Planning and EIA for Infrastructure: Taking Stock of Recent Developments

Dr DUNCAN LAURENCE

Consultant, Duncan Laurence Environmental Ltd, Coolnagee, Forth Mountain, Wexford, Ireland
(00 353 53 9147709 duncan@duncanlaurence.com)

Introduction

The process by which significant effects on the environment are assessed in relation to major development projects has been in place for over 20 years, being initiated when the original EU Directive on Environmental Impact Assessment (Directive 85/337) was published on 3 July 1985\(^1\). These procedures were significantly tightened by amendments which were required to enter into force in March 1999\(^2\) and supplemented by additional public participation-related requirements consequent to the Århus Convention in 2005\(^3\).

A key purpose of environmental impact assessment (EIA) under the Directive is to inform the competent authority of all relevant aspects of the development, of all its significant environmental effects and of the measures by which such effects are to be mitigated. An essential sub-component of this process is that statutory bodies with expertise and the public are allowed to participate.

Transposition of the EIA Directive proved troublesome with the result that, prior to the Planning and Development Act 2000 entering into force, the national legislation comprised an intricate set of interlocking statutory instruments. These followed each other in succession due to Ireland’s apparent failure to grasp the full scope and implications of the Directive\(^4\). Of this material, the Supreme Court rather acidly observed:\(^5\)

“Complex is merely the mildest term that can be applied. It is regrettable that rules of law intended to regulate processes in which individual members of the public are supposed to be able to take part cannot be written in a more accessible form”.

Fortunately for most forms of private and public development, the legislation became consolidated when the Planning and Development Act 2000 and the Planning and Development Regulations 2001 entered into force. However, the pleasure of unravelling the older legislation still awaits persons who are involved in applications for development consent which fall outside the planning legislation\(^6\).

This paper reviews the key aspects of the legislation and relevant case law governing the EIA process, with a particular focus on the environmental impact statement (EIS). As will be seen, the legislation has a very strong influence on the content and scope of an EIS. It should be emphasised at the outset that the following

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\(^4\) See Commission v Ireland, Case C-392/06, ECR [1999] I-05901

\(^5\) O’Connell v EPA [2003] 1 IR 530 at 549

\(^6\) In this context Sections 176(3) and 177(2) of the Planning and Development Act should be noted
discussion about this content concentrates on the legal requirements. Accordingly, this account does not extend to wider issues about good practice in EIS compilation. As will be seen, the legislation sets a minimum – and sometimes rather low – standard for what is legally allowable. In respect of whether an EIS is adequate for the purpose of obtaining development consent for a major project, it needs to be appreciated that there is a significant difference between the level of information that is legally required and that which is acceptable for other reasons.

**The EIA Process: The Fundamentals**

Although this could have been written more accessibly, the fundamentals to the EIA process are set down in one paragraph at the start of the EIA Directive:

“Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by people who may be concerned by the project in question”.

Besides its reference to the EIA process being restricted to only “significant” effects on the environment – a point which will be returned to – this paragraph contains the kernel of the underlying philosophy of the EIA Directive. This is the need for the “prior assessment” of the impacts, that this assessment is to be based on information supplied by the developer and that this material can be “supplemented” by information provided by other statutory bodies and by the public. As such, what is being described here are the founding principles behind the EIA approach in EU law. As will be seen, these relatively simple concepts have extensively exercised developers, planning authorities and other statutory bodies, consultants, objectors and the courts (both national and European) ever since the Directive was adopted.

It also follows from this material that there is a fundamental difference between the EIA procedure and the EIS. The EIA is the assessment process as a whole, while the EIS is the statement that was written by the developer and submitted as a start to the process. This is well explained by Lord Hoffmann in Berkeley8, who also confirms the public nature of this procedure:

“The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is that … 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 Directive⁹…”

“The directly enforceable right of the citizen which is accorded by the Directive 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 inclusive and democratic procedures 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 terms of Irish case law, the role of the EIS in the EIA process is nicely described in Klohn v an Bord Pleanála10, where Mr Justice McMahon observes:

“Although the EIS is intended to be comprehensive, it is rarely definitive. As the first document in the investigation process, it is, at most, the point of departure in an ongoing process. It is intended to launch a process which will attract comment and submissions from other parties, including observations from those with entitlements to participate in the process. The intention is that, as a

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7 Directive 85/337, Recital 10
8 Berkeley v Secretary of State [2001] Env LR 16 at para 37/38. See also R v Rochdale MBC, ex p Tew [2000] Env LR 1 at 29
9 It should be noted that, since the Berkeley judgment, the scope of Article 6 is now somewhat more extensive due to Directive 2003/35 and the Århus Convention
It is also worth emphasising that the EIS is a document submitted by the developer, the terms of which are set when it is submitted. In contrast, the EIA is a process which is an ongoing exercise undertaken by the decision maker. A great deal can happen, and a great deal of information can be accumulated, between the lodging of the EIS by the developer and the final decision by the planning authority or by an Bord Pleanála.

Possibly because the planning systems in both the UK and Ireland have facilitated a degree of public participation in decision-making for many years, it is all too easy to neglect the Directive’s emphasis on furthering this aspect. As will be seen, unless this dimension is acknowledged and accommodated within the consent procedure for EIA development, any affected decision may well open itself inadvertently to challenge in the courts.

**EIS Content: What the Legislation Requires**

Following the Directive, Paragraph 1 of Schedule 6 to the Planning and Development Regulations 2001-2009 sets down the key elements of an EIS. These are shown in Box 1, with these four items being required to be supplemented by a non-technical summary.

<table>
<thead>
<tr>
<th>Box 1 – Compulsory EIS Information</th>
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<tbody>
<tr>
<td>(a) A description of the proposed development comprising information on the site, design and size of the proposed development</td>
</tr>
<tr>
<td>(b) A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects</td>
</tr>
<tr>
<td>(c) The data required to identify and assess the main effects which the proposed development is likely to have on the environment</td>
</tr>
<tr>
<td>(d) An outline of the main alternatives studied by the developer and an indication of the main reasons for his or her choice, taking into account the effects on the environment</td>
</tr>
</tbody>
</table>

In any EIS, this information, as necessary, should be enlarged upon in accordance with the requirements of Article 94(b) and Paragraph 2 to Schedule 6 to the Planning and Development Regulations (see Box 2). However, this supplementary information must be subject to the constraints and context set down in Article 94(b) itself. The most important of these is that information to be contained in an EIS must be “relevant” to the characteristics or type of development and to the “environmental features” which are “likely” to be affected.

In addition, the information to be expected in an EIS is limited that that which may “reasonably be required” from the applicant.

Within all of this material, certain other key principles underlying the EIS and EIA process are apparent. As can be seen from the wording in Box 1, key phrases include an obligation to provide data only on the “main effects” the development is “likely” to have on the environment, to present mitigation measures only in relation to “significant” adverse effects and that only an “outline” of the “main alternatives” to the project is to be provided. Similarly, the wordings in Box 2 suggest that only the “main” characteristics of the production processes need be given, along with “an estimate” of the project’s expected residues and emissions. Likewise, the description of the aspects of the environment impinged upon by the development is constrained

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11 See also Atkinson v Secretary of State for Transport [2007] Env LR 5 at para 23.
12 See also O’Mahony v an Bord Pleanála, [2005] IEHC 39 at page 12.
13 All of this is compulsory information as required by Article 94(a) of the Planning and Development Regulations.
14 Article 94(c) of the Planning and Development Regulations
15 Planning and Development Regulations, Article 94(b)(i)
16 Planning and Development Regulations, Article 94(b)(ii)
to relate to only those elements which are “significantly affected” by it, while the effects themselves are limited to those which are both “likely” and “significant”.

All of these requirements establish limits on the nature and extent of the material that must be submitted in an EIS and considered within the EIA process. For example in Klohn v an Bord Pleanála, the requirements of the phrases requiring that an “outline of the main alternatives” be provided, along with “an indication of the main reasons for his or her choice”, were considered. Mr Justice McMahon observed that:

“One cannot deduce from such loose and forgiving language an obligation that is very specific in its demands”.

In respect of the content of an EIS, the observation of Mr Justice Sullivan in Rochdale MBC ex p Milne is also useful. He asked himself the following hypothetical question:

“If one asks the question “how much information about the site, design, size or scale of the development is required to fall within a ‘description of the development proposed’...?”; the answer must be: sufficient information to enable ‘the main’, or the ‘likely significant’ effects on the environment to be assessed … and the mitigation measures to be described ...”

Besides the constraints created by the legislation, there are also other practical reasons as to how far and detailed the EIA process and the EIS should be. As UK case of Blewett confirms, the material submitted must be relevant information, as otherwise:

“It would be of no advantage to anyone concerned with the development process – applicants, objectors or local authorities – if environmental statements were drafted on a purely “defensive basis”, mentioning every possible scrap of environmental information just in case someone might consider is significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the planning authority, since they would obscure the principal issues with a welter of detail.”

<table>
<thead>
<tr>
<th>Box 2 – Supplementary EIS Information</th>
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<tr>
<td>Further information, by way of explanation or amplification of the information referred to in … [Box 1], on the following matters:</td>
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</table>

(a) 
- (i) a description of the physical characteristics of the whole proposed development and the land-use requirements during the construction and operational phases;
- (ii) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;
- (iii) an estimate, by type and quantity, of expected residues and emissions (including water, air and soil pollution, noise, vibration, light, heat and radiation) resulting from the operation of the proposed development;

(b) A description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular:
- human beings, fauna and flora,
- soil, water, air, climatic factors and the landscape,

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17 Klohn v an Bord Pleanála [2008] 2 ILRM 435
18 Klohn v an Bord Pleanála [2008] 2 ILRM 435 at 450. See also McMahon J’s comments about the requirements on “interactions” at 451
19 Readers are reminded of the note at the start of this paper that the discussion here concentrates on what is legally allowable in relation to EIS content. There is obviously a significant difference between this minimum standard and what is acceptable for the purposes of obtaining development consent
20 R v Rochdale MBC, ex p Milne [2001] Env LR 22 at para 104
21 See R (Blewett) v Derbyshire County Council [2004] Env LR 29 at para 42
22 Planning and Development Regulations, Schedule 6, para 2. It is essential that this material is read in conjunction with Article 94(b) of those Regulations
23 Interestingly, in Klohn v An Bord Pleanála [2008] 2 ILRM 435 at 451, McMahon J notes that this requirement is, in the Directive, part of the EIA process (see Article 3) and is not strictly a requirement of the EIS.
| (c) | a description of the likely significant effects (including direct, indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative) of the proposed development on the environment resulting from: |
|     | - the existence of the proposed development, |
|     | - the use of natural resources, |
|     | - the emission of pollutants, the creation of nuisances and the elimination of waste, |
|     | and a description of the forecasting methods used to assess the effects on the environment; |
| (d) | an indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information. |

### The Project Description

As noted, the legislation both specifies the type of information about the development that is necessary and sets limits on how much is to be provided. In these respects, a key element of an EIS is the project description. The legislation demands that not only information is given about the site, design and size of the project (see Box 1), but that it covers a description of the physical characteristics of the “whole” proposed development and the land-use requirements during the construction and operational phases (see Box 2)\(^\text{24}\).

But, while the “whole” development needs to be described, this requirement is tempered by only a description of the “main” characteristics of the production processes being needed\(^\text{25}\).

As noted above, the key benchmark in relation to the adequacy of the project description is that it must be sufficient for its purpose. That purpose is to ensure that all of the main effects of the development are assessed and that meaningful mitigation measures are provided.

In this respect, there is a tendency for proponents of some projects to desire to provide as little detail as possible about the exact technological nature of what is being proposed. Leaving the project description sketchy has the perceived advantage of flexibility in relation to any later equipment procurement stage. Wind farms are a pertinent example, where the bidding process for access to the electricity grid may mean that a number of years lapse between development consent being issued and the project going ahead. Promoters of waste recovery facilities may require extreme flexibility about the choice of separation equipment and may not have selected either the equipment or even its supplier at the time of the planning application. Such issues become particularly acute in those public projects which, after development consent has been issued, will be subject to a design/build/operate procurement process. All of these commercially-driven requirements create a tension against the need that there is sufficient detail about the project for the EIA process to be meaningful.

While applications for outline planning permission for EIA development are outlawed in Ireland\(^\text{26}\), decisions by the UK courts on such proposals give some assistance about the minimum level of detail that is acceptable in a project description. They also provide a salutary warning about going too far with the minimalist approach. For example, planning permission was quashed for a 213 ha business park in *R v Rochdale MBC ex p Tew*\(^\text{27}\) on the grounds that the EIS was based on an “indicative” master plan of the site, which was illustrative in its content and purpose. A similar outcome awaited an outline planning permission for a motorway service station, the EIS of which was accompanied by illustrative drawings\(^\text{28}\), as well as a permission for a printing works where little information had been given about its design\(^\text{29}\).

\(^{24}\) Planning and Development Regulations, Sch 6, para 2(a)(i)
\(^{25}\) Planning and Development Regulations, Sch 6, para 2(a)(ii)
\(^{26}\) Planning and Development Regulations, Article 96. It may be that the UK will have to follow this principle: see *Commission v United Kingdom*, Case C-508/03 4 May 2006
\(^{27}\) [2000] Env LR 1
\(^{28}\) See *Elmbridge Borough Council v Secretary of State* [2002] Env LR 1
\(^{29}\) *R v Waveney DC ex p Bell* [2001] Env LR 24
Not only does this type of approach fail to provide adequate information on the “design and size” of the project as required by the EIA Directive, the UK judgments often return to a key point made earlier. This is that:

“… the description of the proposed development must be sufficient to enable the main effects which that development is likely to have on the environment to be identified and assessed, to enable the likely significant effects on such matters as flora, fauna, water, air and the landscape to be described, and to enable mitigation measures to be described where significant adverse effects are identified.”

In addition, given the emphasis the Directive makes on public participation in the EIA process, it is pretty obvious why such participation is stymied if the public is not given meaningful detail about the exact nature of what is being proposed.

These general principles do not, of course, imply that all details of the project are to be provided at the EIA stage. As noted, the benchmark is that enough detail must be given so that the likely “significant effects” of the development can assessed. The level of detail to be contained within the project description was subject to consideration in Murphy v Wicklow County Council. Mr Justice Kearns held that

“… the absence of a detailed design specification does not in any way invalidate or take from the EIS. No precedent or authority of any sort has been cited to suggest that an EIS must be prepared to the level of final design drawings.”

Moreover, the relevant UK judgments also appear to accept that the need for flexibility in some types of projects – industrial estates and business parks are good examples – should be accommodated within the EIA process. Subject to the necessity that it must allow all of the main or significant environmental effects to be documented, illustrative material can feature in a project description; but even then it is still essential that the impacts are assessed in relation to a range of non-hypothetical options. Such a process also can be founded on a worst-case approach, whereby an envelope of significant effects on the environment is provided.

**EIS Completeness and the Planning Authority’s Role**

A number of the extracts used earlier emphasise the public nature of the EIA process. This is a key concept, which also has a degree of influence on how the adequacy of an EIS is to be judged. Referring to the Advocate-General’s opinions in two earlier cases on the EIA Directive at the European Court of Justice, the UK decision of Hereford Waste Watchers v Hereford County Council points out that a significant purpose of the EIA procedure is to ensure that all relevant information about the environmental impacts of a project is included in order to further a public debate about a project’s merits prior to development consent being determined. It continues by stating:

“The emphasis therefore is on the need for a fully informed decision, the relevant information being provided in the first place by the developer, with further information resulting from the public consultation.”

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30 R v Rochdale MBC ex p Tew, [2000] Env LR 1 at 27
31 See R v Rochdale MBC ex p Tew, [2000] Env LR 1 at 29 and R v Rochdale MBC, ex p Milne [2001] Env LR 22 at para 113
32 [1999] IEHC 225 at page 45
33 See R v Rochdale MBC ex p Tew, [2000] Env LR 1 at 28 and 30
34 See R v Rochdale Metropolitan Borough Council, ex p Milne [2001] Env LR 22 at paras 120-129 and see also R (Kent) v First Secretary of State (2005) Env LR 30 at para 81, where a list of indicative waste types was considered acceptable as the basis of a risk assessment
35 For reasons concerning brevity, the term “planning authority” in the following discussion about the principles of the EIA process also embraces the role of an Bord Pleanála in respect of appeals and in determining applications for strategic infrastructure development
37 Hereford Waste Watchers Hereford CC [2005] Env LR 29 at para 15
38 Hereford Waste Watchers Hereford CC [2005] Env LR 29 at para 16
This approach is, perhaps not surprisingly, essentially similar to that described by Lord Hoffman in *Berkeley* and which was set out at the start of this paper. As will be seen, it is a theme that is closely intertwined with the other relevant issues which arise when an EIS has been found to be defective.

Under Article 108 of the Planning and Development Regulations, any EIS received by a planning authority has to be checked to ensure that it contains the compulsory information that is required by Article 94 and Schedule 6 to the Regulations. If it does not, the planning authority is required to ask that additional information be submitted. Within this process, the explicit limits set by the wording of Article 94 and Schedule 6 apply in relation to how apparent deficiencies in an EIS are to be dealt with. For example, the principles discussed above indicate that only the “significant” or “main” effects on the environment which are “likely” need be considered and, if necessary, addressed by mitigation. This means that a planning authority is only required to ask for additional information about non-trivial aspects of the project. Within this process, the authority has been granted a key role in determining which effects are and are not significant.

Accordingly, in the UK case of *Blewett*, while the health effects of a proposed landfill site were discussed only briefly in its EIS – via a reference to other published epidemiological studies – the court considered that the planning authority was entitled to take a view that a detailed health effect study was not required to be submitted as part of the statement. This was because, according to the EIS and the local authority’s own judgment, the impact on human health resultant from the proposed development was not “likely” to be a “significant effect”. Conclusions of this type will find additional sustenance when the statutory consultees to the EIA process do not raise an issue as being of particular concern.

In its initial consideration of the EIS, as well as later on immediately prior to taking any final decision, the planning authority has to consider whether the EIS adequately covers all significant impacts and, where appropriate, provides suitable mitigation measures. This is because:

a) the relevant legislation requires that specified material must be included within an EIS, and

b) by the end of the EIA process, the planning authority’s understanding must be sufficiently complete so that it is fully aware of all of the relevant issues and hence is able to make an informed decision on the acceptability of the development.

In general, the UK courts have ruled that it is up to the planning authority to determine the question of whether the material before it is sufficiently comprehensive for a decision on the application to be taken. The courts will not usually become involved in this matter. Mr Justice Harrison, in the UK case of *Kent v First Secretary of State*, reviews the case law about EIS content and then provides the following summation:

“The authorities show that, whilst the environmental statement must contain sufficient information to enable the decision maker to make an informed judgment as to whether the development is likely to have a significant effect on the environment, it is for the decision maker to decide whether the information contained in the document is sufficient to meet the definition of an environmental statement in Regulation 2 of the EIA Regulations, subject only to review on Wednesbury grounds, whilst also bearing in mind that the document does not have to contain information about all the effects, only the “main effects” or “the likely significant effects”. Furthermore, the judgment as to what

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39 Planning and Development Regulations, Article 108(2)
40 *R (Blewett) v Derbyshire County Council* [2004] Env LR 29 at para 44
41 *R (Kent) v First Secretary of State* ([2005] Env LR 30 at para 76
42 This reference reflects the general context within which judicial review proceedings take place. The key issue is that, in general, the courts will not interfere in the nature of a decision by a planning authority. The main exceptions to this general rule arise where a decision has been made without fully following the legislative requirements or when it is somehow so unreasonable that no reasonably-acting planning authority would have come to it (the so-called “Wednesbury principles”
is a "main effect" or a "likely significant effect" is one for the decision maker, not the court, subject to normal Wednesbury principles.\textsuperscript{43}

Besides confirming the primacy of the planning authority in the EIA process and that its evaluation of an EIS is only concerned with non-trivial environmental issues, a further key aspect of this quotation is the reference to the need for a planning authority to make an informed decision on whether significant environment effects are likely to occur. What a planning authority cannot do is to move on to the decision stage while hoping that some significant but unassessed issue associated with the development will not arise in practice. Similarly, it cannot opt out and rely on the fact that the matter in question will be caught by a statutory body such as the EPA later on in the licensing stage; nor can it decide that the gap can be plugged via a planning condition.

In these respects, the Hereford Waste Watchers judgment states that\textsuperscript{44}:

"The authorities make it clear, therefore, that if the planning authority consider that a process or activity will have significant environmental effects then the ES needs to include the detailed information … It cannot leave the matter to be covered by conditions at a later stage. Even if that might otherwise be a satisfactory way of dealing with the problem, it frustrates the democratic purpose of the consultation process. … [I]f the information is defective because it fails to deal with all significant environmental effects, even if it deals with some of them, then the ES will be inadequate and the consultation process will not reach to its full extent".

Possibly with this and other UK judgments in mind, the Department of the Environment’s Circular PD 2/07 unequivocally states that:

"… under no circumstances should planning authorities use compliance conditions to … complete an inadequate EIS … In any such case where a developer has not provided adequate information in respect of environmental or natural heritage impacts or has not supplied adequate information on the nature or impact of appropriate mitigating measures, the appropriate course for the planning authority is to require the developer to submit further information …".

Accordingly, this material collectively confirms that the planning authority must have the full information on the main effects or likely significant effects of a project. It follows that, if additional information is needed to establish the nature of those effects, this information must be obtained, either from the developer or from other sources.

This position is well illustrated by the UK case of Hardy\textsuperscript{45}. In this instance, the planning authority approved an application for EIA development despite two statutory consultees indicating that more information was needed in relation to the local ecology. As part of this process, the authority responded to the ecology issue by requiring that the additional information was submitted via a planning condition. This approach was held to be unlawful, primarily because uncertainties remained about a key and significant environmental effect of the proposal.

Having said that, there are clear limits on how far the Hardy principle goes in relation to responses from consultees who desire that additional information is submitted. Inevitably, there will always be scope for further scientific studies. Perhaps a key test is the cut-off in the legislation about whether the “main effects” associated with the proposal are or are not considered by the planning authority to be “likely”\textsuperscript{46}. And it seems that, in Hardy, a particular emphasis was placed on this issue due to uncertainties about the presence of species protected under the Habitats Directive\textsuperscript{47}. Having said that, this case is one of a number which indicate

\textsuperscript{43} See Klohn v an Bord Pleanála [2008] 2 ILRM 435 at 440, 445/6 & 448

\textsuperscript{44} Hereford Waste Watchers v Hereford CC [2005] Env LR 29 at paras 25/26

\textsuperscript{45} See R v Cornwall CC, ex p Hardy [2001] Env LR 473

\textsuperscript{46} See R v Rochdale MBC ex p Tew [2000] Env LR 1 at 27: “One is not seeking certainty as to the environmental effects of the project, which would be unattainable, one is merely seeking the specified information which will enable the likely significant effects to be assessed”

\textsuperscript{47} See R (PPG11 Ltd) v Dorset CC [2004] Env LR 5 at paras 37-42
that, if significant uncertainty arises about a main effect of a project, it should be resolved – for example via a further information request – prior to the decision on the development’s acceptability being made and certainly not via a condition of the consent for the actual development.

Moreover, if the EIS has been sent out for an external review and it is found by the reviewer to be deficient, it would seem necessary that the planning authority must become satisfied that all non-trivial deficiencies have been addressed – unless, of course, there is other evidence to cause it to take the view that the criticisms are somehow spurious

However, while a planning authority is required to ask for further information in such circumstances, this does not mean that every detail about the project be provided. As noted earlier, the EIA process contains cut-offs which ensure that a decision can be reached when enough information has been submitted. Accordingly, the principle that inadequacies in an EIS cannot be filled by conditions of a planning permission should not be taken too far. In particular, it does not preclude more detailed design- or mitigation-related material being required to be submitted by the actual planning conditions. In this respect, there is a clearly a substantial difference between a planning authority, on the one hand, leaving a significant un-plugged gap in an EIS where inadequate information has been given about an issue of significance and, on the other hand, requiring that further detail of the development or mitigation measures is to be provided by planning conditions.

Finally, it does not follow from this analysis that the only way a gap in an EIS can be plugged is via the applicant being required to provide further information. The information can be obtained from other sources, such as the statutory consultees, be generated by the planning authority itself or, conceivably, be provided by a submission from a third party. This point will be returned to later.

**Requests for further information**

As is the case with non-EIA planning applications, the procedure which enables a planning authority to require a developer to submit further information relating to EIA development is set down in Article 33 of the Planning and Development Regulations. A further information request must be dispatched to the applicant within eight weeks of the receipt of the application. But unlike the case with non-EIA applications, the scope of any second or subsequent further information request remains broad, perhaps reflecting the fact that the EIA consultation process may well draw new issues to the attention of the planning authority as its consideration of the application progresses.

When a further information request is being drafted, it seems necessary that those drafting it must have regard to both the role of the planning authority in the EIA process and the role of the request itself. The context to both of these elements has been set out above, but essentially most further information requests in relation to EIA development will be flagging the fact that some non-trivial aspect of the application is of concern. The analysis of the legislation and relevant case law above also seems to imply that, unless the concerns raised in the request are somehow assuaged, the local authority will need to have an extremely credible alternative justification for granting the application in such circumstances.

Accordingly, any further information request about deficiencies must be carefully worded. It must be confined to requiring the submission of something that can be reasonably submitted by the developer. Moreover, there is also an obvious need for the request to be comprehensively answered.

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48 An example might be where the reviewer patently seemed to misunderstand the legal framework for the production of an EIS or the statutory principles relating to its content.
49 See Blewett v Derbyshire County Council [2004] Env LR 29 at paras 55-66
50 See, for example, R v Rochdale MBC ex p Tew [2000] Env LR 1 at 29
51 Via its own in-house expertise (see Klohn v an Bord Pleanála [2008] 2 ILRM 435 at 440) or by commissioning a third party to provide a specialist report
52 See Planning and Development Regulations, Article 33(2)(b)
In these respects, it would seem that a further information request which related to the submission of unrealistic information may put both the developer and a planning authority in some difficulty. The fact that the information has been requested would suggest that the authority is uncertain about some aspect of the development which it considers may have a significant effect on the environment. Unless that request is answered adequately by the developer, an inadequate or non-existent reply would seem to cut across one of the key principles of the EIA process. This is that development consent should be issued only when adequate information on all aspects of a project’s significant effects and their mitigation is available.

A pertinent example of this issue might be a request which requires an applicant to furnish information on whether a development will or will not affect house prices. Given the other variables affecting the housing market, it is very difficult for an applicant to provide a definitive answer. However, if no answer is forthcoming – due to the applicant taking the not entirely unreasonable view that the request cannot be fulfilled adequately and that any response would be rather meaningless – it may be that the subsequent grant by the planning authority of development consent may invite an appeal or, at worst, legal challenge.

When a response to a further information request is received, the Planning and Development Regulations require the planning authority to consider its contents in the light of whether it contains “significant additional data, including information in relation to effects on the environment”. If it does do so, the existence of this material must be drawn to the attention of the public by the publication of a new newspaper notice and the erection of a revised site notice board. The statutory consultees must be sent this material and persons who made submissions or observations informed of its existence.

Given that the rationale behind most further information requests on EIA projects will be a planning authority’s concern about whether an EIS covers all that it should do, it would seem likely that most responses obtained from the applicant should trigger the above-mentioned process whereby the existence of the new information is notified to the public and to relevant statutory bodies. Unless some other non-EIA matter relating to the application is being clarified, it would seem that the only instance when this notification process is not necessary is when the developer has provided no “significant additional data, including information in relation to effects on the environment” in its response.

If an applicant’s response to a further information request relating to an EIA project has turned up nothing useful and the planning authority remains minded to approve the development, the position may become somewhat difficult. It would appear essential for the authority to consider very carefully what other data it can identify which would allay its original concerns which formed the rationale behind the request. If it cannot identify this material, then it may be rather questionable whether an EIA development can be approved in such circumstances. As has been discussed earlier, a key principle behind the EIA process is that a fully informed decision is made and that any decision to grant development consent is only taken when the full

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53 Given the high bar to access to judicial review in Ireland, whether such a challenge will get off the ground seems highly dependent on the significance of the information to the decision to grant planning permission.
54 Planning and Development Regulations, Article 35(1)
55 Planning and Development Regulations, Article 35(1)
56 In this respect, the words “significant additional data” should be noted. Accordingly, if in the meanwhile the planning authority has obtained the data from another source (eg from a consultee or by commissioning its own report), then the response to the further information request may not contain any additional data of significance: see Kinsella v Dundalk Town Council [2004] IEHC 373 at page 12 and Klohn v an Bord Pleanála [2008] 2 ILRM 435 at 453/4
57 In Kinsella v Dundalk Town Council [2004] IEHC 373 no significant information was received in relation to a further information request relating to an EIA development. The court was satisfied that what was sent in duplicated information in the application. It also appears that the planning authority had addressed a gap in the EIS via a report it commissioned from a planning consultant
58 If the further information request was necessary simply to ensure that the EIS complied fully with the requirements of the legislation, then it might be arguable that the response does not comprise “significant” additional data
information has been considered. Clearly, if the developer has not responded constructively to a further information request about a significant issue and there is no alternative information available from other sources, how can a planning authority state that it is satisfied that it has the full information to grant planning permission for an EIA development?

Whether a planning authority should always ask for additional information when defects in an EIS are encountered was considered in Kildare County Council v an Bord Pleanála. The context was an EIA application for a link road in Athy. Generally, the Board tends not to use deficiencies in an EIS as a reason for refusal – despite this appearing from time-to-time as a recommendation in its inspectors’ reports – but in this instance, EIS deficiency was given as one of three reasons. This was partly because the EIS was founded on a traffic study that dated from the 1970s and that only one, highly contentious, route was being promoted without any consideration of other alternatives.

Kildare County Council applied to the High Court to have the decision quashed, inter alia, for the reason that no request for further information had been received. In its consideration of this matter, the judgment confirmed that the Board has three options available to it on receipt of a defective EIS on a road scheme: reject the application as invalid at the outset as the EIS does not comply with the statutory requirements, require further information to be submitted or to refuse permission on the grounds that, while the statutory requirements are met, the EIS remains deficient. Whether a request for further information should issue is dependent on a number of factors which are essentially project-specific. As the “need” argument for the link road – and hence the consideration of alternatives – was central to many of the submissions received and also the oral hearing itself, it was felt that sufficient opportunity had been given to the County Council to provide whatever additional information it wished to.

Public Involvement in the EIA Process

Certain issues arise about the degree to which the public is entitled to participate in the EIA process, to view the EIS and other material, to comment on it, and so on. These are a function of Directive 83/337’s concept of the EIA process being a transparent one which is open to representations from all relevant viewpoints. Moreover, amendments have been made to the Directive as a consequence of the Århus Convention and the European Community’s adoption of its principles about the public’s entitlement to participate in environmental decision-making.

As amended, Article 6 of the EIA Directive requires that the public “shall be informed” of items such as the existence of the application, the range of decision permutations that are possible, the timeframes and the arrangements for public participation. In addition, the Directive also mandates that other specified information “is made available” to the public, including not only the EIS itself but other information which is relevant and which becomes available after the application has been submitted. These further the Directive’s notion that the public is entitled to be “given early and effective opportunities to participate” in decision-making on EIA projects, as well as being entitled to express comments and opinions “when all options are open to the competent authority” prior to the decision on development consent being taken.

A discussion of a key, albeit rather conceptual, issue about public involvement in the EIA process will follow later. At a more micro level, it should be observed that the content of Article 6 of the Directive requires planning authorities to exercise extreme care to ensure that all the relevant material on an EIA application is available on the public file. For example, it may be all too easy for a report to be passed directly to an officer dealing with the application and not be copied to the public file. This situation is particularly likely when a specialist report has been commissioned by the officer on behalf of the authority as an aid to his or her
determination of a planning application. Not only will its non-disclosure contravene the public participation elements of Article 6 to the Directive; the fact that developer remains unaware of the report’s existence might be viewed as a breach of fair procedures, particularly if no opportunity has been given for a response to be made about its contents. In these respects, whether the non-disclosure of a key item of EIA information might cause judicial review proceedings to succeed seems to be function of the significance of the information to the decision about a project.

In relation to the wider issue about the degree to which the public is to be allowed to engage in the EIA process, some uncertainty still seems to arise, mainly due to the vagueness of the EIA Directive. As has been shown in the extracts used earlier, it is clearly acknowledged in the UK judgments such as Hereford Waste Watchers and Kent that the Directive envisages that there is a fully informed public debate about an EIA project prior to development consent being issued. Not surprisingly, these cases are very much in line with the extract from Lord Hoffmann’s judgment in Berkeley which was used at the start of this paper. These all imply that the debate about an EIA project is to be founded on the public having access to all of the information relating to its non-trivial aspects. Clearly, if this view of the EIA process is correct, it follows that such a debate can only take place at a stage when all of the relevant information is before the planning authority.

This principle also appears to line up with the final element of Article 6 of the EIA Directive:

“Reasonable time-frames for the different phases [of the EIA process] shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in the environmental decision-making subject to the provisions of this Article.

In this respect, the words “prepare and participate effectively” should be noted.

The material cited above is certainly pointing to the need for the relevant information on an EIA project to be comprehensively available in a form which is publicly accessible. In addition, is it also implying that, once all of the required material is with the planning authority, should there be a suitable time period allowed for its public consumption?

Whether the EIA procedures of many member states – not only Ireland – actually achieve the aim of full public engagement is perhaps less clear. In the Planning and Development Regulations, the EIA process seems to have been conceived from the presumption that any additional information necessary will usually be obtained from the applicant via the further information request. If it is significant, its existence is then externally advertised in the manner set down in the Regulations. However, as described above, a planning authority may be faced with a situation where the developer declines to give the material or gives only a partial response. Moreover, the planning authority may have its own material and expertise to hand or may commission its own assessment from a third party. Vital material may also arise from the consultation process with other statutory bodies. But while all of this material must be present on the public file, its existence is not normally publicly advertised in the same way as information obtained from the applicant. Perhaps it should be? If it is not, then the fact that it is not advertised means – and this is the most significant point being made here – that there is no second opportunity for additional submissions or observations to be made on this material.

Again, this matter really goes back to what model the EIA process is to be founded upon: is it a system that ensures that only the planning authority has all of the relevant information or is it a system that requires something more?

In certain respects, this issue is not really a particularly new one, albeit that it does not seem to have exercised the courts up to now. According to some commentators, the Berkeley judgment went too far in stressing the degree to which the public is entitled to engage in the EIA process. If this is correct, it may

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65 See, for example, R v Milton Keynes Borough Council [2009] Env LR 4 at paras 10-18
66 Directive 85/337, Article 6(6)
suggest that this aspect of the Kent, Hereford Waste Watchers and other related UK decisions, which followed on from Berkeley, also exceed these tolerances.

Moreover, as EIA development decisions often involve an appeal, it could be argued that not only is all of the relevant material available at that stage, but that the appeal process is founded on a much wider level of access to it. For example, under Irish planning law, the parties are given an opportunity to both comment on the appeal material and to more extensively interact with it at any oral hearing stage. Having said that, many EIA projects are now defined as “strategic infrastructure development” and, as such, are not subject to the “traditional” dual-stage development consent process, with the application instead passing directly to an Bord Pleanála for determination. Inevitably, there is rather less public interaction in this single-stage strategic infrastructure approach, despite oral hearings being the norm for such applications.

Clearly, if the key focus of the EIA process is to ensure that the decision-making body has available all of the required material about a major project prior to a decision in being made, the role of the public in this process is rather more limited, being confined to drawing relevant material and concerns to the decision-maker’s attention. Moreover, as it relates to large commercial and public projects that are intended to provide a societal benefit, the EIA process cannot go on for ever. As the UK courts have indicated, it should not become an obstacle course for a developer: EIA is meant to be an aid to decision-making. Having said that, the procedures set down in the Planning and Development Regulations – which govern the ability of the public to interact with the full material before the decision is taken – do seem to create some tension in relation to Directive’s requirement about the public being allowed to “participate effectively” in the EIA process.

Some Conclusions

As will be apparent, the relatively simple concept of EIA under EU law has generated a mass of case law. Even from the extracts quoted above, it will be apparent that the legal principles being applied become rather repetitious, with numerous cases being decided in accordance with what are effectively a small number of common doctrines. The contrast between their limited range and the plethora of judgments is perhaps surprising, as it is might be assumed that the relevant issues will have become settled by judicial precedent by now. However, while there has been some significant progress in this respect, other matters remain unresolved. As set out above, perhaps one of these seems to lie at the heart of the EIA process: the degree to which the public is entitled to interact within EIA decision-making.

One key issue that does seem to have been settled relates to the tendency of objectors to proposals for EIA development to over-focus on the content of the EIS and its comprehensiveness. Often criticisms are raised about the statement’s apparent deficiencies as a rationale for asserting that the application is invalid and should be refused or, later on, as grounds to challenge the development’s planning permission. This is partly for the reason that both the Directive and Article 94 of the Planning and Development Regulations mandate that certain minimum information is to be present in every EIS. However, the above discussion has made clear that, provided that certain basics are covered, the decision on the adequacy of an EIS is primarily a matter for the planning authority to determine. Provided that the view taken is a reasonable and lawful one, the courts are reluctant to interfere.

In this respect, it has been emphasised above that the EIS is but one part of the wider EIA process. The original EIS submitted with the application is supplemented by the applicant’s reply to any further information request, from the responses of consultees, from material and expertise within the planning authority, from any reports commissioned by it from third parties, via submissions and observations, as well as by objections and the content of any oral hearing. In other words, subject to compliance with the legislation on basic EIS content, defects in the material forwarded by an applicant for EIA development can be rectified by a range of other means.

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67 See Planning and Development Act, Section 2(1) and elsewhere

68 See for example R v Rochdale MBC ex p Milne [2001] Env LR 22 at 135
The UK case of Blewett sums up the position about challenges to the content of an EIS. As alluded to earlier, a key element of this case, which was ultimately unsuccessful, was a challenge that a landfill EIS was incomplete and, as such, the planning permission for the development was unlawful. In this respect, the following observations of Mr Justice Sullivan should be noted by all persons who seek to challenge a project on the grounds of perceived inadequacies of its EIS69:

I have dealt with it [ie this ground] in some detail because it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements … and to contend that because the document did not contain all of the information required [by the relevant legislation] … it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of “full information”, but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The [EIA] process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the “environmental information” of which the environmental statement is but a part.”

This paper has also described some key aspects of the role of the planning authority in the EIA process. From the relevant judgments, a limited number of principles arise. These are nicely summarised in Hereford Waste Watchers70:

1. “The decision whether a process or activity has significant environmental effects is a matter for the judgment of the planning authority. In making that judgment it must have sufficient details of the nature of the development, of its impact on the environment and of any mitigating measures.

2. “Equally, it is for the planning authority to decide whether it has sufficient information to enable it to make the relevant judgment. It need not have all available material provided it is satisfied that it has sufficient to enable a clear decision to be reached.

3. “In making that determination, the planning authority can have regard to the mitigating measures provided that they are sufficiently specific, they are available and there is no real doubt about their effectiveness. However, the more sophisticated the mitigating measures and the more controversy there is about their efficacy, the more difficult it will be for the authority to reach a decision that the effects are not likely to be significant.

4. “If the authority is left uncertain as to the effects, so that it is not sure whether they may be significant or not, it should either seek further information from the developer before reaching a conclusion, or if an ES has already been provided it should require a supplement to the ES which provides the necessary data and information. It cannot seek to regulate any future potential difficulties merely by the imposition of conditions.

5. “The authority cannot dispense with the need for further information on the basis that it is not sure whether or not there are significant environmental effects, but that even if there are, other enforcement agencies will ensure that steps are taken to prevent improper pollution. However, it should assume that other agencies will act competently and it should not therefore anticipate problems or difficulties on the basis that those agencies may not do so.”71

Overall, it would seem that many of the fundamentals about the EIA process, and the role of the EIS within it, have now been firmed-up by case law. However, the need for a full and fair procedure involving the public requires all planning authorities – as well as the other public bodies charged with issuing development consent to EIA projects – to exercise care to ensure that the basic principles of the national and EU legislation are followed. This is a complex area and, given that EIA projects are usually associated with some controversy, genuine mistakes inevitably will be pounced upon by third parties.

69 R (Blewett) v Derbyshire County Council [2004] Env LR 29 at para 68
70 Hereford Waste Watchers v Hereford CC [2005] Env LR 29 at para 34
71 See also Atkinson v Secretary of State for Transport [2007] Env LR 5 at para 29.
Duncan Laurence is a self-employed consultant specialising in environmental policy and legislation relating to infrastructure. For the last nine years he has been retained as an adviser to the Cork and Dublin-based environmental and engineering consultancy, Fehily Timoney and Co Ltd.

This paper has attempted to cover a very complex area of environmental law in a short space. It reflects the author’s experience in the EIA process and also his understanding of the legislation and relevant case law. Comments and corrections are very much invited and welcomed. Please send them by email to duncan@duncanlaurence.com.

Disclaimer: this paper is intended to act as a helpful summary of the main elements of EIA process. It is not a substitute for legal advice and should not be used for that purpose. Readers wishing to explore the exact nature of the requirements are urged to consult the relevant provisions themselves, to discuss the requirements with their planning authority or the Department of the Environment, Heritage and Local Government and/or to obtain independent legal advice.