Legal context of Environmental Impact Assessment – a gentle introduction

Environmental Impact Assessment (EIA) law is daunting. There are lots of statutory procedures to follow, and an ever-growing number of court decisions. However, it's the detail which is hard – the structure is relatively straightforward. In this article planning lawyer, Neil Collar, provides an introduction to the legislative context of EIA.

Information Gathering Process

The important thing to appreciate is that EIA is an information-gathering process. It is bolted onto the usual consent decision-making processes.

For example, applications for planning permission determined in accordance with the provisions of the development plan unless material considerations indicate otherwise. For any/ all developments, the environmental effects are always a potential material (planning) consideration. If insufficient information is submitted on those effects, planning authorities have general powers to require the applicant to submit further information.

This approach to decision-making is the same for EIA developments; the difference is more detailed information requirements and procedures apply. That requires more time and work for developers (and also for the decision-maker and statutory consultees); hence their keenness to avoid EIA.

Objectors are just as keen for the project to go through EIA. In part that might arise from an erroneous perception that non-EIA development has a lesser status; whereas consent can be refused on grounds of environmental impact even if there is no EIA.

Permitted Development Rights

EIA law does change decision procedures where permitted development rights (PDR) would otherwise apply. Although PDR often apply to minor development such as porches and dormer windows in houses, there are also PDR for extensive infrastructure developments such as at airports.

Where a development has PDR, deemed planning permission is granted and no application for planning permission is required. However, if it is EIA development, PDR are excluded, and a planning application must be submitted. As such, where a proposed PDR development meets the definition

of a Schedule 2 Development then the planning authority should screen it before it progresses to confirm PDR can be used, or – where found to be EIA Development – a planning application would be required (further information on screening below).

That is why there was a legal challenge in 2024 to a decision by Glasgow City Council that EIA was not required for the proposed demolition of four residential 26-storey blocks at Wyndford Road, Maryhill. That legal challenge was unsuccessful, and the demolition was carried out under PDR.

Screening

Screening is the term used in EIA law to describe the process of identifying an EIA development, with the result that EIA is required.

There is a misconception that every large project will require EIA. Scale makes EIA more likely, but it is not determinative. For example, development on a 207Ha site for 98MW of solar and 100MW of battery storage did not require EIA.

Broadly speaking, EIA is only required where the development is likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

That significant effect is assumed for developments listed in Schedule 1 – EIA is required for every Schedule 1 development. For Schedule 2 developments, the consenting authority must decide if EIA is required by applying thresholds and criteria.

This process is not always straightforward, as some of the categories in the schedules are broad and vague, “e.g. urban development projects”; and the categories do not necessarily reflect modern development types or technologies.

This may seem daunting, but a judge recently pointed out that screening is not intended to be “an examination paper expected to contain a record of each and every issue and each and every conclusion”; another judge referred to it as “applying common sense”.

Salami-Slicing “The Project”

The salami-slicing rule is an example of a basic principle becoming daunting. Most of the salami-slicing claims have been rejected by the courts.

The rule’s objective is to avoid projects being split into component parts to avoid EIA. The legal principle is that a development should not be considered in isolation if it is an integral part of a more substantial development.

A rare example of a successful challenge was the "bridge to nowhere". Its purpose was to unlock sites to the east of a railway line for future housing development. After construction, the temporary

haul roads were removed and there were no connecting roads on either side. It should not therefore have been assessed as a standalone development.

It is important to understand and apply the broad principles. Inevitably a bridge or other infrastructure asset is linked to other developments, but that does not mean the wider development is contingent on that infrastructure. Perhaps inevitably, in a subsequent case, an objector challenged the treatment of a different bridge as a standalone development, but on that occasion details in relation to the role and function of the bridge meant that the court rejected the challenge.

Judicial Review

Part of the reason why EIA law is daunting is the perception that the risk of legal challenge is high. However, to borrow the language of EIA, the magnitude of the risk is significant but the likelihood of it occurring is low. In Scotland, we continue to see relatively few judicial review challenges.

Much of EIA consists of exercise of professional judgment, and the courts have made it clear they will not get involved unless the judgment is irrational or perverse.

Conclusion

EIA law can feel daunting. Hopefully that is offset by the gentle introduction in this article.

Further information on the National Planning Hub's work on Environmental Impact Assessment can be found here: Environmental Impact Assessment | Improvement Service.