

# EIA—Getting it Right!<sup>1</sup>

By Paul Winter

## Introduction

The U.K. system of Environmental Impact Assessment (“EIA”)—implementing the Council Directive 1985/337 of June 27, 1985 on the assessment of the effects of certain public and private projects on the environment (“the 1985 Directive”)—came into existence<sup>2</sup> after a long gestation on July 15, 1988. It was the unwanted product of a European Union and was, initially at least, spurned and neglected by those who were entrusted with its nurturing. It is now approaching the awkward teenage years and is beginning to become more assertive in establishing its role and authority in the world. Like many emerging teenagers it has been misunderstood and many of its problems arise from past misunderstandings as to its nature and its needs.

To misquote the *Dutch Dykes* case<sup>3</sup> “the scope of this paper is very wide and its purpose is very broad”. It takes a synoptic view of EIA in order to examine salient problems and issues which have arisen in the emergence and operation of the EIA system in the U.K.—drawing parallels where appropriate from the European framework—in order to ensure that at least some of the pain of those having to deal with this troublesome teenager might be ameliorated or avoided altogether by a better understanding of the growth and maturation processes at work. The aim is to identify possible practical and commercial solutions to some of the problems experienced in the early years of the assessment system.

A learned and more detailed analysis of some of the jurisprudential issues arising out of the Directive and recent cases decided under it can be found in an article by David Elvin Q.C. and Jonathan Robinson in the JPEL for this month.<sup>4</sup>

## Who says we should get it right?

It is first of all necessary to consider the various perspectives from which the process is viewed. In this context, the pressure for “Getting It Right” should be examined from a number of perspectives which are different but essentially related, including:

- the objectives of sustainable development and the global environment
- the implementation of International law—particularly the E.U. legal framework
- statutory authorities with the responsibility for determining planning applications
- regeneration bodies with the responsibility for securing economic regeneration, often involving large development projects
- the developer or landowner wishing to progress a project through the development consent system as quickly and inexpensively as possible
- development practitioners keen to avoid expensive negligence actions which can arise from “getting it wrong”
- NGOs local residents and action groups wishing to stop development—either for sound and

<sup>1</sup> This is an update of the paper delivered at Oxford. It contains various revisions and in particular it takes into account the transcript of Sullivan J.’s judgment in *ex p. Milne* (Rochdale 2) which was unavailable when the original paper was printed.

<sup>2</sup> In the form of the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. 1988. No. 1199) (“the 1988 Regulations”)

<sup>3</sup> See *post*.

<sup>4</sup> “Environmental Impact Assessment” [2000] J.P.L. 876.

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respectable reasons, or NIMBYs or competing developers who simply want to stop a project at all costs!

The primary objective of this paper is to consider the main issues emerging in the field of EIA from the perspective of developers and practitioners. They commonly have a strong commercial drive to get their planning permissions as soon as possible and may see EIA as a costly source of delay. They may need to be advised that, in the long run, their interests are better served by undertaking an EIA early on in the process rather than risking judicial challenge or a requirement for an environmental statement at a late stage in the procedure. Therefore, in order to appreciate fully the principles which developers and their teams must follow, it is essential to take the other perspectives carefully into account because they may provide an indication of the pitfalls and traps which are awaiting major projects where EIA is a likely issue. An early appreciation of the need can benefit the developer and the planning authority supporting a proposed development in many ways including:

- (1) avoiding delay during the planning process<sup>5</sup>;
- (2) to ensure that contractual deadlines in conditional contracts and options are meaningful<sup>6</sup>;
- (3) because recent Court decisions have indicated that EIA is being given much more weight by the courts in judicial review decisions than may have been the case in the past and it is unlikely that the Courts will exercise their discretion to overcome defaults in the light of Lord Hoffmann's declaration that the court's discretion is confined to "the narrowest possible grounds"<sup>7</sup>;
- (4) to avoid loss of credibility for the scheme by retrospective rationalisation when it could have been more robustly based on a timely EIA.

An example of the extreme delays which could occur by failing to carry out a proper EIA is contained in the *Berkeley* case itself. The main events were:

Planning application	— 1994
Call-in	— August 1995
Inquiry	— May 1996
Decision letter	— August 1996
House of Lords judgment	— July 2000.

The result was that the scheme had to go back to the drawing board! For example, it would seem that a precautionary approach to the requirement for EIA is fully justified.

### **Sustainable development—political truth**

The important backdrop to the EIA regime is the growing international and national concern about the effect that our activities seem to be having on our environment. Key lessons and signals are to be derived from consideration of the international and national "sustainability" objectives and the legal framework which has been created to achieve that objective. Whether one accepts the growing body of scientific evidence on the deterioration of our global environment or not, it seems inescapable that there is a "political truth" that the environment is seriously at risk and needs to be protected. Our future activities have to be reconciled or balanced with that need. EIA is part of that process and is described in the recitals to the amending directive<sup>8</sup> as "a fundamental instrument of environmental policy". This recital

<sup>5</sup> See the ADT Auctions case—*post*.

<sup>6</sup> See Haddow—*post*.

<sup>7</sup> see Berkeley—*post*.

<sup>8</sup> Council Directive 1997/11/EC of March 3, 1997 ("the Amending Directive") amending the 1985 Directive

has been quoted in the arguments and judgements of several of the important recent cases which mark the emergence of EIA as an important issue in the development process.

The extensive official and academic research work in the field of EIA and SEA (Strategic Environmental Assessment) provides important pointers to the way in which the law and policy in this rapidly changing field will develop. Already, such reviews have led to a tightening up of the EIA legal framework and there is a commitment in the recent amending directive<sup>9</sup> to a further review of the application and effectiveness of the amended 1985 Directive. This research evidence will be referred to in discussing the principles and trends which must be taken into account by participators in the planning and development process.

Most important of all, there have been a number of recent decisions in the European Court of Justice (“ECJ”) and in the U.K. Courts which demonstrate that EIA is exerting an increasing influence. This is a trend which no-one involved can afford to ignore.

From consideration of such signals it is possible to discern key guidelines or principles which developers and their professional teams must follow in order to avoid the traps and pitfalls which might otherwise prove expensive in the context of major development projects. These issues will be considered under the following headings:

- Implementation of the EIA Directive—how did it go wrong?
- The requirement for EIA before development consent is given – getting it right from the outset!
- The EIA process—key quality issues.
- Public participation in the EIA process—a key to success.
- Future trends and directions.

### **Implementation of the EIA Directive**

The history of the implementation of the EIA Directive reveals the following basic truths, which are important factors for any parties to consider if they are involved in the consent procedures for a major project to which EIA may apply:

- (1) that the U.K. attitude to EIA has substantially changed from initial hostility and resistance to one which is far more supportive and enthusiastic—provided the level playing field is maintained;
- (2) that the Commission has not been prepared to tolerate backsliders and has been prepared to enforce the commitments under the Directive against recalcitrant states;
- (3) that the Commission has kept the performance of the system under review: the first major review of the 1985 Directive was carried out to correct perceived problems with the initial legal framework and the E.U. has also committed itself to ongoing review which is likely to result in further development and extension of the EIA process;
- (4) that the ECJ has been prepared to find against states which have failed to implement the EIA regime;
- (5) that after initial uncertainty,<sup>10</sup> the U.K. Courts have been prepared to apply, strictly and purposively, the obligation to comply with the 1985 Directive (and now the amended 1985 Directive) to the point of quashing development consents (or deemed consents) which have

<sup>9</sup> See Article 2 of the Amending Directive.

<sup>10</sup> *Wycharon D.C. v. S.S.E.* [1993] Env L.R. 330—language too broad for the direct effect doctrine to apply—per Turner J. and followed in the High Court in *S.S. for Transport v. Haughian* [1997] Env L.R. 44 per Collins J.—this point was not pursued when the case went to the CA.

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been granted to developers where such consents were issued without compliance with the Directive, even where there was apparent compliance with the relevant U.K. legislation. As noted earlier, Lord Hoffmann has declared<sup>11</sup> that the Court's discretion to waive breaches is confined within the narrowest possible grounds.

*The U.K. Government's initial reluctant acquiescence*

From the outset, the history of the introduction and implementation of the 1985 Directive in the U.K. indicates a high degree of reluctance and resistance on the part of the Government.<sup>12</sup> The British Government led the opposition to the proposed Directive: by 1980 there had already been 20 internal drafts of the proposed Directive before the draft proposal was officially published. The U.K. consistently refused to accept it and vetoed the proposal until 1983 and even after it acceded to its introduction, having secured many concessions to make the Directive acceptable, its attitude was lukewarm, to say the least. At the time of introducing the regulations to implement the Directive in 1988, the Government anticipated about 10–12 EIA's per year but in fact the number of assessments rapidly went up beyond that number and after the first five years it has stabilised at between 300 and 400 per year. This compared with 6,000 in France and 30–40 in Spain.<sup>13</sup>

The 1988 U.K. Regulations came into force on July 15, 1988, which was twelve days later than was required to comply with the 1985 Directive. Most of the projects covered by the 1985 Directive, (Annexes I and II) were already covered by the U.K. land use planning legislation and the 1988 Regulations incorporated the requirement for EIA within the established development control procedures. Comments at that time suggest that it was commonly perceived that much of the EIA process was already inherent in the standard U.K. approach to development control under planning legislation and it was suggested that the implementation of the 1985 Directive would not greatly change the procedures. The then Environment Minister, William Waldegrave, stated that the purpose of the 1988 Regulations was "to ensure that the requirements of the Directive are met without placing unnecessary burdens on the developer or unnecessarily complicating the planning process". This assurance is repeated in paragraph 8 of the DOE Circular 15/88, explaining the 1988 Regulations, and containing the statement that:

"It has been the Government's aim in implementing the requirements of the Directive to ensure that no unnecessary burdens are based on either developers or authorities. The process of environmental assessment should not be imposed where it is not required by the Directive. However for projects for which environmental assessment is necessary, there are often benefits to developers in designing the scheme if the assessment process is initiated in a sufficiently early stage, and particularly if consultations are undertaken with the planning authority and other interested bodies during the preparatory stages. To the extent that the environmental statements present in a more systematic way information which would in any case have to be supplied by the developer, they may simplify the task of appraisal for the planning authority and enable swifter decisions to be reached."

It is clear that the U.K. Government after its initial grudging acceptance of the EIA Directive, has been more willing to accept the value of the EIA process and has, albeit sometimes under pressure, introduced primary U.K. legislation<sup>14</sup> which enables the Secretary of State to extend EIA to projects which are outside the scope of the 1985 Directive or any other EEC legislation, although the

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<sup>11</sup> In the *Berkeley* case (see *post*).

<sup>12</sup> See "EIA in the United Kingdom" in the U.K. Library of the PENELOPE Project.

<sup>13</sup> See "Second Review of Implementation of 85/337: 1990–1996".

<sup>14</sup> Section 71A of the Town and Country Planning Act 1990, inserted by section 15 of the Planning and Compensation Act 1991.

Government has declared that it would be cautious in exercising these powers in order to ensure that U.K. developers, landowners and businesses are not disadvantaged by comparison with their competitors abroad. In any event, additional projects have been submitted to EIA under the provisions of Section 71A including wind generators, motorway service areas and coastal protection works.

The U.K. Government also amended the permitted development regulations in 1994 to overcome the lacunae in implementing the 1985 Directive resulting from the existence of permitted development rights in relation to certain projects which would otherwise have required EIA. It is currently in the process of considering how to resolve its default in relation to the ROMP procedures in the light of the decisions in *Brown and Huddleston*.<sup>15</sup>

#### *Amendment of the 1985 Directive*

After several evaluations of the implementation and operation of the system<sup>16</sup> and some judicial pronouncements, there was pressure to improve the system introduced by 85/337 and this was effected by Council Directive 1997/11 of March 3, 1997 which amended the earlier Directive in certain fundamental respects to reflect the findings of the earlier assessments, including:

- (1) the addition of projects which should be subjected to the requirement for EIA;
- (2) the introduction of “screening and scoping”;
- (3) requiring a more systematic and consistent approach to the use of thresholds and criteria in screening decisions;
- (4) reinforcing the need for public participation in the assessment process and the right of the public to information arising in connection with the EIA process in relation to any project;
- (5) requiring a further review of the amended Directive five years after it comes into force.

The deadline for implementation of these amendments was March 14, 1999 and the Commission has sent a reasoned opinion<sup>17</sup> to Austria, France, Luxembourg, Germany, Greece, Spain and the U.K. for not transposing the 1997 Amended EIA Directive. Nevertheless, action has been taken to implement these improvements in the U.K.<sup>18</sup> and in the light of this warning by the Commission it is important to take careful note of the guidance contained in paragraph 12 of Circular 2/99 that the Regulations should be interpreted in the context of the Directive.

Undue reliance should not therefore be placed on a literal interpretation of the 1999 Regulations! This is particularly important in the light of the jurisprudence in the ECJ and the U.K. courts in relation to the need for compliance with the 1985 Directive.

#### *The role of the Commission and the European Court of Justice*

When the 1988 Regulations were introduced, the E.C. Commission was not satisfied that the 1985 Directive had been fully and properly implemented in the U.K. (in common with other European States) and identified seven specific areas of default, including “pipeline cases”. The principal cases involved Twyford Down and the East London River Crossing through Oxleas Wood. The E.C. Commission commenced proceedings but terminated them in 1992 and 1993. The Commission has taken other Member States to the ECJ to enforce obligations under the 1985 Directive and has recently indicated that it may take action for failure to fully implement the amending Directive.

<sup>15</sup> See “What is a Development Consent?” *post*. The new regulations came into effect on November 15, 2000.

<sup>16</sup> *e.g.* Second Review of Implementation of 85/337: 1990–1996”. Commissioned by DG XI to update a similar report in 1993 conducted by the EIA Centre at the University of Manchester.

<sup>17</sup> A reasoned opinion is the final step in an infringement procedure before action in the European Court of Justice.

<sup>18</sup> The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (S.I. 1999 No. 293) (“the 1999 Regulations”) and see also DETR Circular 2/99 describing the amended procedures.

A recent notable ECJ case is C-392/96 *ECC v. Ireland* which was decided in the ECJ on September 21, 1999 in which the Irish State was found to be in breach of the 1985 Directive in what was considered to be an excessively rigid application of thresholds and criteria in relation to the size of projects without also taking into account their nature and location (see *post*).

The ECJ has also recently found, in proceedings brought by the World Wildlife Fund, that Germany was in default under the 1985 Directive in seeking to “exclude from the outset, and in their entirety, from the environmental impact assessment procedure established by the Directive, certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such procedures a specific project such as the project of restructuring an airport with a runway shorter than 2,100 metres, either under national legislation or under the basis of an individual examination of that project, unless those classes of project in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effect on the environment”.<sup>19</sup> The result of their finding was that the WWF was entitled to apply to the German national courts for the setting aside of such national rules or measures which were incompatible with the requirements of the Directive.

#### *The attitude of U.K. courts*

An immediate consequence of the delayed implementation of the 1985 Directive in the U.K. was that some projects were granted planning permission in the interregnum between the deadline and the actual date of implementation. The High Court decided in *Wycharon v. Secretary of State for the Environment*<sup>20</sup> that a planning permission granted during this period for an intensive turkey rearing operation should not be quashed even though EIA would have been required if the Directive had been punctually implemented on July 3, 1988. The Court (Turner J.) held that the language of the Directive was too broad to have direct effect and he refused to allow the Local Planning Authority to establish that the Directive should be enforced against a private third party, as opposed to an agency or “emanation of the State”.

However, after this early resistance, the Courts in the U.K. have more recently been willing to interpret the 1985 Directive as having “vertical direct effect”. They have upheld the right of persons affected by planning decisions to ensure that such decisions are carried out properly in accordance with the EIA directives, even though the result may be that another private citizen may have its permission quashed as a result.<sup>21</sup> The U.K. Government’s (and the developer’s) argument that this amounted to applying horizontal direct effect (in *Huddleston*) was firmly rejected by the Court of Appeal.

It is now clearly established that the 1985 Directive (as amended) does have direct effect and that the Courts will be far more willing to enforce it, in a “purposive manner”, against local planning authorities, the Secretary of State and other “emanations of the State” in the interests of good government.<sup>22</sup> In contrast to earlier discussions the Courts have recently taken a firm line on the requirement for planning decision-makers to observe the requirements of the 1985 Directive, on the basis that the EIA is “a fundamental instrument of environmental policy as defined in Article 130 of the Treaty . . .”.<sup>23</sup>

<sup>19</sup> *World Wildlife Fund and Others v. Autonome Provinz Bozen and Others* (see *post*).

<sup>20</sup> [1993] Env.L.R. 239.

<sup>21</sup> See, for example, *R. v. North Yorkshire C.C., ex p. Brown and another* [1999] 1 All E.R. 969; *R. v. Rochdale MBC, ex p. Tew* [2000] J.P.L. 54; *R. v. Durham C.C. and Sherborne Stone Co. Ltd, ex p. Huddleston* [2000] 2 C.M.L.R. 313—Court of Appeal, March 8, 2000; and *Berkeley v. S.S.E. and others* [2000] 3 W.L.R. 420; House of Lords—July 6, 2000.

<sup>22</sup> See, for example, *R. v. Durham C.C. and Others, ex p. Huddleston*; see also *R. v. Rochdale M.B.C., ex p. Tew*; and *R. v. North Yorkshire C.C., ex p. Brown* [1999] 1 All E.R. 969 at page 971G (per Lord Hoffmann).

<sup>23</sup> See the recitals to the 1997 amending Directive.

Underlying these changes of approach are traps which will catch the unwary local planning authority, developer, landowner or planning practitioner. They point to a need to appreciate the fundamental fact that, where domestic legislation is found to be inadequate to implement the requirements of the Directive (or where that legislation is not fully complied with), there is now a serious risk that development consents may be overturned by the U.K. courts.<sup>24</sup>

In the recent House of Lords decision in the *Berkeley* saga, Lord Hoffmann and Lord Bingham declared that the discretion of the Courts to refuse to quash a planning permission where there had been a failure to comply with the 1985 Directive was very narrow: indeed Lord Hoffmann stated that the “legislature was intending to confine any discretion within the narrowest possible grounds”! Not much hope then for developers or LPAs who stray from the required line of EIA and therefore good reason to comply and to err on the side of caution where there may be doubt as to whether EIA is required.

*The general rule: the 1985 Directive rules—OK?*

These cases (and others) reveal an important precautionary principle which developers and their consultants must bear in mind when conducting an EIA on major development projects.

The DETR Circular 2/99, at paragraph 12 contains the advice that the 1999 Regulations “must be interpreted in the context of the Directive itself”. This is an important statement in the light of the ECJ and the U.K. court’s decisions referred to above. The key lessons which developers and local planning authorities should draw from these developments are:

- that the amended 1985 Directive imposes over-arching legal obligations on decision makers;
- that these obligations can be enforced by persons who are adversely affected by any decisions taken in breach of these over-arching obligations (even where they apparently comply with the domestic legislation to implement the Directive);
- that the Courts will approach the interpretation of the Directive (and the relevant U.K. Regulations implementing it) in a “purposive” manner so as to give effect to the purpose of the Directive even if it involves an extension of the literal meaning of the words used in the domestic legislation;
- that these principles are likely to have a profound impact on developers promoting major projects which may (or may not) have significant impacts on the environment and it is extremely important that such developers and their advisers adopt a similarly “purposive” approach to the preparation of their applications and the supporting documentation and in the promotion of their developments so as to ensure compliance with the over-arching obligations under the Directive.

In response to the first question “who says we should get it right?”, the answer is:

- The E.C. Commission
- The ECJ
- The U.K. Government
- The U.K. Courts
- Local Planning Authorities and other decision maker and government agencies
- Interested parties including NGO’s action groups and competing developers
- Your clients and professional indemnity insurers!

There are lots of pitfalls that will beset a project if developers and their professional advisers are unwary.

<sup>24</sup> See, for example, *R. v. North Yorkshire C.C., ex p. Brown* and *R. v. Durham C.C. & ors, ex p. Huddleston*.

In the next section, some of these traps will be considered in the context of discussing the requirement for EIA before development consent is given.

**The requirement for EIA before development consent is given—getting it right from the outset!**

*The basic provisions*

Article 2(1) of the 1985 Directive as amended states as follows:

“Member States shall adopt all measures necessary to ensure that before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.”

Article 4(1) then describes the projects to which EIA should be applied by reference to Annexes I and II. Article 5 then states as follows:

“In the case of projects which pursuant to Article 4 must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex 4 . . . .”

This, in brief summary, constitutes the over-arching obligation to carry out an EIA either in the case of Annex 1 projects or in the case of those Annex 2 projects which are considered to be likely to have significant effects on the environment.

This is now converted into U.K. law by the 1999 Regulations which lay down the requirements for EIA and include the procedures for obtaining and issuing a “screening opinion” of a local planning authority or a “screening direction” by the Secretary of State.

There is now no doubt, in the light of the decision of the House of Lords in the case of *Berkeley v. S.S.E.*,<sup>25</sup> that a failure to require an EIA for a relevant project prior to determination of a planning application will probably result in the planning permission being quashed if an application is made to the Courts within the appropriate time limits. The past uncertainty or complacency, emanating from earlier decisions in which the Courts were reluctant to intervene (including decisions of the lower Courts in the *Berkeley* case), has now been swept aside by this judgement, as well as other decisions of the House of Lords and other U.K. Courts and the ECJ over the last twelve months or so.

*Reasons to get it right at an early stage*

For the reasons briefly outlined earlier, it is in the interests of the developer, as well as the local planning authority and the wider community, that the question as to whether or not a project requires EIA is robustly and professionally assessed before an application is made for planning permission. The advantages of making an early decision on this question (and possibly erring on the side of caution in deciding that a project should be submitted to EIA) include the following:

- to avoid the costs and delays associated with a judicial review in the event that an EIA is not carried out;
- to ensure that a project is designed from the outset to reflect the analysis in the Environmental Statement (“ES”) prior to submission of the application rather than appearing to rationalise retrospectively what was proposed in advance of the ES being prepared;

<sup>25</sup> [2000] 3 W.L.R. 420.

- to avoid the possibility that the decision—maker may require an EIA part way through an application and prior to determination: for example, a local planning authority deciding that EIA is required before the matter is reported to committee (in the light of consultation responses from statutory consultees) or a requirement by the Secretary of State (or an inspector) in the light of third party representations prior to determining a call-in application or an appeal<sup>26</sup>;
- to avoid problems in the context of conditional sales or development agreements: timescales and deadlines can be fixed by taking a cautious view as to the need for EIA and thus avoiding the possibility of over-running such deadlines by failing to carry out EIA at an early stage;
- even where local authority officers (or Government Office planners) advise that no EIA is required, problems may subsequently occur if a subsequent decision is made to require it and no damages are likely to be recoverable for a misleading opinion expressed.<sup>27</sup>

#### *Key issues*

The following issues are key issues to consider in determining whether an EIA is required:

- What is a development consent?
- Screening the project.
- Criteria and thresholds.
- Conversions and modifications.
- Exemptions and immunities.

These issues will now be examined in turn.

#### **What is a development consent?**

The 1985 Directive defines the term “development consent” as “the decision of the competent authority or authorities which entitles the developer to proceed with the project”. There have been a number of very important decisions in the U.K. courts which assist in the interpretation of this term.

#### *The ROMP cases*

The House of Lords, in *R. v. North Yorkshire County Council, ex p. Brown*, on February 12, 1999<sup>28</sup> held that the determination of conditions under Section 22 and Schedule 2 of the Planning and Compensation Act 1995 was a “development consent” requiring an EIA to be carried out and quashed a decision of the Minerals Planning Authority (MPA) determining the conditions which would apply under Schedule 2 to Wensley Quarry, an old limestone quarry near Preston-under-Scar in North Yorkshire, because the County Council had failed to require an EIA prior to determining the application of the quarry owner. In reaching his conclusion that the determination of conditions under Section 22 and Schedule 2 was a development consent for the purposes of the 1985 Directive, Lord Hoffmann adopted a purposive approach as the following passage from his judgment indicates:

“The purpose of this Directive, as I have said, is to ensure that planning decisions which may affect the environment are made on the basis of full information. In Case C-72/95 *Aannemersbedrijf P.J. Kraaijeveld B.J. v. Gedeputeerde Staten van Zuid-Holland* [1996] E.C.R. I-5403 the European Court of Justice said that ‘the wording of the Directive indicates that it has a wide

<sup>26</sup> See *A.D.T. Auctions Ltd v. S.S.E.T.R. and Hart D.C.*—QBD March 16, 2000 for an extreme example.

<sup>27</sup> See *R. v. St Edmundsbury B.C., ex p. Walton* [1999] 3 P.L.R. 51 and *Haddow v. S.S.E.* [2000] Env.L.R. 212.

<sup>28</sup> [1999] 2 W.L.R. 452.

scope and a broad purpose'. A decision as to the conditions under which a quarry may be operated may have a very important effect on the environment. It can protect it by imposing limits on noise, vibration and dust, requiring the preservation of important natural habitats or the reinstatement of damage to the landscape and in many other ways. Without such conditions, the unrestricted operation of the quarry might well have a significant effect on the environment. It cannot therefore be said that the environmental effect of the quarry was determined once and for all in 1947. One of the purposes of the 1991 Act was to allow mineral planning authorities to assess those effects in the light of modern conditions.

The position would be different if, upon a proper construction of the United Kingdom legislation, the determination of conditions was merely a subsidiary part of a single planning process in which the main decision likely to affect the environment had already been taken. In such a case, the environmental impact assessment would be required.

The principle . . . seems to me to be clear: the Directive does not apply to decisions which involve merely the detailed regulation of activities for which the principal consent, raising the substantial environmental issues, has already been given."

This decision was followed by Harrison J. in *R. v. Peak District National Park Authority, ex p. Bleaklow Industries Limited*,<sup>29</sup> in deciding a case in which a ROMP application was at an advanced stage when the Court of Appeal gave judgement on January 28, 1998 in *R. v. North Yorkshire C.C., ex p. Brown*.<sup>30</sup> The MPA required an environmental assessment from the applicant on February 9, 1998 (*i.e.* immediately after the Court of Appeal decision) but it had not been provided by February 13, 1998 when the MPA's determination was made. The MPA took the view that it did not have jurisdiction to make the determination in the absence of an environmental assessment but did not notify the respondent to that effect until June 29, 1998. The MPA sought to argue that that it was unnecessary for the Court to quash the deemed consent because it was a nullity (and therefore an order of certiorari was not required) in order to avoid an order for costs being made against it. However, Mr Justice Harrison took the view that the order should be made and that it would be undesirable not to make an order in these circumstances.

This case illustrates the point that the wrongful determination of an application without an EIA does not automatically make it a nullity. It must therefore be challenged by way of judicial challenge or judicial review<sup>31</sup> if it is to be quashed.

#### *Reserved Matters Approvals and other subsequent "Consents"*

However, what happens if outline planning permission has been granted without the EIA that the amended 1985 Directive (or the 1999 Regulations) require and no challenge is made within the judicial review time limits? Can the requirement for EIA be raised at a later stage in this process?

It has so far been held that a reserved matters application is not a "development consent" requiring EIA, so that where a local resident failed to seek judicial review of the outline planning permission granted for a project (the Crystal Palace leisure development) she was not allowed to use failure to carry out an EIA as a ground for challenging the subsequent reserved matters approval.<sup>32</sup> However, the E.C.

<sup>29</sup> [2000] J.P.L. 290.

<sup>30</sup> [1998] Env.L.R. 381—holding that a MPA could require an environmental assessment when determining the conditions to be attached to a pre-1948 interim development order because such a determination came within the concept of a development consent" within the meaning of the 1985 Directive.

<sup>31</sup> Within the relevant timescales: see *post*—"Exemptions and Immunities".

<sup>32</sup> *R. v. London Borough of Bromley, ex p. Barker* (April 3, 2000) Q.B.D.—per Jackson J.

Commission, in October 2000, has given formal notice that it is dissatisfied with two aspects of this decision and requiring the planning permission to be withdrawn. One of the reasons for its concern was the finding that EIA does not apply to a reserved matters application. Whilst this occurred after the Oxford Conference, this general approach was forecast (see below) in the original paper! In the *Secretary of State for Transport v. Haughian*,<sup>33</sup> a trespasser could not challenge the right of the local authority to possession of land compulsorily acquired for a road scheme on the grounds that the road scheme, in this case the Newbury by-pass, was not the subject of an EIA.

Bearing in mind the dramatic changes in approach that have occurred in the last ten years or so, it is possible that the Courts will eventually take a more purposive approach to the question of whether reserved matters approvals and other consents (for example, the making and confirmation of compulsory purchase orders to implement a planning project under section 226 of the Town and Country Planning Act 1990) are within the concept of “development consent” where the project has not already been the subject of an EIA where such assessment should have been required.

Having regard to the fact that EIA is to serve the public interest in protecting the global and local environment—and is regarded by the EEC as “a fundamental instrument of environmental policy”<sup>34</sup>—it may eventually be considered by the Courts to be inappropriate that developers and/or local planning authorities should benefit from earlier mistakes or defaults in regard to the requirements of the amended 1985 Directive on a technicality, such as the time limits for judicial review. A possible means to overcome such problems may be to interpret the term “development consent” more widely than these cases would currently allow.<sup>34a</sup> The Directive certainly appears to me to be broader than its current interpretation in the U.K. context.

Whilst the need for certainty in the planning and development process is an important principle, and has for a very long time been so held by the Courts, their growing acknowledgement of the importance of EIA in policy terms, may lead to the balance of these principles being altered in the future. This may in turn lead to major projects being caught at a later stage when they have missed the EIA process at the initial development consent stage.

Having determined that a relevant application may lead to a “development consent”, the next question to answer is whether the project is one for which the 1985 Directive (as amended) or the 1999 Regulations will require an EIA. This will turn on whether the project comes within Annex I or Annex II of the amended 1985 Directive or Schedules 1 and 2 to the 1999 Regulations.

This is not always an easy question to answer and the 1999 Regulations provide a mechanism whereby projects can be screened so as to provide a written opinion as to whether or not EIA is required in individual cases. This is considered in the next section of this paper.

### *Screening the project*

It has been recognised and acknowledged<sup>35</sup> that Regulation 4(2) and 9 of the 1988 Regulations (which prohibited the grant of planning permission without an EIA in Schedule 2 cases) required, by necessary implication, the Secretary of State to specifically consider whether or not a project is subject to EIA as a

<sup>33</sup> [1997] Env.L.R. 44 another “Pipeline” case.

<sup>34</sup> Recital to the Amending Directive.

<sup>34a</sup> This prediction now appears to be coming true, in the light of the E.C. Commission’s notification to the UK government in the Barker case—see above.

<sup>35</sup> For example, see the House of Lords judgments in *Berkeley v. S.S.E and Others*.

Schedule 2 project. If he fails to consider that question, his decision to grant planning permission is open to judicial review and the decision might be quashed unless, during the course of the judicial review proceedings, it is clear that no reasonable authority could require an EIA for that project. In the Berkeley case, it was clear that neither the local planning authority nor the Secretary of State in relation to the call-in inquiry, considered the question whether or not EIA was required and on that basis the House of Lords felt obliged to quash the planning permission granted for the redevelopment of the Fulham Town F.C. redevelopment.

The 1999 Regulations introduced a voluntary screening process, enabling developers to request a screening opinion from the local planning authority or a screening direction from the Secretary of State. Under Regulation 4(2) a screening direction can be made by the Secretary of State whether or not he is requested to do so. The relevant provisions are contained in regulations 4–6. Relevant guidance on the screening process is contained in DETR Circular 2/99 at paragraphs 28–80 and the procedures relating to the screening process are contained at paragraphs 49–66. The general rule is that projects should be judged on their own merits based upon the developer's proposals. However, in judging whether the effects of a development are likely to be significant, local planning authorities must always have regard to the possible cumulative effects associated with any existing or approved development.

Where a formal screening opinion that an EIA is not required has been obtained from a local planning authority, that opinion is not conclusive. A local planning authority can change its mind in the light of further information arising in connection with the application, including the representations of interested third parties.

The application of EIA to permitted development is underlined by the guidance contained in paragraphs 61–65 and developers are able to apply for a screening opinion in relation to proposed “permitted development” projects in order to ascertain whether a development consent (*i.e.* planning permission) is required because of the obligation to carry out an EIA for such development.

The case of *A.D.T. Auctions Limited v. (1) the S.S.E., T. & R. and (2) Hart District Council*<sup>36</sup> illustrates the value of a precautionary approach by developers to the question of whether or not an EIA is required. Here, the developer was proposing a modest residential development (42 houses) on the edge of Yately Common Country Park and it was treated as not requiring EIA, although the site was close to a SSSI, which was also being considered for designation as a Special Protection Area for Wild Birds, because of the presence on the site of breeding woodlarks, nightjars and Dartford warblers. Planning permission was refused by the local planning authority and the developer appealed. A public inquiry was held over a period of eight days in June and July 1996. The Inspector found, after hearing evidence from English Nature and other conservation bodies, that the impact on the SSSI/pSPA was not likely to be significant as a result of the development and he recommended to the Secretary of State that the appeal should be annulled. After considering the Inspector's report the Secretary of State decided that an EIA was needed and that it should be taken into account before determining the appeal. An environmental statement was subsequently prepared and submitted to the Secretary of State together with a copy of the appropriate advertisement in relation to the submission of the environmental statement. The Secretary of State decided that the public inquiry would need to be reopened and this was held before a second Inspector, who concluded that planning permission should be refused by virtue of the nature conservation impacts on the proposed SPA. Having considered both Inspectors' reports he decided to dismiss the appeal, because he considered that “it is not possible to conclude that the proposed development will not adversely affect the integrity of the p/SPA”. The appellant sought to challenge that decision but the court declined relief and (*inter alia*) recognised that the Secretary of State was

<sup>36</sup> March 16, 2000 (unreported)—Case No.: CO/4040/99.

entitled to call for an EIA even at such a late stage in the process. As mentioned previously, there is no liability for a planning officer misinforming a developer, prior to submission of an application, that EIA is not required.<sup>37</sup>

There have also been some interesting cases in relation to the authority of officers in the screening process. In *R. v. St Edmundsbury B.C., ex p. Walton*<sup>38</sup> the court found that a planning officer did not have express or implied authority to make a screening decision in relation to a Schedule 2 project and the Committee which determined the application did not consider the point. Mr Justice Hooper decided, having regard to various statements in the Committee Report indicating that there were significant environmental impacts associated with the development proposal, that, whilst it would not be *Wednesbury* unreasonable if the planning authority determined that EIA was not required (*i.e.* because the environmental impacts were not considered by the LPA to be “significant”), it was equally true to say that it would not be *Wednesbury* unreasonable for a local planning authority to determine that it was likely to have significant effects. Therefore the LPA must determine whether EIA would be required. He also came to the conclusion that if such an assessment had been made the result of the planning application would not necessarily be the same and that the planning permission should be quashed as a consequence because the local planning authority had failed, in this case, specifically to determine whether an EIA was required.

In the *Dutch Dykes* case<sup>39</sup> the ECJ held that where a national court is considering proceedings for the annulment of a development consent it must examine of its own motion whether the legislative or administrative authorities of the Member State have remained within the limits of their discretion under Articles 2(1) and 4(2) of the 1985 Directive and take account of that analysis in deciding whether or not to annul.

#### *Criteria And Thresholds*

Whilst it is acceptable to use criteria and thresholds in determining which development projects require EIA, the overriding obligation is that set out in Article 2(1) of the amended 1985 Directive to “adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are subject to . . . an assessment with regard to their effects”. Subject to that overriding obligation, Articles 4(2) and 4(3) envisage that screening decisions for Annex II projects will be made by reference to thresholds or criteria set by the Member State, taking Annex III to the amended 1985 Directive into account. These principles are carried over into the 1999 Regulations in regulation 2(1) and the thresholds and criteria set out in Schedules 2 and 3.

During the years preceding the 1997 Amending Directive, one of the more serious criticisms of the EIA system addressed the inconsistencies in the requirement for EIA in the different member states for similar projects. In its report of the Five Year Review of the operation of the 1985 Directive (Report dated April 2, 1993) the Environmental Assessment Unit of Manchester University noted marked differences between Members of States in the number of projects assessed. This was (at least in part) traced to the wide discrepancies in the thresholds used to “screen” Annex II Projects in deciding whether or not to subject them to formal assessments. For example, the threshold in Greece for pig-rearing installations was only 20 pigs, whereas in Ireland it was 1,000 pigs, in Germany 1,300 and in the U.K. it was 5,000 pigs. Small wonder that there were wide discrepancies in the number of projects

<sup>37</sup> See *Haddow v. S.S.E.* [2000] Env.L.R. 212.

<sup>38</sup> Hooper J.—April 13, 1999, QBD; Reported at [1999] Env.L.R. 879 and [1999] 3 P.L.R. 51.

<sup>39</sup> Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld B.V. E.A. v. Gedeputeerde Staten Van Zuid-Holland*—ECJ, October 24, 1996.

assessed. In the 1997 Amending Directive the clarification of Annex I projects has now applied compulsory assessment to pig rearing units with over 3,000 places for production pigs and Annex II will continue to apply to units below that level.

It is still for the Member State to determine precisely what thresholds and criteria will apply, but Annex III identifies the important matters to be taken into account under the following headings:

- Characteristics of projects
- Location of projects.
- Characteristics of potential impact.

The Commission and the ECJ, adopting a “purposive approach”, will no doubt be monitoring the thresholds and criteria laid down by individual Member States to ensure that they achieve the paramount duty laid down in Article 2(1) and quoted above.

This is the clear message from various cases in the ECJ. In the *Commission v. Belgium*<sup>40</sup> the ECJ held that the criteria and/or thresholds mentioned in Article 4(2) of the Directive are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of that project listed in Annex II which may be envisaged on the territory of a Member State. The ECJ has also held,<sup>41</sup> that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted from the need for an EIA, would exceed the limits of its discretion under Article 2(1) and 4(2) of the Directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

In the *Bolzano St Jacob Airport* case<sup>42</sup> the ECJ stated as follows:

“45. . . . whatever the method adopted by Member States to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects . . .

49. . . . Articles 4(2) and 2(1) of the Directive are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2,100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment.”

In this case, the project was to transform an airfield which, since 1925/26, had been used for military purposes, for private flying and during a certain period and (to a limited extent), also for civil purposes,

<sup>40</sup> Case C-133/94: [1996] E.C.R. I—2323 at paragraph 42.

<sup>41</sup> Paragraph 53 of the judgment in the *Dutch Dykes* case.

<sup>42</sup> *World Wildlife Fund and Others v. Autonome Provinz Bozen and Others*: C-435/97 (ECJ—16.09.99)

into an airport could be used commercially, with the aim of having regular scheduled flights as well as charter and cargo flights. The works and alterations envisaged included the renewal of the existing runway, construction of access roads and car parks, construction of a control tower with air traffic controlled installations, construction of a departure building and of a hangar, the carrying out of the necessary connections and diversions and the extension of a runway from 1,040 to 1,400 metres.

In *ECC v. Ireland*<sup>43</sup> the question of thresholds and criteria arose again in the context of various allegations that Ireland had failed to fulfil its obligations under the 1985 Directive. In particular it was argued by the Commission that it had incorrectly transposed Article 4(2) of the Directive. The focal concerns related to agricultural, afforestation and peat extraction activities in sensitive locations, including forestation on Pettigo Plateau and peat extraction from Clonfinane Bog. It also related to the intensive agricultural use of uncultivated land or semi-natural areas and, in particular, it alleged that 60,000 hectares of semi-natural terrain in the West of Ireland had become used for intensive sheep farming and were thus suffering from serious degradation. Further complaints concerned land reclamation within the Burren, an extensive area of limestone pavement in County Clare, which is an exceptional interest for its fauna, flora and natural landscape which is rich in archaeological remains.

At the heart of the Ireland case were the thresholds which applied to such projects where EIA was not required for projects covering an area of less than 70 hectares. The Court held:

“65. . . . a Member State which established criteria or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

66. . . . even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive, such as fauna and flora soil, water, climate or cultural heritage are sensitive to the slightest alteration.

67. . . . similarly, a project is likely to have significant effects, where by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size”.

At this point it is perhaps relevant to mention that, in the U.K. context, paragraph 39 of PPG 9 on Nature Conservation advises that “the effect of Schedule 2 Development on a SSSI will often be such as to require EA. Whilst each case should be judged on its merits, EA would normally be required where a Ramsar site or a potential or classified SPA, or a candidate, agreed or designated SAC could be affected”.

All of these are clear indicators of the importance of approaching the screening of projects (whether as a developer or as a local planning authority) in a cautious manner and applying thresholds and criteria carefully with the overall aim of identifying whether, in the words of Article 2(1), a project is “likely to have significant effects on the environment”. Once again, an excessively legalistic and literal interpretation of domestic legislation may result in problems down the line if projects are not subjected to EIA when the overarching obligation under the amended 1985 Directive would require it.

#### *Exemptions and Immunities*

The 1985 Directive specifies two limited exceptions to the requirement of EIA in the context of major projects which may have significant environmental effects. This section of the paper examines these

<sup>43</sup> 392/96—(ECJ—21.09.99)

exceptions as well as the “immunity” which the U.K. Courts appear to be recognising at the present time in their application of the strict time limits applied to judicial review applications.

The 1985 Directive includes, at Article 1(4) and 1(5) specific exemptions for “projects serving national defence purposes” and “projects the details of which are adopted by a specific act of national legislation, since the objects of this Directive, including that of supplying information, are achieved through the legislative process”. This would seem to include Private Acts of Parliament and Orders under the Transport and Works Act 1992.

The “national defence exemption” was considered in the St Jacob Bolzano Airport case<sup>44</sup> in which the ECJ held that this exemption was only available for projects “which mainly serve national defence purposes” and that it is not available where an airport “may simultaneously serve both civil and military purposes, but whose main use is commercial . . .”.

The exemption under the more general provisions of Article 1(5) was, according to the ECJ in the same case, limited to projects which were authorised by legislation under which the legislature has taken into account “all the elements of the project relevant to the environmental impact assessment”.<sup>45</sup> The ECJ went on at paragraph 60 of its judgment to say:

“60. . . . It is only by complying with such requirements that the objectives referred to in the second condition laid down by Article 1(5) can be achieved through the legislative process. If the specific legislative act by which a particular project is adopted and therefore authorised, does not include the elements of the specific project which may be relevant to the assessment of its impact on the environment, the objectives of the Directive would be undermined, because a project could be granted consent without prior assessment of its environmental effects even though they might be significant.”

Clearly, Article 2(1) is again recognised by the ECJ as the overriding consideration in applying the exemptions laid down under the 1985 Directive, with the narrow exception of the projects predominantly for National Defence purposes.

The question of “immunities” alludes to the vexed question of the strict time limits and other restrictive technical rules laid down under the U.K. legislation in relation to judicial review and judicial challenge proceedings.

There are a number of cases in the U.K. courts, including recent cases, in which the Court has effectively granted immunity to clear or strongly argued breaches of the 1985 Directive (and the U.K. legislation implementing it) on the grounds that the challenge has not been initiated by an interested party within the relevant time limits. The overriding principle in those cases appears to have been the need to secure confidence in the development process.<sup>46</sup>

Further examples of a restrictive approach by the Court to the remedy of judicial review include the case of *R. v. East Sussex County Council, ex p. ARC Limited and Others*<sup>47</sup> in the Queen’s Bench Division where Maurice Kay J. refused to exercise his discretion to refuse relief to the applicants (ARC) where there had been a “minor procedural mistake” in service of a notice under the ROMP provisions

<sup>44</sup> *WWF and Others v. Autonome Provinz Bozen*—see ante.

<sup>45</sup> Paragraph 59 of the judgment.

<sup>46</sup> See for example, *R. v. London Borough of Bromley and Other, ex p. Dianne Barker*, QBD—April 3, 2000—Mr Justice Jackson; *R. v. North West Leicestershire D.C. and Other, ex p. Moses* [2000] J.P.L. 1287, CA.

<sup>47</sup> July 29, 1999—QBD.

contained in the Environment Act 1995, Schedule 13, paragraph 9. The consequence of his refusal of relief was that the MPA and the environmental interests for which it is responsible would be seriously prejudiced by the existence of “unworkable conditions with big gaps”. The Judge stated that:

“it seems to me that it is virtually inevitable that when an MPA so conducts itself as to cause paragraph 9(9) to give effect to conditions proposed by the Applicants, the outcome will be environmentally disadvantageous. It does not necessarily mean that such an outcome need be permanent because the MPA may resort to the statutory powers of revocation and modification in section 97 of the 1990 Act, albeit at a price in the form of statutory compensation. All this is clear, and I apprehend, intended result of the statutory regime in relation to ‘old mineral provisions’. It is a regime which enables MPAs to disturb the status quo, and impose modern conditions but only if they acted within the strict time limits in agreed extensions.”<sup>48</sup>

In *R. v. Somerset County Council, ex p. Morris & Perry (Gurney Slade Quarry) Limited*<sup>49</sup> the same judge declined to exercise his discretion to refuse relief in judicial review proceedings where a declaration as to “deemed” conditions was sought the MPA failed to get the time for determination of the Conditions extended. The Respondent argued that granting relief would amount to a breach of the 1985 Directive but relief was granted nevertheless.

It remains to be seen whether this bastion of immunity is likely to survive the rising tide of weight attached to environmental protection issues and the increasing recognition that of Articles 2(1) and 4(2) of the amended 1985 Directive are of paramount importance. In the light of recent ECJ and House of Lords decisions, it seems likely that the Courts will ultimately overcome their restrictive approach to judicial review time limits, perhaps by either applying the requirement for EIA to later consent procedures (such as reserved matters applications and/or CPO confirmation procedures) or by allowing late challenges where there are clear breaches of Articles 2(1) and 4(2), and where this is seen to be in the public interest of protecting the environment.

### **The EIA process—key quality issues**

It may be that the initial reluctance of the Courts (and the U.K. Government) to enforce rigorously the requirements of the 1985 Directive was based upon a failure to appreciate that EIA is fundamentally different from the normal planning reports dealing with matters such as the environmental impacts of proposed development. Various studies carried out in the first ten years of operation of the 1985 Directive suggest that the quality of Environmental Statements was open to criticism and that many statements failed to satisfy the requirements of the Directive.<sup>50</sup> Various reports suggest that poor scoping at the initial stage of the EIA process was causing major problems in the quality of Environmental Statements and that a high proportion failed to achieve the basic legal requirements of EIA.

It is fair to say that the leading environmental audit practitioners generally achieved high standards in the quality of their assessments and this was particularly so for the larger projects reviewed. However, then as now, EIAs are carried out by smaller non-specialist consultancies with little if any experience of the EIA process and quality problems inevitably arise in those situations.

The basic requirements in regard to the information to be produced in an EIA is laid down in Article 5

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<sup>48</sup> In the Government’s review of the ROMP procedures, following the Brown decision, this detailed technical point is likely to be resolved but the general principle of “technical” breaches nevertheless has general relevance and this case serves as an example of the general approach of the courts—at the present time.

<sup>49</sup> [2000] 79 P. & C.R.

<sup>50</sup> See, for example, DOE study carried out by Manchester University in 1991 reported in ENDS Report 199 pp. 12–15; and a study by Oxford Brookes University in relation to 25 matched pairs of environmental statements prepared in 1988–1990 and 1992–1994—ENDS Report 256 (May 1996) at pp. 7 and 8.

and Annex IV of the amended 1985 Directive. This is subject to the qualification that (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and that the environmental features likely to be affected; and (b) that the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment. Article 5(3) requires, as a minimum, the following information:

- (1) a description of the project comprising information on the site, design and size of the project;
- (2) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;
- (3) the data required to identify and assess the main effects which the project is likely to have on the environment;
- (4) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;
- (5) a non-technical summary of the information.

In Annex IV, these elements of information are described in greater detail and in particular in paragraph 4, “the likely significant effects of the proposed project on the environment” is (by a footnote) expressly required to deal with “direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project”.

There is likely to be added emphasis in future on indirect and cumulative effects in the amended 1985 Directive in the light of a study carried out on behalf of EC DG XI by Hyder on the extent to which Member States were addressing such effects in implementation of the 1985 Directive and which found a very widespread failure to properly address indirect and cumulative impacts in the EIA process.<sup>51</sup>

These provisions as to the information to be provided have now been translated into U.K. law by the 1999 Regulations. The contents of an “environmental statement” are prescribed in regulation 2 by reference to Schedule 4, which (in Part II) specifies the minimum information required, including:

- (1) A description of the development comprising information on the site, design and size of the development.
- (2) A description of the measures envisaged in order to avoid, reduce and if possible, remedy significant adverse effects.
- (3) The data required to identify and assess the main effects which the development is likely to have on the environment.
- (4) An outline of the main alternatives studied by the applicant or appellant as an indication of the main reasons for his choice, taking into account the environmental effects.
- (5) A non-technical summary.

Guidance on the preparation and content of an Environmental Statement is contained in paragraphs 81–99 of DETR Circular 2/99. This includes the following guidance:

“82. . . whilst every ES should provide a full factual description of the development, the emphasis of Schedule 4 is on the ‘main’ or ‘significant’ environmental effects to which a development is likely to give rise. In many cases, only a few of the effects will be significant and will need to be discussed in the ES in any great depth . . . while each ES must comply with the requirements of the Regulations, it is important that they should be prepared on a realistic basis and without unnecessary elaboration.”

<sup>51</sup> See “Study on the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions”—May 1999.

### Defining the project—the Rochdale cases

One of the key requirements of the amended 1985 Directive and the 1999 Regulations is “a description of the project comprising information on the site, design and size of the project”.

For most development projects this is not a particularly difficult problem because the developer usually has a pretty clear idea of what the development entails. However, certain categories of development specified in Schedule 2 to the 1999 Regulations are more difficult to define and problems have already arisen in the U.K. Courts in relation to “infrastructure projects”, including “industrial estate development projects”. Traditionally, the promoters of such industrial estates have obtained outline planning permissions for the overall estate with detailed planning permission for the site infrastructure (estate roads etc) and have then marketed the estate on the basis that detailed applications or reserved matters applications are made as and when specific occupiers come forward.

The guidance in Circular 2/99 on the question of whether an outline planning application can be made for an EIA project states as follows:

“48. Where EIA is required for a planning application made in outline, the requirements of the regulations must be fully met at the outline stage since reserved matters cannot be subject to EIA. When any planning application is made in outline, the local planning authority will need to satisfy themselves that they have sufficient information available on the environmental effects of the proposal to enable them to determine whether or not planning permission should be granted in principle.”

The legality of this approach has been significantly clarified by the Rochdale cases.<sup>52</sup> As is now well-known, in *Rochdale 1* Sullivan J. quashed an outline planning permission for the Kingsway Business Park and detailed planning permissions for associated infrastructure on the grounds that the Local Planning Authority had failed to fulfil the requirements of the 1985 Directive. The principal reason for his decision was based upon the fact that the application contained an inadequate description of the development project because and the Environmental Statement (and the whole EIA process) was focused on plans and descriptions which were “for illustrative purposes only”. The following passage from Sullivan J.’s judgment encapsulates the key problem which led to the planning permission being quashed:

“The fundamental difficulty in the present case is that the Environmental Statement describes the environmental effects of a Business Park development carried out in accordance with the Illustrative Masterplan and the indicative Schedule of Land Uses, but the outline planning permission was not tied in any way to either of these documents. Conditions 1.7 and 1.11 dispensed with the Master Plan and replaced it with the Framework Document to be submitted and approved in due course. The reason given for the imposition of Condition 1.11 explains that the Masterplan was submitted for illustrative purposes only and that it gave insufficient detail on which to determine the layout of the site. If it was inadequate for that purpose, it is difficult to see how it could have been an adequate description for the purposes of paragraph 2(a) of Schedule 3 to the Assessment Regulations.”

As discussed earlier, the Courts have so far taken the view that, under the U.K. legislation

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<sup>52</sup> *R. v. Rochdale MBC, ex p. Tew* [1999] 3 P.L.R. 74 (“Rochdale 1”) and *R. v. Rochdale MBC and others, ex p. Milne*, QBD—Sullivan J. delivering judgment on July 31, 2000 (“Rochdale 2”).

implementing the 1985 Directive, EIA cannot be required for “reserved matters” applications and therefore by reserving these key details of the project for approval after the outline planning permission (*i.e.* “the development consent”) was granted, the Council had not complied with the 1985 Directive or the 1988 regulations.

Quite apart from the serious disruption which this decision in Rochdale 1 caused to the development project, which is of great regional strategic importance, the judgment also sent a frisson of panic throughout the development industry. Suggestions were made that this case probably meant that such large business park developments were to be ruled out, if and to the extent that they required EIA, because they depended upon a flexible outline planning permission in order to provide serviced sites<sup>53</sup> onto which occupiers could locate their buildings according to their own specification and design.

The recent judgment of Sullivan J. in Rochdale 2 clearly indicates that it is possible to obtain outline planning permissions for such projects, provided the application and planning permission link the project either to a specific layout or to parameters which will determine the specific layout and which can then be properly assessed in accordance with the EIA.

The developers in the Rochdale case responded to the quashing of their planning permission by revising the application so as to tie it to a Master Plan and Development Framework by conditions incorporated in the planning permission. This identified the parameters that were likely to define the environmental impacts associated with the project. Planning permission was granted on this amended basis in December 1999 and further judicial review proceedings were brought by Mr Milne on the grounds (*inter alia*) that (1) as a matter of law it was not possible to grant an outline planning permission for an EIA project; and (2) that (if outline planning permission was possible) the level of detail (and particularly the absence of detailed siting, design and landscaping of buildings within the Employment Park) meant that the ES (and the description of the development project) were inadequate to satisfy the requirements of the 1985 Directive.

In this connection, it is worth quoting another passage from Sullivan J.’s judgment in Rochdale 1 at page 50:

“Recognising, as I do the utility of the outline application procedure for projects such as this, I would not wish to rule out the adoption of a Masterplan approach, provided the Masterplan was tied, for example by the imposition of condition to the description of the development permitted. If illustrative floor space or hectare figures are given, it may be appropriate for an Environmental Assessment to assess the impact of a range of possible figures before describing the likely significant effects. Conditions may then be imposed to ensure that any permitted development keeps within those ranges.”

And at page 52 where he stated:

“In summary, whilst the Council took into consideration ‘Environmental Information’ about the effects of carrying out a Business Park Development in accord with an illustrative Masterplan and an indicative schedule of land uses, that was not the development which was proposed to be carried out in the application for planning permission, nor was it the development for which permission was granted; nor was the information sufficient in any event to comply with the requirements of Schedule Three: see, for example, paragraph 2(d), as to mitigation measures. It follows that the Council did not have power to grant planning permission for the Business Park . . . .”

<sup>53</sup> Although obviously the site infrastructure—particularly roads—may require detailed planning permission

The Developer and the NWDA (as statutory successor to English Partnerships) responded to the judgement in this case by amending the planning application so as to tie it to a more detailed description of the development, comprised in:

- (1) The form of application.
- (2) An attachment setting out a detailed description of development.
- (3) A schedule of development (breaking the development down into 26 plots or sub-plots, showing the area and proposed use, the total floor space of the units proposed and a breakdown of the footscap for each unit, the maximum height of the proposed buildings, the number of parking spaces, an assessment of the traffic flows and an assessment of the employment generation).
- (4) A Development Framework, giving further particulars with regard to the development concept.
- (5) A Masterplan showing the plots within the development, the spine road, loop roads of the spine road providing access to the plots, footpaths, cycleways, structural planting, and other details of the proposal.

These documents were all part of the planning application and were incorporated by reference into the planning permission which was granted by the Council (for the second time) in December 1999.

The arguments submitted on behalf of Mr Milne in Rochdale 2 included the suggestion that, as a matter of law, outline planning permission could not be granted for an EIA development—this was rejected by Sullivan J. on the purposive approach: if such large employment parks necessarily involved flexible permissions to enable them to respond to market demand, the Council must have intended them to have that degree of flexibility when it included them in Annex II and the Directive and implementing regulations should be interpreted so as to give effect to that intention.

In response to the submission by Mr Milne’s counsel that the project description did not satisfy the requirements of the Directive and the 1999 regulations, the judge declared:

“It is for the local planning authority to decide whether it has sufficient information in respect of material considerations. Its decision is subject to review by the courts, but the courts will defer to the local planning authority’s judgment in that matter in all but the most extreme cases. Regulation 4(2) reinforces this general obligation to have regard to all material considerations in the case of a particularly material consideration; ‘environmental information’ which has been provided pursuant to the assessment regulations.

There is no reason why the adequacy of this information, which includes the sufficiency of information about the site, design, size and scale of development should not be determined by the local planning authority: see paragraph 48 of circular 2/99 . . .

The question whether such information does provide a sufficient ‘description of the development proposed’ for the purposes of the assessment regulations is, in any event, not a question of primary fact, which the court would be well equipped to answer. It is pre-eminently a question of planning judgment, highly dependent on a detailed knowledge of the locality, of local planning policies and the essential characteristics of the various kinds of development project to be assessed.”<sup>54</sup>

<sup>54</sup> Transcript—paragraphs 108–110.

He also went on to reject the suggestion that such projects should have no matters reserved if they may have a significant impact on the environment and made the following point which relates to the importance of public participation:

“An environmental statement that attempted to describe every environmental effect of the kind of major project where assessment is required would be so voluminous that there would be a real danger of the public during consultation, and the local planning authority in determining the application, ‘losing the wood for the trees’. What is ‘significant’ has to be considered in the context of all kinds of development that are included in Schedules 1 and 2. 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 assessment regulations.”<sup>55</sup>

An application to the Court of Appeal for permission to appeal against this judgement is pending at the time of going to press.

### *Scoping*

Prior to the Amending Directive,<sup>56</sup> there was no formal legal provision relating to the screening and scoping of proposed projects as to whether or not EIA may be required and (if so) what impacts were likely to be significant and therefore needed particular focus in the E.S. In the U.K., many leading specialist EIA consultants would often go through an informal screening and scoping process in consultation with the local planning authority and other relevant statutory bodies, but this was done voluntarily as a matter of good practice. In various academic and official reviews of the EIA process,<sup>57</sup> scoping was identified as a very important factor in determining the quality of Environmental Statements and the outcome of the EIA process. When it was done—even on an informal and voluntary basis—the quality of the ES was significantly better than when it was not done.

During the political process leading to the Amending Directive in 1997, increasing pressure was applied on Member States to approve a formal requirement for a scoping exercise as part of the EIA process, but various governments (including the U.K. Government) resisted this pressure and the Amending Directive merely makes provision for voluntary scoping at the discretion of the developer although it is open for Member States to require it in their domestic legislation. It is not a requirement that is imposed on a developer or a local planning authority under either the Directive or the 1999 regulations.

The procedures introduced as a result of the Amending Directive are contained in regulations 10 and 11 of the 1999 Regulations which do not impose a mandatory requirement for scoping before an application is submitted. There is also in regulation 12, a procedure whereby a developer intending to prepare an Environmental Statement can request the assistance of the local planning authority (or the Secretary of State) in obtaining any environmental information which they may hold and they in turn must notify the “consultation bodies”, which essentially means the statutory consultees in relation to the application for planning permission to which the ES will relate and specifically any principal council in the area where the land is situated, the Countryside Agency, English Nature and the Environment Agency. They are thereby obliged to consult with the developer to ascertain whether they have information which they consider relevant to the preparation of the ES and (if so) they must make it available, unless it is “confidential”.

<sup>55</sup> *ibid.*—paragraph 113.

<sup>56</sup> The Council Directive 1997/11 amending Directive 1985/337.

<sup>57</sup> For example, the European Commission: Evaluation of the Performance of EIA Process. Final Report. Volume 1: Main Report. Manchester (October 1996) page 20.

### *Baseline information*

One of the key problems which can emerge in practice in relation to EIAs and other assessments is the lack of baseline information for the purposes of measuring cumulative and indirect impacts. Whilst the local planning authorities in Agenda 21 documents and the statutory bodies, such as English Nature and the Environment Agency, may have a growing database of environmental information in relation to the environment generally or in relation to specific aspects of the environment, such as critical loads or existing environmental conditions, such information is still at a relatively rudimentary stage. It can therefore be difficult to assess either individual or cumulative impacts on particular receptors.

For example, in a recent case in which my firm was involved, the relevant statutory body sought to impose on a developer the obligation of assessing emissions from a number of industrial processes within quite a wide area around a candidate SAC for the purposes of carrying out an appropriate assessment under the Habitats Directive. Whilst this problem arose specifically in relation to the “appropriate assessment” under the Habitats Regulations (in which the local planning authority carries out the appropriate assessment), the same issue might possibly occur under the EIA process. However it is worth noting that, in relation to the information which a developer may be required to supply as part of an EIA under the amended 1985 Directive is subject to the qualification in Article 5 (1) (b) that “a developer may reasonably be required to compile this information having regard *inter alia* to current knowledge and methods of assessment.”

In the guidance contained in Circular 2/99, paragraphs 97–99 reference is made to the environmental information available to developers from the local planning authority and other consultation bodies, such as English Nature, the Countryside Agency and the Environment Agency. It states:

“There is no obligation on public bodies to undertake research or otherwise to take steps to obtain information which they do not already have. Nor is there any obligation to make available information which is capable of being treated as confidential under the Environmental Information Regulation 1992.”<sup>58</sup>

At paragraph 109 of the Circular, the following guidance is contained:

“Local planning authorities should satisfy themselves in every case that submitted statements contain the information specified in Part II of Schedule 4 to the Regulations and the relevant information set out in Part I of that Schedule that the developer can reasonably be required to compile. To avoid delays in determining EIA applications, consideration of the need for further information and any necessary request of such information should take place as early as possible in the scrutiny of the planning application.”

### *Alternatives*

Article 5(3) of the amended 1985 Directive requires, as part of the information to be provided and in accordance with Article 5(1):

“An outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects”. This is repeated in Annex IV to the amended Directive. In its original form, the 1985 Directive at Annex I, the requirement to provide an outline of the main alternatives studied was qualified by the words “where appropriate”. To that extent, the current requirement appears to be strengthened.

This may reflect a recommendation in the Final Report entitled “Evaluation of the Performance of the

<sup>58</sup> Paragraph 99 DETR Circular 2/99.

EIA Process (October 1996)” carried out by the EIA Centre of the University of Manchester which identified various measures to strengthen the quality of Environmental Statements and EIA evaluation methods, including “increased emphasis on the treatment of both alternatives and mitigation measures in EIA reports”.<sup>59</sup>

In *R. v. SSETR and Another, ex p. Michael Challenger and the Cathedral Area Residents' Association*<sup>60</sup> the Applicant was seeking (*inter alia*) to argue that the ES prepared by Railtrack in connection with the Thameslink Project had inadequately considered alternatives to the line which they are pursuing in an inquiry into the Railtrack (Thameslink 2000) (Consolidated) Order 2000. This project involves significant works to enable the introduction of new cross-London services and amongst those works it is proposed to provide two new tracks and three new platforms at London Bridge and a new two-track viaduct at Borough Market to the West of London Bridge. The Applicant (and a number of other objectors) were opposing the order on the basis that an alternative route (the Herne Hill alternative) was to be preferred. In the judicial review proceedings it was argued that the information contained in an earlier 1997 Alternatives Report (not part of the ES) failed to comply with the requirements under the Transports & Works Rules 1992 relating to environmental impact assessment. The judge had some sympathy with the Applicant’s criticism on this basis but in refusing relief, he stated as follows:

“[the Alternatives Report] does give information in outline of the Herne Hill alternative considered by Railtrack and it does give the main reasons for choosing the London Bridge route rather than the Herne Hill route, taking into account the environmental effects. Whilst the Applicants would no doubt have liked more information than was given in the 1997 Alternatives Report that was not required by the Rules.”<sup>61</sup>

It should also be remembered that the local planning authority (or other decision maker—including the Secretary of State and an Inspector) has a discretion to decide how much information is required to enable the significant environmental effects of a project to be assessed adequately and the courts will only interfere with an exercise of that discretion if it is unreasonable in the *Wednesbury* sense.

#### *Professional expertise and integrity*

In the USA, the Environmental Protection Agency carries out most environmental impact assessments of either public or private projects under the U.S. equivalent of the 1985 Directive. This has generally been regarded in research as a positive factor in ensuring that the quality of environmental statements in the U.S. is superior to that elsewhere because the expertise and experience is focused mainly on one independent government agency rather than as in Europe dispersed amongst a number of professional consultancies (which may be more susceptible to commercial pressures).

As stated earlier, the quality of Environmental Statements and the assessment process in the U.K. (and Europe) is variable. Large and specialist practices are often able to provide the necessary concentrations of resource, experience and expertise. Smaller and less experienced practices often fail to achieve the necessary standards of EIA and this has been suggested as the reason for failures to fulfil the requirements of the Directive in those surveys where E.S.s have been found to fall below the required standards.

A further limitation on the process is that most local authorities lack the necessary expertise, experience and resources to evaluate properly the E.S.s or properly to interrogate the base information or the findings.

<sup>59</sup> Paragraph 213.

<sup>60</sup> QBD—*per* Harrison J.—June 15, 2000.

<sup>61</sup> Transcript—paragraph 61.

Similarly, problems sometimes arise where consultants and planning officers, under pressure from clients or political masters, see the EIA process as a formality which has to be undertaken in order to “justify” the proposed development rather than to genuinely assess it against relevant environmental criteria.

Various methods have been employed to raise standards including guidance notes on the preparation of environmental statements.<sup>62</sup> There have also been guidance notes on monitoring environmental assessments,<sup>63</sup> and screening and scoping methods. Suggestions have been made that environmental assessment consultants should be required to undergo specialist training and CPD programmes, professional registration and accreditation. So far, there is no legal requirement for this, but it is quite likely that such developments will occur in the future.

The DOE publication “Preparation of Environmental Statements for Planning Projects that require Environmental Assessment—A Good Practice Guide” contains the following advice:

“The analysis should use the best practicable techniques and available sources of information. The presentation should be in a form which provides a focus for scrutiny of the project by those with specialist knowledge as well as non-expert decision makers and interested members of the public. It should also allow the importance of the predicted effects, and the scope for modifying or mitigating them, to be properly evaluated by the planning authority before a decision is taken.”

In terms of the professional integrity of Environmental Statements (and those who produce them) it has to be said that very often an Environmental Statement may read (at least in parts) as a justification for a project rather than a robust and professionally objective assessment of it. Similarly, the officers of local planning authorities, in their approach to such Environmental Statements, sometimes appear to gloss over the issues in the interests of a Council’s overall political objectives in relation to a particular strategic project. Commercial and political pressures are prevalent throughout the planning and development process and analogies can be drawn in this context with the role of “expert witnesses” in planning inquiries.

In their Practice Statement and Guidance Notes to “Surveyors acting as Expert Witnesses”, the RICS states that a Surveyor must, in preparing any written evidence, “consider all matters material to the assignment” and in providing written evidence must “declare . . . that the report includes all facts which the surveyor regards as being relevant to the opinion which he has expressed and that he has drawn to the attention of the Judicial Body any matter which would affect the validity of that opinion”.

In the case of *Burroughs Day v. Bristol Corporation*, Richard Southwell Q.C. sitting as a deputy judge of QBD on January 18, 1996, declared that the planning evidence in an inquiry which was the subject of judicial review proceedings was of little value because it had failed to achieve the standards required of expert witnesses in judicial proceedings. He enumerated the relevant standards (as laid down by Cresswell J. in the *Ikarian Reefer* case)<sup>64</sup> which may be summarised as follows:

- (1) Expert evidence should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

<sup>62</sup> e.g. Preparation of environmental statements for planning projects that require environmental assessment—A good practice guide [1995].

<sup>63</sup> DOE—“Monitoring environmental assessment and planning”.

<sup>64</sup> *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Limited* [1993] 2 Lloyd’s Rep. 455.

- (3) An expert witness should state the facts or assumption, upon which his opinion is based. He should not omit to consider material facts which could detract from his concluding opinion.
- (4) An expert witness should make it clear when a particular question or issue falls outside his expertise.
- (5) If an expert's opinion is not properly researched because he considers insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report
- (6) If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay.
- (7) Where expert evidence refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents these must be provided to the opposite party at the same time as the exchange for report.

The deputy judge announced that although this summary was given in a commercial court action it applies to all legal proceedings.

A modified form of this ethical code, applied to professionals producing E.S.s along similar lines to these principles could well produce a dramatic improvement in the quality of E.S.s. Even without a codification of such principles, it is possible, having regard to development in the Courts of an increasing willingness to ensure that the 1985 Directive is carried out in a purposive manner, that they may intervene where such standards are not adhered to in the production of environmental statements or in the decision making process based upon such assessments.

The key principle to learn from these various sources of guidance is that the quality of E.S.s (and the decisions based upon them) is likely to be scrutinised extremely carefully in the future by decision-makers and "interested parties" and the expectation will be that high professional standards must be attained.<sup>64a</sup> It is always difficult in the pressurised context of promoting major schemes with huge financial and other interests (including political objectives) at stake to resist the pressure to simply rationalise the schemes as put forward. However, unless a robustly independent and professional approach is adopted, it is likely that planning permissions will be refused or appeals dismissed and that even favourable decisions may be successfully challenged in the courts—either in the U.K. or in the ECJ.

At the end of the day it is for the Council or the Secretary of State to exercise proper discretion on the information presented to it in the E.S. and in the various statutory and public consultation responses which all form part of the EIA and, with limited exceptions,<sup>65</sup> they are relatively free to exercise their discretion in deciding whether or not to grant planning permission. As long as the EIA process has been properly followed, including the involvement of the public in accordance with the 1985 Directive and the 1999 Regulations, the ultimate discretion to determine the application after EIA is with the local planning authority or the Secretary of State in accordance with the well-established principles laid down in planning law.

<sup>64a</sup> In its formal notification to the UK government relating to the Crystal Palace Leisure Development case (see above), one of the reasons stated by the E.C. Commission for its concern was the "flawed" report of the Environment Consultants, on which basis the decision was taken not to receive EIA.

<sup>65</sup> For example under the Birds Directive and the Habitats Directive.

### Public participation in the EIA process—a key to success

The legal framework for EIA is designed to encourage and facilitate public participation in the EIA process. This is one of its essential elements.

The new Article 6(2) of the 1985 Directive requires any application for development consent and any information gathered pursuant to Article 5 (*i.e.* the Environmental Statement and other relevant information on the environmental impact) are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted. In the case of projects having possible trans-boundary impacts, the Member State is obliged to ensure that the relevant information is made available to the affected States so that it can also inform its own public as to the project and its likely trans-boundary impacts and the nature of the decision which may be taken and to allow a reasonable opportunity for the Member State to indicate whether it wishes to participate in the EIA process.

Under Article 8 the results of consultations (*ie:* including public consultations) and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedures. Decisions on screening and scoping issues, as well as the ultimate determination of the application for development consent, must be made available to the public, together with all relevant information arising under the EIA process (with very narrow exceptions).

These provisions have been carried forward into the 1999 Regulations in the U.K. Special forms of notice are required<sup>66</sup> so that members of the public are aware of the application and are able to inspect the Environmental Statement<sup>67</sup> and any other information pertaining to it. The non-technical summary is clearly an important mechanism for communicating the essential details of the proposals to members of the public.

The requirement for publication of EIA applications is dealt with in DETR Circular 2/99 and at paragraph 127 the advice suggests that the requirement to make available the main reasons and considerations on which the planning decision is based now applies equally to cases where planning permission is granted and where it is refused. It is suggested that authorities may find that this requirement is made by the relevant Planning Officer's Report to the Planning Committee.

The Courts have recognised that public participation is a fundamentally important aspect of the EIA process. In the *Bolzano-St-Jacob Airport* case<sup>68</sup> the court specifically referred to the requirement, in any alternative EIA procedures laid down in the domestic legislation of a Member State, to “satisfy the requirements of . . . the Directive, including public participation as provided for in Article 6”.

The U.K. courts have also attached great weight to the need for public participation in the EIA process.<sup>69</sup> In the recent House of Lords Decision in the *Berkeley* case,<sup>70</sup> Lord Hoffmann made the following comments:

“ . . . an essential element in this [*i.e.* the EIA] procedure is that what the Regulations call the ‘environmental statement’ by the developer should have been ‘made available to the public’ and that the public should have been ‘given the opportunity to express an opinion in accordance with Article 6.2 of the Directive . . .’. The directly enforceable rights of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issues. It must

<sup>66</sup> See Regulation 13 and Part V generally.

<sup>67</sup> See Regulations 20 and 21.

<sup>68</sup> See *ante*—paragraphs 50 and 54.

<sup>69</sup> For example, see the comments of Brook L.J. in *Huddleston* (Transcript paras 38, 39 and 43).

<sup>70</sup> See *ante*.

have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.”

In response to the arguments submitted on behalf of the Secretary of State that members of the public, having engaged very actively in a full public inquiry and having received evidence and copies of reports in connection with the various proceedings, had in effect seen all that there was to see in relation to the anticipated significant environmental impacts, Lord Hoffmann responded as follows:

“My Lords, I do not accept that this paper-chase can be treated as the equivalent of an Environmental Statement. In the first place, I do not think it complies with the terms of the Directive. The point about the Environmental Statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language . . . I do not think it [*i.e.* the Directive] allows a Member State to treat a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the Annexe III information which should have been provided by the developer.”

The Good Practice Guide<sup>71</sup> also advocates the importance of ensuring that the general public is given adequate information in a readily understandable form in order to allay unnecessary fears created by lack of information.

Obviously, major development projects, particularly those with the possibility of environmental risks associated with them, are likely to cause public concern and hostility. Even where full information is available in the form of a comprehensive Environmental Statement, those fears and concerns are not readily overcome. However I wonder whether the Planning Inspectorate’s recent Pilot Study as to the use of mediation in the planning appeal system<sup>72</sup> might offer a possible mechanism for reducing the conflicts inherent in large schemes through a mediation process. Whilst the majority of cases dealt with in the Planning Inspectorate’s Pilot Study were relatively small scale, I was (as a participating mediator) extremely encouraged by the experience in multi-party mediations for larger-scale schemes which involved conflicts and environmental and local impacts. I am also aware of various projects in which mediation has been used to achieve consensus between public bodies, developers and members of the public on environmental management issues. It seems to me that there may be scope for considering the possibility of mediation in the context of the EIA process, in order to achieve a better public understanding of major projects and their environmental impacts and, possibly, public involvement in the solutions and mitigation of any effects associated with such schemes.

### **Future trends and directions**

Throughout this paper I have tried, in relation to the specific issues discussed, to identify possible future trends in the detailed implementation and practice of EIA and I do not intend to repeat those predications in this section of the paper. Instead, I now want to anticipate, from “straws in the wind”, possible future developments in EIA and related fields of assessment.

<sup>71</sup> “Environmental Assessment: A Guide to the Procedures” (HMSO 1989).

<sup>72</sup> See DETR planning research report: “Mediation in the Planning System” by Michael Welbank in association with Nick Davies and Ian Heywood (May 2000).

### *Strategic Environmental Assessment*

For some time now, academics in the field of environmental assessment and officials at DG XI have been promoting the concept of Strategic Environmental Assessment in order to extend the concept to policies and programmes at a strategic level in order to overcome the limitations of EIA at the project assessment level. This proposal was anticipated in the Fifth Environmental Action Programme and a draft proposed Directive on the assessment of the effects certain plans and programmes on the environment was reduced in 1996. This proposal was amended by the Commission in 1999 after the European Parliament had its first reading and in December 1999 the Environment Ministers reached a political agreement on a common text for the future of the Directive which was formally adopted on March 30, 2000. This will now go back to the European Parliament for a second reading<sup>72a</sup> and it is anticipated that the final Directive will be adopted at the end of this year. Member States will then be given three years for integrating the new Directive into their national systems.

Already, tentative steps towards strategic assessment have been required for development plans (PPG 6) and for Regional Planning Guidance.<sup>73</sup> The new SEA Directive is likely to accelerate those trends and produce legally enforceable SEA procedures. This will enable project EIAs to take place within a strategic framework which has itself been required to undergo a rigorous assessment of the environmental affects of strategic policies and plans.

### *Training and professional accreditation of environmental assessors*

One proposal which has emerged from time to time is that the environmental assessment profession should be subject to professional regulation and training requirements which will maintain and enhance expertise and technical knowledge in the field. The regulatory function of a professional body will also help to maintain standards in terms of integrity as well as professional expertise. So far, the Government has not taken up this proposal so as to require mandatory training or accreditation but it is not unlikely that such requirements will eventually be introduced in due course.

### *Local authority resources in the handling of assessments*

By definition, EIA projects are considered likely to have significant impacts on the environment and therefore they demand a higher level of expertise in the planning officers and other professionals dealing with these applications (and the ES and other information received in the context of EIA) so as to ensure that the information is rigorously and expertly analysed before the application is determined. Suggestions have been made in various contexts that the local authorities lack both the resources and the expertise to handle such matters effectively. If the number of EIA applications increases then this situation can only get worse. Inevitably, there must be a requirement to provide better resources to local authorities for handling such projects.

### *Integration of EIA and other system of appraisal and risk assessment*

There are many systems within and related to the development control land use planning system in which assessments similar to EIA are required. These include the following:

- Integrated pollution control.
- Risk assessment for waste management licensing.
- Risk assessment for hazardous circumstances and hazardous installations.

<sup>72a</sup> The Draft Directive was (according to reports) being considered by the Parliament and has been substantially amended.

<sup>73</sup> See Proposals for a Good Practice Guide on Sustainability Appraisal of Regional Planning Guidance—DETR 1999.

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- “Appropriate assessments” under the Birds Directive (1979) and the Habitats Directive (1994).

The various suggestions have been made for the integration of EIA procedures with those other systems.<sup>74</sup>

According to a recent report,<sup>75</sup> the Commission is promising amendments of the 1997 Directive on environmental impact assessment projects and the 1996 Directive on integrated pollution prevention and control in a paper on “Shaping the New Europe” published in February. The Report speculates that it “may well be that an attempt to provide a unified procedure to satisfy the prior assessment requirements of both regimes is in the offing”. It may be that similar initiatives may follow in relation to some of the other parallel or related appraisal and assessment regimes so as to create a more holistic approach to the development control process.

#### *Monitoring the outcomes and accuracy of EIA*

Limited work has been done on the accuracy of the EIA process in predicting (and mitigating) environmental impacts of major projects.

Currently, there is no sanction against developers or local planning authorities which underestimate the environmental impacts of development. As the importance of sustainable development and the assessment procedures related to it gain in political importance, it is possible that legislation will be introduced to ensure that there is a sanction (or a remedy) in the event that the EIA process underestimates or fails to recognise particular environmental impacts. Examples of such action may include a right to review planning conditions so as to require additional mitigation measures or (in extreme cases) a right to revoke without compensation a planning permission so as to ensure that the unacceptable environmental impacts are reduced or avoided. The ROMP procedures may serve as a model for such future adjustments.

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<sup>74</sup> See “Overlaps” in the requirement for Environmental Assessment—A Report of the United Environmental Law Association and Institute of Environmental Assessment working party on Environmental Assessment and Integrated Pollution Control (March 29, 1993).

<sup>75</sup> See ENDS Report 301(February 2000) at p. 44.