briefly discuss the nature of the EC, the institutions that make EC policy and the form that that policy takes.

The EC is puzzling to most people because they cannot compare it with any other arrangement they know. It is not a nation state, nor is it a federal nation state - though some think it should become one. EC policy making has some of the attributes of foreign affairs but some of the attributes of home affairs. EC policy is like foreign policy in that it is usually formulated abroad and for that reason alone may seem remote, and also because it is conducted, following the traditions of diplomacy, very largely behind closed doors, which makes it even more remote. But unlike the principal instrument of foreign policy - the treaty - EC legislation is directly applicable in national courts (Regulations) or binding on Governments as to the ends to be achieved (Directives) without the need for ratification. Furthermore, the Commission has a duty under the Treaty (Article 155) to ensure that EC legislation is applied, and can bring the matter before the Court of Justice (Article 169) which can find against a member State that fails to implement EC legislation.

While some EC legislation deals with the relations between the member nation states, much of it has the same character as purely national legislation and can affect relations between interest groups and individuals within the Member States. We thus have to recognise that, in addition to the legislature that we are familiar with at Westminster, we have a second legislature, comprised of the Commission and Council acting together - with the European Parliament sometimes having a small - though increasingly influential - role. The fact that the EC legislature departs from the traditions of legislating openly in Parliament that is a hallmark of Western democracies is a matter that is being

more openly commented upon now that the full potential of EC legislation is becoming better known and now that there is so much of it.

I have only to mention water privatisation to make the point that EC legislation has the power decisively to effect national affairs. Water privatisation is a policy being pursued by the Government for reasons unconnected with environmental policy. First the Government had to abandon its proposal to privatise the water authorities complete with their regulatory functions, at least partly because an EC Directive requires authorisations to discharge dangerous substances to be granted by a 'competent authority'. Could a private company answerable to shareholders be a 'competent authority'? I was myself responsible for raising this point (in a letter to The Times on 13 May 1986), and as a result the Council for the Protection of Rural England (CPRE) sought the opinion of Mr Francis Jacobs QC and Mr Murray Shanks, who advised that the European Court might well decide that the UK Government could not assign to WSPLCs all the functions that the Directives require to be carried out by a 'competent authority'. I have it from a good source that this point was a major factor in the Government's decision to abandon its plans to privatise the water authorities intact and to establish instead an NRA. Then the wording of the Water Bill had to be changed to preserve the rights of the Commission in ensuring that drinking water meets standards set in another Directive. Finally the costs of achieving the standards in various Directives are such that investors may well yet be deterred.

The legislation produced since 1973 has covered water and air pollution, waste disposal, control of chemicals, noise and wildlife protection. These have all been described by me elsewhere (1). Although many items are rather technical and of limited interest, some are important by any standard. I will mention some of them later. But let me describe first the process by which EC legislation is produced and the opportunities for influencing the process.

Only the Commission may propose legislation. While the Council and the Parliament (which, with the Court, constitute the four main institutions of the EC) can call on the Commission to make a proposal, they cannot compel the Commission to do so. The Commission, in making a proposal, is not drawing on a manifesto tested in a general election but is responding to the obligations placed on it by the Treaty, to its views of the needs of the Community, and to suggestions made by the other Institutions and by the Member States. It is of course influenced by developments in national policies, and under the so-called information agreement Member States have to forward draft environmental legislation to give the Commission an opportunity to decide whether EC legislation is appropriate.

Once the Commission has made a proposal it is published and sent to the Council and Parliament. Each Member State maintains a permanent representation in Brussels (similar to

an Embassy), and working groups consisting of officials from each Member State and the Commission go through the proposal suggesting amendments before they come before the Council for final decision. Meanwhile, the Parliament also considers the proposal. It will be transmitted to one of its committees, which appoints a rapporteur to draft a report and motion for a resolution. Once this draft is agreed by the Committee it is put to a vote in plenary session, which may amend the motion before adopting it. The motion will frequently propose detailed amendments. The Council cannot adopt the proposal until it has received Parliament's opinion, but may ignore it. While the deliberations of the Council and its working groups take place behind closed doors, officials can often be found who will describe the state of negotiations and Ministers sometimes report to their national parliaments. The progress of negotiations can to some extent be followed by the motivated, but essentially it is a closed procedure. The Parliament's debates are on the public record, and the environment committee's meetings are open to the public.

Some national parliaments discuss or debate EC proposals (eg in Germany, Netherlands and the UK). The Danish Folketing goes so far as to give binding instructions to their Minister on the line he is to take even though Ministers are not delegates to the Council. In the UK the House of Commons has a scrutiny committee that recommends that some proposals should be debated by the House, while the House of Lords has a scrutiny committee which produces substantial reports on proposals after taking evidence from interested parties. If the Lords hold a debate they do it on a motion to take note of their report. The Commons, on the other hand, will hold a debate on a motion proposed by the government (and sometimes amended) intended to give policy guidance to the Minister and to strengthen his hand in the negotiations in Council. For example, the Resolution on the proposed Directive on environmental impact assessment welcomed 'the Government's policy of encouraging environmental assessment within the general principles of the existing law', which, while splendidly ambiguous, can be interpreted to mean that the Commons did not want EC legislation that changed anything much. Influence can thus be brought to bear, but in the end power resides with the Council of Ministers.

The second Action Programme of 1977 had announced that proposals for environmental impact assessment would be made and a Directive was proposed in 1980 and adopted in 1985. This is the one item of EC environmental legislation that directly impinges on planning and it has always struck me as one of the ironies of environmental policy making that what provided the inspiration for the Directive was not the land use planning system of any of the Member States, nor the procedures for authorisation of industrial plants that exists in most, but the legislation of a country - the USA - that has no national land use planning system and does not really believe in it. The example of the 1969 US National Environmental Policy Act is clear and is acknowledged as the

source in the second Action Programme. The Americans perhaps had to invent environmental impact assessment (EIA) to fill the vacuum caused by a lack of planning at the federal level, and it is the weakness of the planning system in several Member States that makes EIA so necessary in Europe. Britain finds itself in the rather curious position of having its development control system strengthened by influence from countries with weaker systems just at a time when the Government was setting about relaxing the planning system. EC policy is full of such surprises and we can expect more.

The Directive is the subject of a separate paper by Professor Lichfield so I refer to it only as an example of influence exerted between the proposal being made by the Commission in 1980 and its adoption in 1985. In Britain the bodies that gave evidence to the House of Lords included, besides the DoE, the European Environmental Bureau (representing several UK environmental groups), Atkins R and D, Cremer and Warner, Land Use Consultants, CBI, Union of Industries of the European Community, European Centre for Public Enterprises, AMA, ADC, ACC, my own Institute (Institute for European Environmental Policy), and RTPI. (The RTPI may not like to be reminded that they proposed a wrecking amendment.) This array of bodies shows that the proposal was well known. For there to have been a debate in both Commons and Lords shows that its importance was also recognised. The Government's objections were ventilated in these debates, and have been summarised by me elsewhere (1) where I have also argued that the strong support for a Directive by the House of Lords both in their report (2) and in their debate played a key role in persuading the Government to withdraw its opposition. When it did so in November 1983 it was Danish opposition to having to prepare assessments for projects approved by Acts of Parliament that held up adoption by a further 18 months until an amendment exempted such developments.

The Government's principal objection to the Directive as proposed was that it would create scope for dispute and litigation (and hence delay). They feared that opponents to a development would be provided with the opportunity to seize on some procedural failure in the assessment provided by the developer as a ground for challenging a planning decision in the Courts. This objection has probably been overcome by the amendments made during negotiations. The information to be supplied by the developer is now to be supplied 'only to the extent that the Member State considers it relevant' thus enabling the Government to devolve the exercise of discretion to the local authorities. The likelihood of a challenge before a national court is therefore diminished. If, however, an interested party feels that the Directive is not being properly implemented, it is possible for them to complain to the Commission, which may then investigate the complaint, and could possibly refer the matter to the European Court. It is not, in general, open to individuals to bring an action against a Member State before the European Court.

The Directive has been implemented in Britain by a whole series of Regulations made under the European Communities Act 1972 which empowers Ministers to make Regulations to fulfil any obligation arising from membership of the EC. Although it would have been possible for the Government to have introduced a Bill before Parliament to implement the Directive and to add to the basic requirements set out in the Directive they chose not to do so. The Government and Parliament by doing so have confirmed that they regard the EC legislature as a normal source of a major element of environmental policy. Anyone looking for an account of British planning law will no longer find that Acts of Parliament include all the major headings. Section 25 of the Town and Country Planning Act 1971 conveys no flavour of the current requirements for environmental impact assessment, though this is something that can still one day be put right.

The lack of a clear legal base for environmental policy has been a point of contention but was removed when the Single European Act amended the Treaty in July 1987. Article 130R now provides a basis for environmental policy and makes the important statement that 'environmental protection requirements are to be a component of the Community's other policies'. The Article also sets out the principle under which competence is shared between the EC and its Member States: 'The Community shall take action relating to the environment to the extent to which the objectives...can be attained better at Community level than at the level of the individual Member State'.

This is hardly a clear dividing line but countries that have a federal structure know of the difficulty of allocating competences and there is usually a continuous and lively dialogue on the point. As far as environmental policy goes, we now have to recognise that the EC is effectively a federal system with laws made at both EC and national level. We too must be prepared to have a lively dialogue over the demarcation line and planning will be an interesting test subject.

The Single European Act (SEA) also sets the target date of the end of 1992 for the completion of the internal market which it defines in Article 8A as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. In order to make it more likely that this ambitious goal will be achieved the process of adopting legislation has been amended to allow more decisions to be taken by qualified majority in Council which effectively means that decisions cannot be blocked by just one or two countries. To legitimise this process the Parliament's powers have been increased, and if the Commission supports amendments adopted by the Parliament at its 'second reading' then the Council can only overturn them unanimously. This procedure, known as the 'cooperation procedure', has recently been used with dramatic effect over emission standards for cars.

Surveying existing EC legislation, one can point to the following that can touch on land use:

The Birds Directive (79/409). This lists protected species and prohibits deliberate killing, but it also places a general duty on Member States to preserve a sufficient area and diversity of habitats to maintain the population of all wild birds. More specifically, Member States are to classify special protection areas for the conservation of the listed species. A dispute over the failure by the United Kingdom to classify the island of Islay in Scotland as a special protection area has already led to a change in the outcome of a planning application to extract peat for the purposes of making whisky.

The Environmental Impact Assessment Directive (85/337) In certain circumstances, a developer will have to supply more information with his planning application than he would have previously, and the planning authority when granting (or refusing) its consent, will have to take account of many matters which previously were left to pollution control or other authorities. As a result, planning authorities and pollution authorities will have to work more closely together.

The so-called 'Seveso' Directive (82/501) on major accident hazards requires manufacturers using certain listed substances in certain quantities to prepare safety reports and 'on-site' emergency plans. A competent authority is to prepare 'off-site' emergency plans and the local population have to be informed of the correct behaviour to adopt in the event of an accident. Clearly this has implications for the relative location of housing and industry.

To the extent that pollution matters are 'material considerations' then any of the very long list of Directives concerned with emissions to water, air and the handling of waste have the potential to be relevant to some planning applications.

So far I have spoken only of EC legislation, but that is only one policy instrument available to the EC although it is the instrument mostly used in the environmental field. In the field of agricultural policy and regional policy by far the most influential instrument has been the provision of finance. Indeed the EC's agricultural policy is dominated by its price policy, which involves setting prices for certain commodities and the buying of commodities if market prices fall below these. The much smaller part of the Common Agricultural Policy (CAP) called the structural policy has had as one of its objectives the modernisation of farms, and so has impinged directly on land use in some areas. Recently, under Regulation 1094/88, as a means to reduce surpluses of certain commodities, farmers are being encouraged to set land aside from agriculture. Land set aside must be left fallow, wooded or used for non-agricultural purposes. The British scheme began in September 1988 and

for the first year farmers agreed to withdraw about 58,000 hectares from production.

In addition to funds forming part of the CAP, the EC has long had a regional fund and a social fund. The importance of these has been increased by moves to complete the internal market by the end of 1992, since it is feared that '1992' will increase prosperity in the centre faster than in the peripheral regions and so increase the differences in living standards. 'Economic and Social Cohesion' is the name given by the Single European Act to policies intended to ensure that the differences in wealth between different parts of the Community do not lead to it breaking down. The chosen instrument is to reform and greatly increase the so-called Structural Funds (social, regional and agricultural) and direct them at the poorest areas (Portugal, Greece, Ireland, Northern Ireland, Southern Italy, much of Spain, Corsica and the French overseas departments). Investment plans are being drawn up by national governments to spend the very large sums of money involved. The pressure on the environment in areas where there is a lack of skills and manpower able to plan for and control the ensuing development can only increase pressure for the introduction of better land use planning procedures, whether these are inspired by the EC or whether they be national.

An example is provided by the proposed habitats Directive. This would extend to other fauna and flora the same principles as those contained in the birds Directive. Member States would have to identify special protection areas to protect all the listed species. It is precisely because EC policies for 'cohesion' are creating pressure for the development of land in the peripheral regions that the need is felt for EC policies to protect the environment to act as a check on the developments foreseen.

Urban policies per se have not been developed by the EC beyond the provision of some finance under schemes known as 'integrated development operations'. Some of the environmental action programmes have suggested that the EC has a larger role here, and recently the European Parliament adopted a Resolution (OJ C12 16.1.89) based on a report by Ken Collins MEP on 'the environment in urban areas'. The current Commissioner for the Environment, Mr Carlo Ripa di Meana, is interested, and has asked for a paper to be drawn up, but it is not yet clear whether this will propose legislation or more financial provision.

To conclude therefore. There is no EC land use planning policy at present and there must be doubt whether there will ever be given the statement in the Single European Act about the allocation of competences for environmental policy. Land use planning is bound to be a subject which national governments will regard as something that they can best handle or that can be handled better still at a local level. The German Basic Law for example gives competence over land use planning to the Länder and the same is true for those

other Member States that have a federal or regional structure (Italy, Spain and Belgium).

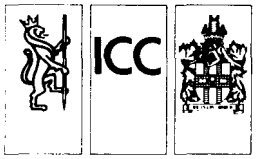
But the EC with its environmental impact assessment Directive has already made a significant entry into development control as an extension of environmental policy and there could well be similar incursions to be made. I would not be surprised if there was not an extension of the Seveso Directive in this way. As far as plan making is concerned, one can imagine that an attempt might be made to produce EC wide strategic regional plans to guide the large investments under the policies for 'cohesion'. Indeed, the very selection of certain countries and areas to be recipients of this bounty is a first step towards such a plan.

References

1. Haigh, N., *EEC Environmental Policy and Britain*, Longman, second edition 1987, revised 1989

2. House of Lords, *Environmental Assessment of Projects* 11th Report Session 1980-81

Organisers



INSTITUTION AND COLLEGE CONFERENCES

INSTITUTION AND COLLEGE CONFERENCES
The Royal Institution of Chartered Surveyors
12 Great George Street,
London SW1P 3AD
Tel: 01-222 7000