People Over Wind: Implications for EIA

In Case C-323/17 People Over Wind v Coillte Teoranta, the CJEU gave an important judgment on the screening of development proposals for the purposes of the Habitats Directive. It found that measures intended to avoid or reduce the harmful effects of a plan or project on a European site should not be considered when determining (or screening) whether it should be subject to Appropriate Assessment (AA). Such measures should only be considered when undertaking an AA itself.

This finding is inconsistent with established practice and case law in the UK, such as R (Hart DC) v SSCLG [2008], which treated Habitats Regulations Assessment (HRA) screening in much the same way as Environmental Impact Assessment (EIA) screening – where the decision on if it was required was taken with consideration of proposed mitigation and avoidance measures that are well-established, easily achievable and not likely in themselves to result in significant environmental effects.

While the judgement directly concerns HRA and not EIA, there are instances where it will have practical implications for EIA practitioners and their clients, not to mention determining authorities. Interestingly, this is likely to be of more relevance to projects that are not subject to EIA than those that are.

By way of example, let us take a scheme for 200 residential units on a disused, brownfield site within one kilometre of a Special Protection Area (SPA).

Other than the fact the site is close to the SPA, it is relatively benign – containing no designated habitats or protected species, lying in Flood Zone 1, having low potential for soil or groundwater contamination, being well-screened by existing woodland that is to be retained, and being well-served by public transport.

In the EIA practitioner’s view, provided the scheme includes the provision of Suitable Alternative Natural Greenspace (SANG) to avoid recreational pressure on the nearby SPA, in line with established guidance from Natural England (NE), it is unlikely to result in significant environmental effects and is a suitable candidate to be ‘screened out’ of the need for EIA.

Before People Over Wind, the request for a screening opinion may well have been submitted relatively early in the design process, once the maximum parameters of the scheme were established (i.e. the maximum number of residential units was known, along with the maximum building heights and proposed area of the SANG). This would allow the EIA consultant to formally establish that, in the view of the determining authority, an Environmental Statement (ES) was not required to support the planning application well in advance of its submission, giving greater cost certainty to the client and streamlining the overall project programme.
Following People Over Wind, procedurally, the determining authority would not be able to give a ‘negative’ screening opinion – one that states that EIA is not required – before having first undertaken the AA. This is because the return of a negative screening opinion, essentially a finding that the development would not result in likely significant environmental effects, would presuppose the findings of the AA.

The AA itself would likely require additional information on the design of the SANG than would be required for EIA screening. This means either:

1) the detailed design of the SANG needs to be considered earlier in the design process than would otherwise have been the case, so that this information is available for the determining authority to undertake AA and EIA screening semi-concurrently; or

2) that the submission of the request for a screening opinion is delayed until closer to the application submission date.

In the case of 1), there may be a delay in receipt of the screening opinion because there are no prescribed timescales in undertaking AA. In the case of 2) there is a risk that the local authority disagrees with the view of the EIA consultant and returns a ‘positive’ screening opinion, potentially pushing out the project programme to allow for the submission of a request for a scoping opinion and the preparation of additional documentation to support the EIA than would otherwise have been required.

The full implications of People Over Wind are clearly still being considered by central Government, local authorities and NE – as evidenced by the explanatory note on paragraph 177 of the new National Planning Policy Framework – but EIA practitioners should be aware of the unintended consequences on the procedural crossover between HRA and EIA.

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