Legal Challenges and Mitigation

The 2017 EIA Regulations were borne from a European Commission drive to achieve effective EIA, harmonising approaches between Member States, bringing about efficiency and improving quality. Most EIA practitioners will now be familiar with the ‘not so new’ 2017 Regulations, but to date there has been limited proving of the legal grey areas which are typically settled by case law. This article examines key regulatory areas we should treat with caution, highlights value of actively managing risks of legal challenge and provides observations on the merit of pragmatic legal advice in the EIA process.

Judicial review (JR) is a challenge to the lawfulness of a decisions made by public authorities and if successful, can be damaging for projects, adding significant cost and delay. EIA developments have long been an easy target for JR which has generated voluminous case law. Case law has shaped and improved EIA practice over the years and clarified legal grey areas.

Screening is the most common area for legal challenge of the EIA process and has been the root cause of many permissions being quashed. This does not mean however, that EIA should be undertaken on a purely precautionary basis. Conversely, whilst it may be attractive for developers to avoid EIA, adopting an overly aggressive stance to screening and not acknowledging significant effects is not in a developer’s interests since this may undermine what would otherwise be a secure consent.

When it comes to whether an effect is ‘significant’ in JRs on screening, the Courts tend to adopt a “hands off” approach, leaving this decision to local authorities. Instead, JR risks in screening lie primarily where the authority makes an obvious error of process or demonstrates unreasonableness.

Clearly setting out regulatory process and requirements in the screening request can be helpful to minimise JR risk, but this is never infallible. It is also important to review decisions at the earliest opportunity for soundness. In doing so, it is useful to be reminded of recent case law which underlines that planning decision letters (and screening assessments) should be read fairly and in good faith. Helpfully, the Courts are likely to be dismissive of an unduly forensic and nit-picking reading of any decision.

To minimise JR risk, in addition to the minimum regulatory information requirements, requests for screening opinions should ideally be supported by technical evidence which is relevant to the case and provide sufficient information about the proposals to allow sound decision making. Screening opinion requests should also clearly present what mitigation features or measures are being relied upon to prevent what could otherwise have been significant adverse effects. It is advisable to adopt a ‘tried and tested’ principle to these measures to ensure there is sufficient confidence in their efficacy.
Where a negative screening opinion is secured, teams must ensure any mitigation measures relied upon are carried through to design or otherwise secured through planning permission to reduce JR risk.

The 2017 Regulations introduced new / amended procedures, aspects and topics which are as yet untested by case law. Further case law is surely only a matter of time, and whilst it is unnecessary to adopt a defensive approach to EIA to cover all angles (i.e. the kitchen sink approach), practitioners must be conversant with procedural risks and be confident enough to guide LPAs where appropriate. In addition to screening, the following as yet untested grey areas presented by the 2017 EIA Regulations should be treated with caution:

Scoping: ES being based on the scoping opinion and agreeing departures.

Competence: in undertaking the EIA and the LPA review.

Alternatives: defining reasonable alternatives and ensuring effects are compared.

Expanded scope: evolving approaches to ‘new’ topics.

Decisions: being up-to-date and sound in process and output
Cumulative effects assessment: approach to scheme selection.

Consultation: ensuring procedures and programmes are correctly adhered to.

Whilst much can be done by the EIA practitioner to reduce JR risks, involvement of legal representatives at key project decision stages can be more valuable than a review of the ES at the end of the process, particularly when dealing with high risk or complex projects. These areas will depend on the project circumstances, but may include screening, scoping, definition of assessment approaches (e.g. scenarios/cumulatives), site and development definition, mitigation / delivery strategies.

By adopting a proactive risk management approach throughout the EIA process, risks of legal challenge can be successfully managed and mitigated.

Quod, April 2019.

1 Kenyon, R (On the Application Of) v Wakefield Council & Ors [2018] EWHC 3485 (Admin) (18 December 2018)