Recent European Community Legislation Concerning the Environment

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ABSTRACT

This paper outlines certain current aspects of European law relating to the environment and the possible consequences for property developers, lenders of finance and property investors.

The property developer and those responsible for financing property development can no longer afford to ignore European environmental law. Aside from the moral and political issues involved, such ignorance may prove costly. The 1990 Government White Paper on the Environment notes that the newly privatised water industry in England and Wales will be spending £13.7bn to improve sewerage works and £1.8bn and £2.9bn to bring drinking water and bathing water respectively up to standard by the mid-1990s.

Article 25 of Ch. II (sub-s. VI) of the Single European Act 1986 amends the EEC Treaty of 1957 ('the EEC Treaty') by *inter alia* adding a new Art. 130R(2) which states:

> '2. Action by the Community relating to the environment shall be based on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.'

European Community Directive 85/337/EEC of 27th June, 1985, concerning the assessment of the effects of certain public and private projects on the environment (the 'Assessment Directive'), aims to ensure that planning permission will not be granted for certain projects unless the relevant authority has properly considered the environmental implications of the proposed project.

The Assessment Directive provides that member states introduce measures implementing its contents into their domestic law by 3rd July, 1988. The UK has implemented the Assessment Directive by way of the 'Town and Country Planning (Assessment of Environmental Effects) Regulations 1988' ('the 1988 Regulations').

However, implementing legislation should always be viewed in the context of the originating European Directive itself. Domestic member state law may only implement the requirements of a Directive, but the terms of the Directive itself will remain overriding should any conflict arise.

The overriding effect of Community law

in the UK is made clear in ss. 2 and 3 of the European Communities Act 1972 ('the 1972 Act').

Section 3(1) of the 1972 Act *inter alia* provides:

> '... any Community instrument, shall be treated as a question of law [ie, by the UK court] (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).'

Section 3 of the 1972 Act should be read in the context of Art. 5 of the EEC Treaty which provides:

> 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty resulting from action taken by the Institutions of the Community. They shall facilitate the achievement of the Community's tasks.
> 'They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

Article 1 of the Assessment Directive provides that it 'shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment'. A project is defined as 'the execution of construction works or other installations or schemes' and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. Under Art. 2 member states are under an obligation to 'adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects'.

Projects within Art. 2 are defined in Art. 4 which divides the type of projects subject to Art. 2 into two classes: those listed within Annex I, in respect of which an environmental assessment is compulsory before planning consent may be obtained, and those projects listed in Annex II, where the member states are under a duty to require the carrying out of an environmental assessment where they consider an assessment is required.

Projects listed under Annex I *inter alia* include the carrying out of material building works or other operations or the change of use of buildings or other land to provide any one or more of the following:

- crude oil refineries,
- thermal power stations,
- radio-active waste storage or final disposal installations,
- integrated cast iron steel works,
- asbestos processing and transformation works,
- motorways and express roads,
- railway lines and work relating to airports,
- trading ports and
- inland waterways.

Annex II likewise provides an extensive list of projects likely to require an environmental assessment. Of particular concern to those involved in property finance are those projects listed under the title of '*Infrastructure projects*'. This title *inter alia* covers industrial estate development projects, urban development projects, the construction of roads, harbours, oil installations and canalisation or flood relief work. Under the title of '*Other projects*' are included *inter alia* the construction of holiday villages, hotel complexes, waste treatment plants, as well as installations for the disposal of industrial and commercial waste (unless dealt with under Annex I).

Annex I and Annex II projects are dealt with under Sch. 1 and 2 respectively of the 1988 Regulations. The 1988 Regulations interpret the members states' discretion to require the carrying out of an environment

assessment in respect of Annex II projects by referring to Art. 1 of the Assessment Directive which states that the Assessment Directive is concerned with those projects 'likely to have significant effects on the environment'. However, if it is felt that the jurisprudence of the European Court of Justice and/or Community legislation sets the meaning of 'significant effects' too high, members states may still implement more restrictive environmental domestic legislation where they consider such legislation is so required. This is made clear in the recital as well as Art. 13 of the Assessment Directive which states, 'The provisions of this Directive shall not affect the right of member states to lay down stricter rules regarding scope and procedure when assessing environmental effects.'

Guidance on how the meaning of 'significant effects' will be interpreted by the Department of the Environment in the UK is provided by the 1988 Regulations which list those projects likely to require an environmental assessment.

Under the 1988 Regulations, industrial estate projects may require an environmental assessment where:

'(i) the site area of the estate is in excess of 20 ha; or
'(ii) there are significant numbers of dwellings in close proximity to the site of the proposed estate, eg more than 1,000 dwellings within 200 metres of the site boundaries.'

Urban development schemes other than purely housing schemes may require an environmental assessment where a proposed development is being considered on sites which have not previously been intensely developed where:

'(i) the site area of the scheme is more than 5 ha in an urbanised area; or
'(ii) there are significant numbers of dwellings in close proximity to the site of the proposed development eg more than 700 dwellings within 200 metres of the site boundaries; or
'(iii) the development would provide a total of more than 10,000 sq. metres (gross) of shops, offices or other commercial uses.'

The 1988 Regulations also suggest that *other infrastructure projects* (eg, a holiday village or hotel complex) may require an environmental assessment where the proposed development is to take place on a site in excess of 100 ha.

By virtue of s. 2(1) of the 1972 Act, the Assessment Directive is now part of United Kingdom law and there is thereby an obligation to abide by its terms. However, if it is alleged that a member state has failed to implement the terms of a Directive properly, enforcement measures are available at the Community level. Under Art. 169 of the EEC Treaty, proceedings may be brought by the Commission against any defaulting member state or by another member state against the defaulting state under Art. 170. A preliminary ruling from the European Court regarding the interpretation of the Assessment Directive may also be requested by domestic courts under Art. 177. Further litigious options remain under Art. 173, 175, 178 and 215(2) of the EEC Treaty.

Under Art. 173 of the EEC Treaty 'any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former'. Proceedings brought under this Article must be instituted within two months of publication of the relevant decision or notification to the Plaintiff or in the absence of notification within two months of the day on which it came to the knowledge of the Plaintiff. A successful action will result in the decision being declared void by the European Court of Justice under Art. 174 of the EEC Treaty.

Proceedings under Art. 175 allow action to be brought against the Council or Commission by a member state or other Community institution where the Commission has refused to 'act' and such refusal infringes the EEC Treaty. However, the scope for an individual or corporation to bring a private action under this Article is extremely limited.

Articles 178 and 215(2) empower the European Court of Justice to grant compensation as a result of damage arising from the non-contractual liability of the Community. These Articles would cover damage resulting from Community maladministration or in respect of liability under the English law of tort.

Of importance in the context of enforcement, at the domestic member state level, is the proposed draft Waste Liability Directive (89/C251/04) of 1st September, 1989, (the 'waste proposal') which aims to put into effect the 'polluter should pay' principle expounded in the 'European Community Policy and Action Programme on the Environment' (1987–1992) (87/C328/01).

Article 1 of the waste proposal states: '1. This Directive shall concern civil liability for damage and injury to the environment caused by waste generated in the course of an occupational activity, from the moment it arises'.

The waste proposal has been drafted on the basis that, in order to prevent environmental damage, it is necessary to ensure that the cost of the damage or injury to the environment caused by the waste is reflected in the cost of the goods or services that give rise to the waste; that 'the strict liability of the producer constitutes the best solution to the problem'; that 'the effective protection of the injured party requires that he should be able to claim full redress from each of the parties responsible for the damage or injury to the environment, irrespective of the establishment of the relative liabilities of the parties'; and that 'rules must be laid down at Community level for compensation for damage and injury to the environment caused by waste in the event that payment of full compensation is not possible'.

Waste is defined by reference to Art. 1 of Council Directive 75/442/EEC as being 'any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of the national law in force'.

The producer of waste, who under Art. 3 of the waste proposal is to be held strictly liable irrespective of fault, is defined as 'any natural legal person whose occupational activities produce waste and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste, until the moment when the *damage* or *injury to the environment* is caused'. *Damage* is defined in Art. 2 as meaning damage resulting from death or physical injury as well as damage to property. *Injury to the environment* will occur where there is 'a significant and persistent interference in the environment caused by a modification of the physical, chemical or biological conditions of water soil and/or air . . .'.

In certain cases importers of waste into the Community or those in control of waste at the time of an accident or who are responsible for its disposal also run the risk of being 'deemed to be the producer of waste' for the purposes of the proposal.

Bearing in mind some of the more extreme decisions which have on occasion characterised the American jurisprudential approach to civil waste liability under the Comprehensive Environmental Response Compensation and Liability Act (1980) (CERCLA) (under which liability arises, likewise irrespective of fault, when there is any 'release or threatened release of a hazardous substance'), the possible serious financial consequences of a person being 'deemed' to be a producer of waste should not be underestimated. If the more extreme American jurisprudential approach is followed by the European Court of Justice, a deemed pro-

ducer of waste could include financial institutions such as banks or pension funds who retain control or could have exercised control over the management of property by virtue of their loan facility documentation or leasing arrangements. Banks exercising their power of sale in the event of default, administrators, receivers or liquidators would need to be particularly careful.

When a damaging act occurs, the waste proposal *inter alia* provides that a Plaintiff would be entitled to take action to obtain the prohibition or cessation of the damaging act; claim reimbursement in respect of expenditure arising from damage prevention measures or in respect of compensation payments; and make further claims with regard to the restoration of the environment to its state immediately prior to the injury to the environment. There is provision for damage payments to be made on an indemnity basis with a limitation period of 30 years. Under Art. 4 public authorities may bring an action as Plaintiff as regards *injury to the environment*, as may common-interest groups where the law of the member state gives such groups a right of action. Common interest groups do not currently have such a right under existing UK law. As the Commission has introduced this measure by way of the qualified majority voting procedure under Art. 100A of the EEC Treaty, thereby preventing the measure being vetoed by any one member state, its adoption by the Council before the beginning of 1992 is likely.

Other recent environmental Community legislation which the reader should bear in mind includes, somewhat surprisingly, Directive 89/552/EEC of 3rd October, 1989 (to be implemented by 3rd October, 1991) concerning television broadcasting. This Directive *inter alia* provides that 'television advertising shall not... (e) encourage behaviour prejudicial to the protection of the environment'. Directive 90/313/EEC of 7th June, 1990, seeks to provide better access to information on the environment by ensuring 'freedom of access to, and the dissemination of, information on the environment held by public authorities...'. Under this Directive on freedom of access to information (to be implemented by 31st December, 1992), member states are under an obligation to make information available to any natural or legal person without that person having to prove a legal interest except in particular cases requiring confidentiality and/or matters dealing with international relations and national defence.

The Directive on freedom of access to information should be read together with Council Regulation 1210/90 of 7th May, 1990 (implementation date as yet undecided), which provides for the establishment of an European Environment Agency as well as a European environment information and observation network. This Regulation has among its objects the aim of collating, analysing and co-ordinating data and providing the Community and member states with the information necessary to implement sound environmental policies.

It is evident that the groundwork for a more effective European environmental legislative framework is being established, although it is still too early to assess how that framework will actually work in practice. However, the European Court of Justice has already indicated that it will take a firm line regarding Community environmental legislation. In the recent joined Cases 207 and 207/88, *Vessosso and Zanetti* (28th March, 1990) and Case 359/88, *Zanetti and Others*, the European Court of Justice on an Art. 177 EEC Treaty reference from an Italian magistrates' court, appears to broaden the meaning of *waste* under Art. 1 of Council Directive 75/442/EEC (see above) by stating that the term 'is not to be understood as excluding substances and objects which are capable of economic re-utilisation'. It is clear that a teleological (ie, purposive) approach to the interpretation of environmental legislation will be followed to ensure adequate and effective compliance with the law. Whether this means that the European Court of

Justice will interpret the Waste Liability Directive, as ultimately adopted by the Council, in a manner similar to the American jurisprudential approach to CERCLA remains to be seen. Nonetheless, there are many within the financial community, mindful of the American experience, who would like to see the current waste proposal amended by the provision of an appropriate lenders' exclusion clause, so as to prevent a liberal interpretation of 'deemed producer of waste' catching the unsuspecting lender or property investor.