EIA, SEA and AA, Present Position

Where are we now?

Robert McCracken QC

Appropriate assessments; Environmental impact assessments; EU law; Strategic environmental assessments

"Nel mezzo del cammin di nostra vita
Mi ritrovar per una selva oscura
Che la diritta vis era smarrita..." 1

Introduction: European Union context

It is easy to despair like Dante at the start of the Inferno—lost in a dark wood—and terrified by fierce and hungry beasts. He found his way with the guidance of Virgil and the inspiration of Beatrice. For common lawyers two characteristics shared by the legally required procedures popularly called environmental impact assessment ("EIA"), strategic environmental assessment ("SEA") and appropriate assessment ("AA") are a useful guide to an appreciation of where we are and whither we are likely to go.

The first common characteristic is that they are required by European Union legislation. The second is that they are procedural mechanisms which structure the assessment of relevant interventions in the natural or human environment. True it is that there are important differences. The Habitats Directive, unlike the EIA and SEA Directives, imposes substantive requirements on what may be done as a result of the assessment. The EIA and SEA Directives, unlike the Habitats Directive, specify how the assessment is to be carried out.

The EU origin of all three is fundamental to any sound legal analysis of the various conceptual and practical issues which face the entrepreneur, regulator or judge.

The question posed by the title of this article, of course, presupposes that our position has changed. The reality is that not only has our position changed, but also, and perhaps more importantly, our awareness as lawyers and legislators of what that position is, has greatly increased in recent years. Many English lawyers, whether be they judges or counsellors acting for national or local Government, industrial, construction or property entrepreneurs have been struggling in a mist of confusion.

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1 MA (Oxon), LARTPI, Visiting Fellow at the Centre for European Law King's College, London, and of Francis Taylor Building, Temple, London EC4Y 7BY. I am grateful to Charles George QC of my chambers, James Nell of 6 Pump Court and Michael Bedford of 2/3 Gray's Inn Square for alerting me to what I would otherwise have missed. Remaining omissions and errors are of course my own. This article is based on a paper presented to the Planning and Environmental Bar Association Conference and is a general introduction to the topic. It is not a suitable basis for specific decisions as to action; advice as to them is available in the conventional way.

2 In the middle of the journey of our life, came to myself within a dark wood where the straight way was lost..." Dante: Inferno: Canto 14 1


It has seemed to some that the EIA process is an obstacle race\(^5\) rather than an aid to efficient and inclusive decision making. This may be because for many the demands of participatory democracy are faint in comparison to the traditional comforts of technocratic paternalism. It is essential to appreciate that the substance of the EA directives is procedural and participatory. The EIA process is designed as Lord Steyn observed in *R. (on the application of Burckett) v Hammersmith and Fulham LBC (No. 1)*\(^6\) at [15] \(^7\):

"... to redress to some extent the imbalance in resources between promoters of major developments and those concerned, on behalf of individual or community interests, about the environmental effects of such projects."

The nature, extent and content of these rights can only be properly understood by appreciating that they derive from EU legislation. Certain important consequences follow. Many English lawyers have been slow to recognise this. The consequences include the following.

**Importance of high level principles**

The promotion of a high level of protection and improvement of the quality of the environment is identified by art.3 TFEU/2 EC\(^6\) as one of the fundamental tasks of the Community. Article 191 TFEU/174(2) EC requires that Community policy should be based inter alia on the precautionary preventive and polluter pays principles. These principles have been highly influential in the process of reasoning of the ECJ which has held that the EIA Directive has a:

"wide scope and very broad purpose."

Article 191(3) TFEU/174(3) EC however requires that account also be taken of:

- Available scientific and technical data;
- Differences between regions;
- Potential benefits and costs of action or inaction;
- Economic and social development.

It would therefore have been easy for the court to view the precautionary principle\(^8\) as little better than a vague policy aspiration, and certainly of no value in making hard decisions on concrete situations. That has not been its approach.

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\(^5\) The witty characterisation by Cannsath L.J. in *Jones v Mansfield* [2002] EWCA Civ 1408 of some challengers’ irredentist approach.

\(^6\) Lord Steyn went on to say that: "The Directive creates rights for individuals enforceable in the courts: World Wildlife Fund (WWF) v Autonome Province Bozen (C-435/97) [2000] 1 C.M.L.R. 149 [69]-[71]; Berkeley v Secretary of State for the Environment, Transport and the Regions (No. 1) [2001] 2 A.C. 603. There is an obligation on national courts to ensure that individual rights are fully and effectively protected: see the Berkeley case, at pp.668D (Lord Bingham of Cornhill) and 618B-H."

\(^7\) *R. (on the application of Burckett) v Hammersmith and Fulham LBC (No. 1)* [2002] UKHL 23.

\(^8\) The post Treaty of Lisbon 2007 (in force since December 2009) equivalents to the European Treaty are provided. The Treaty on European Union is abbreviated to TFEU. The Treaty on the Functioning of the Union is abbreviated to TFEU. The corresponding provisions are not always identical. For example in the English version, (unlike the equally authoritative German version, "all appropriate measures" has become "any appropriate measure").


The ECJ in interpreting EC environmental legislation has applied the principle, in giving a broad scope where more than one interpretation is feasible. Recent cases show that it has no reluctance in doing so. It has been willing to do so even where the effect has been to extend the literal meaning of the legislative words used.

"Likely" can mean "possible"

Thus in the Waddenzee case the court held that the meaning of the phrase in the Habitats Directive “likely to have significant effects” on a Special Area of Conservation was as a result of the precautionary principle to be understood as in the sense that such a likelihood existed if the possibility of harm could not be excluded on the basis of objective information. The consequence is that absent proof of the harmlessness of a project it must be subjective to an “appropriate assessment” to ascertain whether it will adversely affect the integrity of the site concerned. If it will, it may only go ahead if there are no alternatives and there are “imperative reasons of overriding public interest, including reasons of a social or economic nature” The application of the principle in this context is robust although its force is applied through procedural rather than substantive obligations. The importance of this broad definition of the concept of “likelihood” as the meaning of the phrase “likely significant effects” is also critical to the scope of the obligations under the EIA Directive 85/337.

A contrast with the approach in a purely domestic context

The approach of the English Court of Appeal in Duddridge displays much less enthusiasm for integrating the principle into English law in a purely domestic context. Three children claimed that the Secretary of State should have issued regulations restricting the electromagnetic field around electricity cables. The scientific evidence before the court was that there was a possible but not proven risk to health from such electromagnetic fields.

The Secretary of State had a duty under the Electricity Act 1989 to exercise his functions under the Act in the manner he considered best calculated inter alia to “...protect the public from dangers arising from the generation, transmission or supply of electricity”. His functions included the making of regulations he thought fit for “...eliminating or reducing the risks of personal injury...”. The children claimed that he should have approached his decision on the basis of the precautionary principle. He admitted that he had not.
The Divisional Court would have made an order requiring him to carry out at least a cost benefit analysis if he were under any obligation to apply the principle. But both the Divisional Court and the Court of Appeal rejected the idea that the principle was a requirement for administrative decision making or a principle which should influence judicial reasoning.

**Broad drafting style: purposive construction**

The drafting style of EU legislation is different from that of C20 Parliamentary draftsmen. There is no vain attempt comprehensively to cover every conceivable eventuality. The style is succinct, accessible and efficient. It calls, however, for a purposive approach from readers. The Preamble can be critical. For example the phrase “major effect on the environment” only appears in the Preamble. Yet the use of the word “major” there establishes the register for the term “significant” in the body of the Directive where its presence in the phrase “significant effects on the environment” is a key element of the test for the activation of the Directive.

A recent Court of Appeal decision *R. (on the application of Morge) v Hampshire CC* illustrates the importance of a purposive approach focussing not only on the substance of legislation but also preambles. It demonstrates that such an approach does not always favour the champions of the environment. The Court of Appeal held, inter alia, that the prohibition in art.12(1)(b) of the Habitats Directive on disturbance of species was limited to disturbance which affected the conservation status of the population.

**Nature of Directives**

The combined effect of arts 4(3) TEU/10 EC and 288 TFEU/249 EC is that national and local government and other emanations of the UK Member State must ensure the results required by the EIA and SEA Directives. English transposing legislation must so far as possible be interpreted in accordance with the canon of “convergent construction” (to use the felicitous phrase coined by Sedley L.J. in *R. v Durham CC* Ex p. Huddleston). Insofar as English legislation cannot be so construed it must be disappplied.

Both the United Kingdom and the European Community have ratified the Aarhus Convention which applies to Greater Europe. It is therefore necessary to interpret the EIA and SEA Directives so as to be convergent with it if possible. If not there is an argument that the Convention may be directly effective within the United Kingdom because of the effect of art.300(7) EC/216(2) TFEU as applied by the ECJ in *Syndicat Professionnel Coordination des Pecheurs de l’Etang de Berre et de la Region v Electricite de*
France (EDF). The Court of Appeal has however accepted in Garner v Elmbridge DC that art.10a of the EIA Directive, as amended to transpose in part the Aarhus Convention, is directly effective and that applications for protective costs orders in EIA cases must be made on the basis that costs must not on a largely objective assessment from the perspective of the “ordinary litigant” be prohibitively expensive.

Judicial restraint

The courts will only interfere with decisions of planning authorities on SEA, EIA or AA where they have made errors justiciable on administrative law principles (such as departing from the range of decisions open to a reasonable (rational) decision maker properly understanding and seeking to apply the relevant law (Wednesbury grounds)). Questions such as “What does this term in the regulation mean?” are questions of law—whereas “does this term as defined by the courts apply to the facts of this case?” is a question for the decision maker. The approach of judicial restraint is well illustrated in R. (on the application of Morgo) v Hampshire CC where both HD and EIA arguments were advanced. Some errors on the part of the planning authority were identified but the permission was not quashed because the errors could not have made any difference to the decision. A significant influence on the decision was that Natural England had no objection to the development.

Guidance

The wise course is always to return to the Directives. UK legislation is subordinate to it. European Commission guidance, (for example on the precautionary principle or derogations from Directive 85/337 or strict protection under the HD), is worth examining. It and UK Government guidance is however merely that. It may well be out of date. It is necessary to look at the facts of cases in the light of the wording of the Directives approached with the above considerations in mind. “If in doubt do not leave out. Do EIA or AA. Cover it.” It is necessary to remember a mistake at an early stage can lead to the quashing of a planning permission at a much later permission stage.

Screening: When is EIA necessary?

Annex I projects are relatively straightforward. The scope of the categories in both Annexes I and II must be approached in accordance with the principles set out above. It is Annex II projects which tend to present problems. The current version of the Directive includes the useful Annex III. This sets out considerations which enable a decision maker to decide whether a project within Annex II is likely to have significant environmental effects and therefore must be subject to the procedures of the Directive. Thresholds, as in the English Regulations, are in principle acceptable (art.4(2)(b)). A change of circumstance may justify, or require, a reconsideration of a screening opinion or direction.

What does “likely” mean? What degree of probability is needed? The English word suggests more than 50 per cent probability. So SEE would not be likely even if there was a 49/100 chance of SEE. This would make no sense. It would not be consistent with the principles set out above. The ECJ in the context of the requirement for an “appropriate assessment” under the Habitats Directive held that it means no more than

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27 Garner v Elmbridge DC [2010] EWCA Civ 1006 at [32] and [46].
28 R. (on the application of Goodman) v Lewisham LBC (the “Big Yellow Case”) [2003] EWCA Civ 140.
30 e.g. Circular 2/99 is now long out of date. It has been supplemented, but not comprehensively updated, by letters from the Government to chief planning officers.
31 R. (on the application of Buckett) v Hammersmith and Fulham LBC (No.1) [2002] UKHL 23.
32 Magee v Secretary of State for Communities and Local Government (unrep July 28, 2010) HH Judge Robinson sitting as a DJHC.

that the relevant effects cannot be ruled out. The judgment expressly states that the test in 85/337/EEC is the same [42]. So “likely” means “possible”. This was not always appreciated by English courts. The observations of Richards J. in Jones v Mansfield were inconsistent with the ECJ decision. The Court of Appeal has now acknowledged it in R. (on the application of Morge) v Hampshire CC where at [80] it acknowledges that “real risk and not probability” is the test.

An even broader approach from Aarhus?

It is only those projects which are listed in Annexes I and II which can be subject to EIA. Or is it? The Aarhus Convention does not have an Annex II. It requires EIA for all projects not within Annex I which are likely to have significant environmental effects (Aarhus art.6(1)(b)). The ECJ has treated the list of processes in the Waste Framework Directive as in effect including a category of all processes not otherwise listed. Syndicat Professionnel Coordination des Pecheurs de l’Etang de Berre et de la Region v Electricite de France (EDF) suggests the possibility of an even further extension of the scope of the EIA Directive.

Can mitigation measures (“MM”) make EIA unnecessary?

One of the most difficult questions is the extent to which mitigation measures, such as conditions proposed by developers, are relevant to the decision as to whether a project is likely to have SEE. Is it the net post mitigation effects that are relevant? The arguments for and against are obvious. For: it’s a waste of time to subject to the expensive procedures of the Directive a project in respect of which straightforward, standard conditions can remove the possibility of SEE. Against: that assumption is to decide in advance what the assessment would decide and to deprive the public of their opportunity to contribute to the decision as to the adequacy and effectiveness of the measures. The Court of Appeal has struggled with this question. It accepts that mitigation measures do not have to be ignored. But it has been unable to give clear guidance as to how to approach the question of whether they should be.

Various tests have been proposed, particularly in Bellway URS v Gillespie. Are the nature, availability and effectiveness of the MM well established? This is unlikely if the proposals are complex. Will the MM themselves have SEE? Are the MM modest in scope, plainly and easily achievable? Complexity and controversy not determinative but are relevant. “Standardness” of condition is not decisive. But the public must have their right to express views on the MM. Do the proposed MM leave uncertainty as to the favourable implementation, i.e. without SEE?

A strict approach might be to say that mitigation measures are irrelevant unless (1) they are certain to be taken and (2) they are certain to work.

It is easy to feel confused. A purposive approach might be as follows. Would an open minded adviser to the competent authority or member of the public concerned about the potential SEE want the systematic assembly of the EIA data to judge how effective the proposed MM would be? If so EIA is required. Ultimately it is a question of judgement to be approached both with a sense of proportion and a commitment to participatory decision making in accordance with the precautionary principle.

34 Jones v Mansfield at HC [51] quoted at Court of Appeal [20] endorsed by the Court of Appeal at [38].
36 Bellway URS v Gillespie [2003] EWCA Civ 400 per Laws L.J. at [46].
37 Bellway URS v Gillespie [2003] EWCA Civ 400 per Arden L.J. at [49].
38 Bellway URS v Gillespie [2003] EWCA Civ 400 per Pill L.J. at [37].
39 Bellway URS v Gillespie [2003] EWCA Civ 400 per Pill L.J. at [26].
41 Pill L.J. in Carr v Brighton [2007] EWCA Civ 298 at [33]-[37].
The most recent view of the Court of Appeal was expressed in Trinity Term this year in R. (on the application of Morge) v Hampshire CC where it simply held at [81] that regard may be had to mitigation measures and that environmentally beneficial effects are irrelevant. The latter point, while appealing on a purposive approach, is inconsistent with the application of expressio unius exclusio alterius to the Directive and what the Court of Appeal had held in R. (on the application of Barker) v Bromley LBC. It probably needs at the least to be expanded by the observation that potentially adverse effects are relevant. The former point is potentially problematic and may be difficult to reconcile with a purposive approach.

What is a project?

EIA Is only required for “projects”. They are defined in art.1(2) so as to include both construction projects and interventions in the natural surroundings. But EIA examines the effects of completed projects when they are in use. What happens if their manner of operation changes after they have been completed? Can changes in manner of operation require EIA? The majority of the House of Lords in Edwards v Environment Agency thought not. But there was some doubt. Had the issue been decisive the question would have been referred to the ECJ. The Court of Appeal has recognised that it is not clear whether demolition comes within the definition (although effectively holding that once a building has been demolished no one has standing to bring proceedings to establish the point).

Modifications

The English Regulations and Circular Guidance 2/99 held that where modifications were proposed to a project the thresholds of sch.2 of the Regulations applied to the additional rather than the cumulative size of the project. That was not consistent with the approach adopted by the ECJ in cases such as Aannamaersbedrijf PK Kraaijveld BV v Gedempteere Staten van Zuid-Holland, Abraham v Region Wallonne, or Ecologistes en aсcion-CODA v Ayuntamiento de Madrid. The High Court recognised this in R. (on the application of Baker) v Bath and North East Somerset DC and held that the screening process must assess against the thresholds the cumulative size of the project. The ECJ also held in Madrid that the external as well as direct effects of a road refurbishment scheme were relevant. The Court of Appeal recently took a broad view of an attempt to separate for assessment purposes a freight distribution centre and airport works required by a s.106 TCPA agreement.

Reasons for no EIA?

Must reasons be given for a decision not to subject a project to EIA before giving development consent i.e. granting planning permission? There is no general duty to give reasons for administrative decisions in England even though those decisions are in principle subject to judicial review. Such a duty is sometimes seen as the Holy Grail of true believers in public law. The absence of such a duty presents obvious problems.

42 R. (on the application of Barker) v Bromley LBC [2001] EWCA Civ 1766.
44 Edwards v Environment Agency [2008] UKHL 22 at [82]–[83].
45 England v LB Tower Hamlets [2006] EWCA Civ 1744 at [8] and [9].
46 Cf. the rejected argument in Jemimov v Baker [1972] Q.B. 52 that a landlady could not be committed to prison for contempt of court in disobeying an order not to harass a tenant or her cat because she had killed the cat.
47 The lawfulness of which was affirmed in Horner v Lancashire CC [2007] EWCA Civ 784.
48 Cross boundary elements must be cumulative for screening Umwelteinwirkung von Karnten v Karntner Landesregierung (C-205/08) [2010] 2 C.M.L.R.
for those unhappy with decisions who are considering the hazardous process of Judicial Review with its unpredictably high costs. EC law tends towards a general duty to require reasons for decisions affecting people’s rights. In *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* the ECJ has held that reasons for a decision not to require an EIA or sufficient material to understand why the decision was reached must be available on request.

**Scoping: What should EIA cover?**

This is a matter of judgement. There is a tendency for ES to be unnecessarily lengthy. The fundamental requirement is to provide in a systematic form the data necessary to *identify* as well as assess the significant environmental effects of the project (art.5(3)). Naturally information must be given about some non significant EE if the reader of the ES is to be able to identify the SEE. On the other hand it is only the SEE with which EIA is concerned. Here the use of the word “major” in the preamble should not be forgotten.

**Can assessment of certain effects and mitigation measures be deferred?**

This question must be distinguished from that which arises if for some reason the necessary assessment has not taken place at an early stage. Then the ECJ has held that the assessment must take place at the later stage. *R. (on the application of Barker) v Bromley LBC (Crystal Palace) and R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions*. New Regulations have at last been promulgated to deal with the problem of old mining permissions which the Court of Appeal held *should* be subject to EIA, but for which the English legislative scheme made no provision. These decisions do not affect the approach which should be taken at the earlier stage. The preamble requires assessment at the earliest possible stage, as the ECJ pointed out. The fundamental requirement is a prohibition on the grant of consent before assessment. The Directive does however expressly contemplate staged consent processes (art.5(1)(a)).

The Court of Appeal considered the question in *Smith v Secretary of State for the Environment, Transport and the Regions*. Its decision was made without the benefit of the *R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* and *R. (on the application of Barker) v Bromley LBC* decisions. Some parts of its reasoning remain good. There is nothing in EC law preventing the United Kingdom from requiring matters to be assessed at an early stage (provided that it does not prevent remediation of errors at a later stage). The preamble to the Directive suggests assessment at “the earliest possible stage”. Where outline permission is sought EIA should take place at that stage [25]. Questions as to SEE and mitigation measures should not be deferred [27]. The final details of a mitigation scheme, such as a landscaping scheme, can be deferred for later determination [28]. The rationale for this is that provided the general parameters have been clearly defined and conditioned there is no real risk of unexpected and unassessed SEE from such a project.

It is of course irrational to decide that a project will have no SEE and at the same time impose a condition for subsequent survey of a strictly protected species thought potentially to be present (as happened in the sometimes misunderstood case of *R. v Cornwall CC Ex p. Hardy*).

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54 *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* (C-75/08) [2010] E.C.R. 880.
What if something has gone wrong?

There is a duty to nullify the unlawful consequences of a breach of EC law.  The heart of the EIA Directive is the prohibition on the grant of a development consent without EIA where the project would have SEE.  The House of Lords held in Berkeley v Secretary of State for the Environment, Transport and the Regions (No. 1)\(^{54}\) that courts have no discretion not to quash a planning permission granted in breach of the Directive unless the breach is de minimis.  The HL demonstrated the operation of the de minimis exception in Edwards v Environment Agency.  It declined to quash a permission where events had moved on so that the original defect was of academic interest.  The same approach was taken in R. (on the application of Barker) v Bromley LBC where it did not quash the unlawfully approved reserved matters (where the permission had expired through effluxion of time).

Time for challenge runs from the grant of permission (rather than the occurrence of the error) (Burkett).  If more than three months have passed and the court is not willing to extend time to challenge the ECJ implied in R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions that permissions should be revoked.  This can, of course, involve substantial sums of compensation.  Planning authorities should be cautious therefore before invoking delay as a reason for resisting challenges to planning permission in these circumstances.

The ECJ held early this year in Uniplex (UK) Ltd v NHS Business Services Authority\(^{55}\) that the CPR requirement for promptitude cannot be interpreted as a limitation period.  The court held at [39] that certainty required that limitation periods must be sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations.  It endorsed at [42] Advocate General Kokott’s opinion at AG 69 that a limitation period the duration of which is placed at the discretion of the court is not predictable in its effects and fails to ensure effective transposition of a Directive’s requirements.  It did not hold, as some wrongly suppose, that time to seek quashing orders did not start to run until the potential challengers were actually aware of the decision—although it did hold that time for seeking other sorts of relief did not start until the aggrieved party knew of the decision.\(^{61}\)

Costs after Aarhus

There is a longstanding controversy about the adverse costs orders which are generally made against unsuccessful challengers.  The Sullivan Report and the Jackson Report have not yet led to a resolution of the challenge presented by art.9 of the Aarhus Convention.  It is a difficult question.  The fear of a large costs award has a chilling effect on even meritorious claims.  But local planning authorities are short of funds for worthwhile activities, so any failure to recover their costs when they are successful reduces the opportunities they have for other expenditure in the public interest.  The ECJ held in Commission of the European Communities v Ireland\(^{60}\) that the Irish approach to costs, which is broadly similar to that of England, did not comply with Directive 85/337 as amended to reflect the Aarhus Convention because a discretion not to award costs was insufficient to ensure that access to the courts was not unreasonably expensive.  Protective costs orders are available.  So far their effect is quite limited.

In Pallikaropoulos the SC costs officials adopted this approach:

\[18.\] .... we are presently minded to adopt the test of 'prohibitively expensive' which was propounded in the 2008 Sullivan Report:

\[\text{Francovich v Italy (C-6/90) [1991] E.C.R. I-5357 at [36].}\]
\[\text{Berkeley v Secretary of State for the Environment, Transport and the Regions (No. 1) [2001] 2 A.C. 603.}\]
\[\text{Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08) [2010] E.T.S.R. 1377.}\]
\[\text{It was not followed in a HCJ QBD permission hearing R. (on the application of Pamphisford Estates) v SSCLG which took place between the publication of the AG’s Opinion and the delivery of the Judgement of the ECJ. Permission was also refused for substantive reasons which made an appeal inappropriate.}\]
\[\text{Commission of the European Communities v Ireland (C-427/07) [2009] E.C.R. I-6277.}\]

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... costs, actual or risked, should be regarded as “prohibitively expensive” if they would reasonably prevent an “ordinary” member of the public (that is, “one who is neither very rich nor very poor, and would not be entitled to legal aid”) from embarking on the challenge falling within the terms of Aarhus.”

19. That seems to us to require us to start by making an objective assessment of what costs are reasonable costs. However, any allowance or disallowance of costs we make must be made in the light of all the circumstances. We presently take the view that we should also have regard to the following:

i) The financial resources of both parties.

ii) Their conduct in connection with the appeal.

iii) *The fact that the threat of an adverse costs order did not in fact prohibit the appeal*

iv) The fact that a request to waive security money was refused and security was in fact provided.

v) The amount raised and paid for the Appellant’s own costs.” (my emphasis)

*Retrospective EIA?*

What if EIA development is carried out without development consent? Can the position be regularised by the grant of retrospective permission? The ECJ has recently decided that the grant of retrospective planning permission for EIA development, save exceptionally and with safeguards to prevent circumvention of EC law, is not permitted under EC law. The ECJ so held in July 2008 in *Commission of the European Communities v Ireland.*63 Irish, like English, legislation generally requires EIA and grant of permission before EIA development is carried out [54]. However, both permit retrospective applications for EIA development [55]. Exceptionally retrospective regularisation may be permitted. But it must be subject to safeguards that prevent circumvention of the requirements of the Directive [57]. The Irish system, which is materially identical to the English system, may encourage disregard of the requirements of the Directive by developers. As the court observed:

“A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment*64. The first recital of the preamble to Directive 85/337 however states that it is *necessary* for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects:

It is undisputed that, in Ireland, the absence of an environmental impact assessment required by Directive 85/337 as amended can be remedied by obtaining a retention permission which makes it possible, in particular, to leave projects which were not properly authorised undisturbed, provided that the application for such a permission is made before the commencement of enforcement proceedings.

The consequence of that possibility, as indeed Ireland recognises, may be that the competent authorities do not take action to suspend or put an end to a project that is within the scope of Directive 85/337 as amended and is being carried out or has already been carried out with no regard to the

63 *Commission of the European Communities v Ireland* (C-215/06) [2008] E.C.R. I-4911 at [54]-[60].
64 i.e. by the competent authority/planning authority.
requirements relating to development consent and to an environmental impact assessment prior to issue of that development consent, and that they refrain from initiating the enforcement procedure provided for by the PDA, in relation to which Ireland points out that the powers are discretionary.

The inadequacy of the enforcement system set up by Ireland is accordingly demonstrated inasmuch as the existence of retention permission deprives it of any effectiveness, and that inadequacy is the direct consequence of the Member State’s failure to fulfil its obligations which was found in the course of consideration of the first two pleas in law.69

The Court of Appeal decision in R. (on the application of Prokopp) v London Underground Ltd 65 must therefore be approached with caution insofar as some of the reasoning of the court is inconsistent with this decision. The Court of Appeal held in Ardagh Glass Ltd v Chester City Council 66 that permission may in principle be granted retrospectively.

Enforcement by private action

One of the principal mechanisms by which the Community has sought to pursue its environmental policies is that of the Directive. Directives, of course, are binding as to the result which must be achieved, but leave to members states the choice of form and methods.67 This creates the potential for confusion, dilution and failures in transposition. One of the most effective means by which any legal system ensures compliance with its norms is by providing procedures whereby ordinary subjects adversely affected by, or otherwise concerned about, non compliance initiate proceedings and pursue legal redress.

The absence of such procedures for individual enforcement or limitations on them inevitably reduces the effectiveness of such a legal system. That immediately presents a problem for Directives. They are addressed to Member States. There was originally no requirement for them to be published in the OJ. Article 249 EC/288 TFEU is not drafted in a way which immediately suggests any possibility that citizens could directly invoke them in any legal proceedings. As is well known, the court adopted various reasons for holding that in some circumstances Directives may be invoked in national courts even though they have not been correctly transposed. These initially included the principle of effectiveness, the consequences for domestic law inherent in the binding nature of Directives and the implications of the power and duty of national courts to seek preliminary rulings in respect of directives.68

Later the court based its approach on the principle that Member States who failed to adopt directives could not rely on their own wrongdoing against subjects seeking to rely on the rights which they would have had had the Directive in question been correctly transposed. This is neatly expressed in the Latin aphorism Nemo auditur propriem turpitudinem allegans.69 The adoption of this rationale in preference to that of the principle of effectiveness naturally led to the general principle that a Directive could only have vertical but not horizontal direct effect. A subject could only invoke it against the state, not against another subject.70 Many problems in the enforcement of environmental protection directives might have been alleviated had the view of van Gerven and Jacob AAG prevailed that directives should be capable of horizontal direct effect.71

67 Article 249 EC/288 TFEU.
**Triangular direct effect**

The court has overcome two obstacles to the direct effect of environmental protection directives. First, some time ago, it sidestepped the problem that measures for the protection of the environment are designed to protect a common interest rather than create individual rights. Notwithstanding this in *Aannamaersbedrijf PK Kraaijveld BV v Gedeputeerde Staten van Zuid-Holland* and *World Wildlife Fund (WWF) v Autonome Provinz Bozen* the court held that the Environmental Assessment directive could be directly invoked in national courts. Secondly, it has recently in *R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* limited the scope of the restriction against horizontal direct effect by rejecting the UK Government’s view that so called “triangular” direct effect falls with it.

The problem of “triangular” direct effect arises in this way. Much environmental protection is achieved through a requirement that before potentially harmful activities are undertaken a consent is obtained. Where such a consent has been granted in breach of the requirements of a Directive proceedings seeking the annulment of the consent are likely, if successful, adversely to affect the interests of the body wishing to undertake the activity. Should proceedings by an affected or otherwise concerned individual or group be seen as an example of the admissible vertical enforcement of the Directive? Or should they be seen as the inadmissible horizontal enforcement of the Directive against the undertaker of the activity? This problem is particularly acute in the case of the EIA Directive. The foundation of the Directive is the transfer from the state and potential objectors to the promoter of development projects of the burden of investigation and assembly of relevant data for assessing the significance of the likely significant environmental effects.

The Court of Appeal in *R. v Durham CC Ex p. Huddleston* rejected the Government’s view that once planning permission had been granted the direct application of the EA Directive would infringe the rule against horizontal direct effect. It cited among other ECJ cases that of *Fratelli Costanzo SpA v Comune di Milano* where the award of a contract for the construction of a football stadium in Milan had been annulled because the tendering process had breached the requirements of an untransposed Directive. Under complicated legislation imposing environmental protection conditions on old quarrying consents applications which had not been determined within three months were deemed to be granted. The House of Lords had previously held that such applications were applications for development consents and subject to the EA Directive.

Mr Huddleston lived next to an old quarry and was worried about the effect of resumption of quarrying on his home. He challenged the consent deemed to be granted by reason of Durham CC’s failure to make a decision within three months because no environmental assessment had been carried out. The quarrying company and the Government claimed that as the Directive had not been properly transposed into English law he could not rely on it since he would in effect be seeking to deprived the quarrying company of a right which it had acquired. As Brooke L.J. said:

“I, an individual citizen, should have had a valuable opportunity to take part in an informed consultation in relation to an extraction project which will detrimentally affect my home and environment in which I live.”

The House of Lords refused leave to appeal and declined to make a reference to the ECJ.

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77 Article 5(1).
Thereafter somewhat uncharacteristically the Government agreed to a reference to the ECJ at first instance in another quarrying case, R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions,\(^{81}\) hoping perhaps to persuade the ECJ to reverse the effect of R. v Durham CC Ex p. Huddleston. Mrs Wells lived next to Conyghar Quarry. Neither the mineral planning authority nor the Secretary of State to whom the operator appealed considered the possible need for an environmental assessment pursuant to Directive 85/337 before determining the conditions under which the resumption of quarrying operations could take place. The court confirmed the House of Lords decision in R. v North Yorkshire Ex p. Brown\(^{82}\) that the imposition of new conditions on old mineral consents constituted the grant of a development consent which in principle could be subject to a requirement for environmental assessment.\(^{83}\)

It rejected the UK Government’s argument that the consequences to the operator of having to halt its quarrying operations as a result of the enforcement through direct effect of the Directive constituted inadmissible “inverse” direct effect in relation to the quarry owners. The court expressly\(^{84}\) dealt with and decisively rejected the argument based on the adverse consequence of the immediate interference with the ability to continue with quarrying operations. It did not however expressly deal with the effect on the operator of the transfer of the burden of investigating the environmental effects of the quarrying.\(^{85}\)

It made clear that where a consent procedure involved several stages the assessment should in principle be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment. It left open the question of whether there should be a multi-stage assessment process if the effects become apparent at different stages. This was perhaps implied.\(^{86}\) The court answered that question in the affirmative when it delivered its judgments in the Crystal Palace case R. (on the application of Barker) v Bromley LBC and Commission v United Kingdom.\(^{87}\) The English Court of Appeal\(^{88}\) had held that no environmental assessment could ever be required at the stage of consideration of matters reserved or deferred at the time of the grant of outline planning permission. The House of Lords referred the question.

The Court in R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions reaffirmed the breadth of the duty of loyal cooperation imposed by art.106 C (now art.4(3) TEU). It reaffirmed in this context the applicability of the duty to nullify the unlawful consequences of a breach of EC law establishes in Humblet v Belgium\(^{89}\) and Francovich v Italy.\(^{90}\) It held, somewhat ambiguously in an English context, that it extended to the revocation or suspension of a consent already granted to ensure that an assessment takes place “subject to the limits laid down by the principle of procedural autonomy of Member States”.\(^{91}\)

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\(^{81}\) R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions (C-201/02) [2004] E.C.R. I-723.


\(^{85}\) Lord Steyn’s observation in R. (on the application of Barker) v Hammersmith and Fulham LBC (No. 1) [2002] UKHL 23 that “The Directive seeks to redress to some extent the imbalance in resources between promoters of major developments and those concerned, on behalf of individual or community interests, about the environmental effects of such projects” ([15]) not only reflects an appreciation of the value of participatory democracy and the economic obstacles to its realisation in practice but also acknowledges implicitly that a burden is imposed by the Directive on promoters of projects as well as the state.

\(^{86}\) R. (on the application of Barker) v Hammersmith and Fulham LBC (No. 1) [2002] UKHL 23 at [52]-[54].

\(^{87}\) R. (on the application of Barker) v Bromley LBC (C-290/03) and R. (on the application of Barker) v Bromley LBC (C-290/03) [2006] Q.B. 764.

\(^{88}\) R. (on the application of Barker) v Bromley LBC [2001] EWCA Civ 1766.


\(^{90}\) Francovich v Italy (C-6/90) [1991] E.C.R. I 5357 at [36].

\(^{91}\) Francovich v Italy (C-6/90) [1991] E.C.R. I 5357 (65)-69.
It is not entirely clear whether the term “revoke” was used as a generic term encompassing annulment by judicial quashing as well as in the sense of revocation under English planning legislation by planning authorities (with obligation to pay compensation to the operator deprived of his permission). This leaves open the question in an English context of whether the duty to revoke exists where the aggrieved citizen seeking it could have, but failed to apply within three months, for the annulment/quashing of the consent but instead at a later stage seeks revocation. If it means that he can insist on revocation even though he did not challenge the consent then the approach of the High Court illustrated in case such as CPRE will have to be revisited.

The tantalising suggestion at [69] that compensation might be paid instead of any other form of relief is problematic. First, it is difficult to see how such compensation could be assessed. The EA Directive does not mandate any substantive outcome, but merely requires a particular inquisitive decision making process to be adopted. Secondly, it is hardly consistent with a broad approach to standing or an appreciation that the individual litigant is protecting a common interest in respect of challenges to consents granted in breach of the EA Directive. As Colomer AG observed in 176/03:

“Thus there emerges a right to enjoy an acceptable environment, not so much on the part of the individual as such, but as a member of a group, in which the individual shares common social interests.”

It suggests that only those whose material interests are potentially directly affected have standing. Who else could claim damages? It is however consistent with the thinking illustrated in Antonio Munoz y Cia SA v Frumar Ltd which requires that damages must be available between economic operators for breaches of regulations

**Strategic Environmental Assessment: Directive 2001/42**

Perhaps inevitably there are few decision about this Directive yet. The High Court in Northern Ireland in Seaport Investments Ltd's Application for Judicial Review, Re quashed a plan because there was no independent environmental regulator who could be consulted by the plan maker. The Court of Appeal of Northern Ireland has referred the matter to the ECJ.

The point to note is that consultation must be “early and effective” (art.6(2)). That means when all options are open (art.6(4) Aarhus).

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93 Which according to a decision of Richards J. as he then was is not a factor which planning authorities may take into account when deciding whether or not to exercise this power R. v Secretary of State Ex p. Anwick DC. It is difficult to think that this decision could ever survive scrutiny by a higher court, as it inevitably encourages in many cases either intellectually dishonest decision making or financial ruin.
96 Some of the language in English cases such as R. v Durham CC Ex p. Huddleston [2000] 1 W.L.R. 1484 and Berkeley v Secretary of State for the Environment, Transport and the Region (No.1) [2001] 2 A.C. 603 is of course consistent with this view. In the latter cases Lord Hoffmann observed that “The directly enforceable right of the citizen... is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inquisitive and democratic procedure prescribed by the Directive for the public, however misguided or wrong-headed its views may be...”,(615 G).
97 Commission of the European Communities v Council of the European Union (C-176/03) [2006] All E.R. (EC) 1 Opinion [67].
98 Antonio Munoz y Cia SA v Frumar Ltd (C253/00) [2003] Ch. 328.
Appropriate assessment under the Habitats Directive 92/43

The complicated transposing regulations of 1994,\(^{100}\) which ran to more than 50 pages of typescript, came into force late.\(^{101}\) That was the least of their vices. Fundamental failures of transposition were still being defended by the UK Government at the hearing of Commission of the European Communities v United Kingdom\(^{102}\) almost 13 years after the Directive had been enacted. They have now been replaced by Conservation of Habitats and Species Regulations 2010.\(^{103}\)

The complexity of drafting made the 1994 Regulations virtually impenetrable even to the professional lawyer. It permitted the Government to advance arguments as to their meaning which caused the Kokott AG to observe that the Government’s interpretation appeared to be at odds with that of the Court of Appeal.\(^{104}\)

The lamentable approach of the United Kingdom might have been unexamined by the ECJ had it not been for the indefatigable efforts of one active Union citizen Councillor Klaus Armstrong Braun whose role in alerting the Commission to the problems not only of transposition but also implementation and enforcement, ought not to be unrecorded. His efforts and achievements demonstrate the importance of participatory democracy rather than technocratic paternalism as a model for European decision making. It demonstrates the good sense of Rio Principle 10 of the Rio de Janeiro Declaration\(^{105}\) which acknowledged that:

> “environmental issues are best handled with the participation of all concerned citizens.”

Fairness requires an acknowledgement that the United Kingdom was successful in resisting one of the complaints made by the Commission in Commission of the European Communities v United Kingdom.\(^{106}\) Nine other complaints were however upheld. Three defects in the 1994 Regulations exposed in this case stand out—and illustrate how far we have now come.\(^{107}\)

The Directive seeks to establish a network of sites of European importance for nature conservation and biodiversity called Natura 2000. Member States must designate certain areas as Special Areas of Conservation. The saga of the United Kingdom’s dilatory approach to designation is not the subject of the present discussion; it is well illustrated in the Court of Appeal decision of R. (on the application of Brown) v Secretary of State for Transport\(^{108}\). It is the treatment and protection of such sites after designation which featured in the court judgment. Article 6(3) provides that:

> “Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to an appropriate assessment of its implication for the site in view of the site’s conservation objectives…”

Plans and projects may be approved only if either there is no risk to the integrity of the site or there are imperative reasons of overriding public interest ("IROPI") and no alternatives.\(^{109}\)

The year before the promulgation of the Directive the UK Parliament had enacted in s.26 of the Planning and Compensation Act 1991 a provision inserted into the Town and Country Planning act 1990 as s.54a\(^{107}\) which provided that:

\(^{100}\) Conservation (Natural Habitats etc) Regulations 1994 (SI 1994/2716).
\(^{101}\) October 30, 1994 some months after the 2 years allowed by art.23 from publication in the OJ 1 2067/7 on May 21, 1992.
\(^{102}\) Commission of the European Communities v United Kingdom (C-6/04) [2005] E.C.R. I-9017.
\(^{103}\) Conservation of Habitats and Species Regulations 2010 (SI 2010/490).
\(^{105}\) UN Doc A/CONF. 151.5 June 14, 1992.
\(^{107}\) Article 6(3) and (4) TEU.
\(^{108}\) Now s.38(6) of the Planning and Compulsory Purchase Act 2004.
"Where in making any determination under the planning Acts regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material circumstances indicate otherwise."

Decisions as to the grant of planning permission must have regard to the development plan. The importance of development plans to SAC’s in their area is therefore obvious.

It is therefore somewhat surprising that the UK Government sought to argue that although development plans were within the ambit of the phrase “plans and projects” they could not have a significant effect on protected sites since a specific planning permission was needed before development could take place.

Kokott AG made three telling observations. First, there was a danger that any appropriate assessment of the effects on the SAC made in the context of the statutory presumption in favour of the development plan “would no longer be open, but with the objective of putting the plan into effect.” Secondly, development plans can have indirect effects on protected sites. They can lead to developments which would preclude options which would otherwise have been alternative locations for developments damaging to the protected site. A housing development may be constructed so as to make impossible what would otherwise be a road route which avoided the protected site. Thirdly, the undertaking of the first stage of a multi stage project may effectively determine the form of the later stages. She sensibly opined that:

“...adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure.”

Not surprisingly the court rejected the United Kingdom’s submissions mildly observing that:

“...Section 54A TCPA 1990 .... may have considerable influence on development decisions...”

It is worth noting that subsequently the Court of Appeal held in Boggis v Natural England (the “Canute” case) that notification as a SSSI did not constitute the promulgation of a plan or initiation of a project.

Appropriate assessment was not therefore required. Such notification informed decisions as to plans and projects. By contrast Owen J. held in Akester v DEFRA that the introduction of a new type of ferry to the Isle of Wight was a project:

“In this context Mr Drabble sought to fall back on the argument that if Wightlink and its advisers were wrong in their view that the introduction of the W class ferries was not a project, then that was an error that could not be said to have been Wednesbury unreasonable. But if wrong in law, as I hold it to have been, the question of whether it was a reasonable error to have made is irrelevant. The challenge to the decision that the introduction of the ferries was not a project falling within the ambit of the Habitats Direction is not that it was Wednesbury unreasonable, but that it was based on an error of law.”

This illustrates well the point that if a specialist decision makes an error of law then it goes outside its legitimate discretion and its decision is liable to quashing.

The second ruling which is worth highlighting is the condemnation by the court of the derogation in the 1994 Regulations in respect of the unavoidable incidental effects of lawful operations. They were (but are no longer) excepted from the prohibition on killing of protected species and to the deterioration or
destruction of their breeding and resting places. That prohibition is required by arts12–16 of the Directive
which form a coherent entity. The exception was important as it was invoked to justify damage caused
by the implementation of development projects for which planning permission has been granted.

The court held that as Article specifies the precise circumstances in which a derogation is permissible
it must be interpreted restrictively. Those circumstances exist when two conditions are fulfilled. The first
is that there is no satisfactory alternative. The second is that the derogation is not harmful to the maintenance
of the populations of the species concerned at a favourable conservation status in their range.

The United Kingdom derogation was described by the court as “contrary to the spirit and purpose” of
the Directive. The United Kingdom argued that the wider derogation was necessary as it had chosen to
criminalise relevant harm and made damage to or deterioration of breeding places and resting sites an
offence regardless of fault. As Kokott AG pithily observed:

“It can remain undecided here whether Article 12(1)(d) in fact requires an offence regardless of fault.
Under no circumstances is transposition adequate if an offence which might be too broad is limited
by a derogation that is too broad.”

The third ruling which is worth highlighting is confirmation of the English courts’ eventual view that the
Directive applies outside territorial waters to the United Kingdom’s exclusive economic zone and the
continental shelf. What is remarkable is that as long ago as 1999 the High Court had acknowledged
that the United Kingdom ought to have transposed the Directive beyond territorial waters, but it had still
to promulgate regulations save in respect of the petroleum industry. The High Court decision was itself
remarkable in that it reversed its previous approach in which it had not even permitted Greenpeace to seek
judicial review on this point.

The Conservation of Habitats and Species Regulations 2010 have now sought to remedy these deficiencies
in implementation. There remain however the difficulties associated with the limited obligation on planning
authorities. Regulation 9(5) (ex 4(3) merely obliges them to “have regard to” the requirements of the HD
in so far as they may be affected by the development. The Court of Appeal in R. (on the application of Morge) v Hampshire CC held at [61] that this meant that planning permission could only be granted where
either that would be consistent with the strict protection required by the HD or it was “likely” that Natural
England would grant a licence. Thus the ultimate judgement as to matters such as the existence of imperative
reasons of overriding importance is left to Natural England. Opinions may differ as to the relative ability
of Natural England and planning authorities to make such decisions.

Form of appropriate assessment

No procedures are prescribed but Owen J. held in Akester v DEFRA observed that:

“It is submitted on behalf of the claimants that an appropriate assessment, or what purports to be an
appropriate assessment, will be open to challenge if—

a. it arrives at a conclusion that is Wednesbury unreasonable,
b. its conclusion is based on a partial (in both senses of the word) assessment of the evidence,
c. the process is unfair in the sense that the decision maker has evidenced bias or a commercial
incentive (a fortiori imperative) to reach a particular conclusion,

116 Commission of the European Communities v United Kingdom (C-6/04) [2005] E.C.R. I-9017 at [111]-[113].
117 Commission of the European Communities v United Kingdom (C-6/04) [2005] E.C.R. I-9017 Opinion [120].
118 Commission of the European Communities v United Kingdom (C-6/04) [2005] E.C.R. I-9017 at [115]-[119
The defendants do not, and could not, take issue with those propositions."

Conclusions

We have come a long way from the time when assessment of the effects of a development plan or project on important habitats or the general environment was optional. The courts have moved from a reluctance to engage with EU law and an extreme deference to specialist decision makers. There remain problems of transposition, interpretation and implementation. Affordable access to justice continues to be a great challenge. The new decision making process for nationally significant infrastructure projects is likely to increase the focus on SEA, EIA and AA.

Wise economic operators no longer regard compliance with EU assessment law as a matter of indifference. Those who rejoice prematurely in the grant of a consent without adequate consideration of the authority’s duties under EU law know now that they may have occasion to utter Francesca’s lament:

"Nessun maggior dolore
Che ricordarsi del tempo felice
Nella miseria;..." 125

124 "There is no greater pain than to remember happiness in misery" Dante Inferno: Canto V:120. These words may be especially poignant in the context of s.112 Planning Act 2008 which broadly prohibits (rather than leaving it to the choice of the challenger) any challenge to decisions relating to nationally significant infrastructure projects (unless causing delay to the taking of a decision) until the eventual decision has been taken by the Infrastructure Planning Commission or Secretary of State.