

The year's hottest cases reviewed – Part 1

EIA, SEA, Waste, EU ETS

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This article covers case law since the June 2008 UKELA conference in the areas of:

- Environmental Impact Assessment (EIA)
- Strategic Environmental Assessment (SEA)
- Waste
- EU Emissions Trading Scheme (EU ETS)

Environmental Impact Assessment

I R (Mellor) v Secretary of State for Communities and Local Government

Case C–75/08 (2009) 18 EG 84 (CS)

This case was a reference from the Court of Appeal concerning the need for reasons for negative screening decisions under the EIA Directive, ie decisions that a project does not need to be the subject of an EIA. In *Mellor* the Secretary of State's negative screening decision was recorded in a letter dated 4 December 2006 as being that the proposed development of HMS Forest Moor (a former military site that has been put forward for various forms of wholly unpopular development since it ceased to be used for military purposes) would not be likely to have significant effect on the environment by virtue of factors such as its nature, size and location.

The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 schedule 2 paragraph 13 column 2 (the EIA Regulations) do *not* require reasons for a negative screening decision. In direct contrast, under reg 4(6) of the 1999 Regulations where a positive screening decision is given, ie that development is EIA development, there is an express duty to give a written statement giving precisely and clearly the full reasons for that conclusion. This would suggest that the drafter of the 1999 Regulations made a deliberate choice not to require the giving of reasons for negative, as opposed to positive, screening decisions under reg 4.

Moreover, there is not much in the EIA Directive itself that supports any requirement for reasons for negative screening decisions. Article 4 makes no reference to a need to provide reasons in determining whether EIA is required. This is in marked contrast with the wording at Article 9 of the EIA Directive relating to decisions to grant or refuse development consent. The wording here expressly requires the competent authority to make reasons for its decision

available to the public. Had it been the purpose and intention of the EIA Directive that competent authorities were required to make available to the public reasons why, in a specific case, EIA was not required, is it not reasonable to assume the wording would have been more explicit, and in line with that used in Article 9? Furthermore, Article 3(7) of the more recent Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive) expressly requires that reasons be given for not requiring an environmental assessment. The contrast with Article 4 of the EIA Directive could not be clearer.

So, on a legislative reading, and taking the English approach, there is, I would suggest, absolutely no basis at all in legislation for saying that there would be a requirement for reasons for negative screening decisions.

In *R v Secretary of State for the Environment, Transport and Regions ex parte Marson* [1998] Env LR 761 the Court of Appeal had held (in a permission judgment) that there was no duty to give reasons for a negative screening decision. However, two subsequent ECJ decisions, Case C–87/02 *Commission v Italy* and Case C–83/03 *Commission v Italy*, at least hinted at the possibility that there was a requirement to give reasons for a negative screening decision. In *R (on the application of Probyn) v First Secretary of State* [2005] EWHC 398 (Admin) Burton J remarked: 'it is plain that the drift of the European Courts – or, at any rate, that of those arguing before the European Court – is flowing in the other direction from *Marson*'.

The questions referred by the Court of Appeal in *Mellor* were:

1. Whether under Article 4 the EIA Directive Member States must make available to the public reasons for a negative screening decision?
2. If the answer to Question 1 is in the affirmative whether that requirement was satisfied by the content of the letter dated 4 December 2006 from the Secretary of State?
3. If the answer to Question 2 is in the negative, what is the extent of the requirement to give reasons in this context?

The ECJ answered those questions thus:

1. Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must

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be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that Directive to an environmental impact assessment, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.

2. If a determination of a Member State not to subject a project, falling within Annex II to Directive 85/337 as amended by Directive 2003/35, to an environmental impact assessment in accordance with Articles 5 to 10 of that Directive, states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information which the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.

Accordingly, in a rare victory for the UK in the ECJ, the effect of the judgment is that:

- there is no need for a negative screening decision itself to contain reasons
- but there is a duty to provide further information on the reasons for the decision if an interested person subsequently requests the same
- that request need not be met by a formal statement
- reasons, when given, can be very short.

The decision effectively upholds the correctness of the Court of Appeal's decision in *Marson*. The outcome of that case was recently the subject of infraction proceedings (Case C-495/08 *Commission v UK*) which proceedings it is assumed will now fail. The *Mellor* case is re-listed before the Court of Appeal in the autumn 2009.

II *Ardagh Glass Limited v Chester CC & Another* [2009] EWHC 745 (Admin) [2009] Env LR 34

This case is a further chapter in the history of the Quinn Glass works at Elton, near Chester. The Elton works are the largest container glass factory in Europe and have been producing glass since May 2005. The works do not benefit from planning permission. Quinn took a calculated risk to build without permission. In early 2007 the Secretary of State refused an application for retrospective planning permission which had been called in. The Elton works lie partly within the area of Chester City Council and partly within Ellesmere and Neston Borough Council (the Defendant Councils). Quinn made a further application for retrospective permission to the Defendant Councils in early 2008 accompanied by an EIA but this has yet to be

determined and is the subject of an Article 14 direction. The Elton works, which are presently unlawful development, will become immune from enforcement sometime in 2009 under the four-year rule (see section 171B of the Town and Country Planning Act (TCPA) 1990). The exact date on which immunity accrues is a matter of dispute.

Ardagh, a commercial rival of Quinn, brought judicial review proceedings seeking: (i) a mandatory order that the Defendant Councils take enforcement action on a precautionary basis in order to prevent immunity accruing; and (ii) an order prohibiting the grant of permission, alternatively a declaration that the grant of permission would be lawful. Ardagh argued that as the unlawful development was EIA development not subject to EIA before it was constructed: (i) EU law required that the Defendant Councils enforce; and (ii) the grant of retrospective planning permission was, following the ECJ's decision in Case-215/06 *Commission v Ireland* (which deals with something called 'retention permissions' in Ireland) prohibited by the EIA Directive.

The judge granted the mandatory order remarking that not to enforce and so allow immunity to accrue 'would be a betrayal by the planning authorities of their responsibilities and a disgrace upon the proper planning of this country'. He considered that it would be a breach of the EIA Directive if EIA development were granted without permission and the planning authorities stood by and did nothing (see further *R (Prokopp) v LUL* [2003] EWCA Civ 961 and also Case C-98/04 *Commission v UK*). However, he rejected the contention that the grant of retrospective permission for EIA development was prohibited by the EIA Directive. He considered that permission could be granted retrospectively consistently with the EIA Directive in *exceptional* circumstances so long as no advantage was gained by the developer in having unlawfully commenced the development without undertaking EIA. He noted that that was very close to the approach applied by the Secretary of State in refusing retrospective permission in 2007.

This is a very interesting case. The idea that enforcement action which is inherently discretionary can actually be required in a particular case is novel but here the facts were clear as to why that should happen. The case is I understand going further to the Court of Appeal. The glass works have already occupied the courts on numerous occasions and I am sure this is going to continue. The Court of Appeal is due to hear the case in February 2010.

III *R (Baker) v Bath and North East Somerset DC* [2009] EWHC 595 (Admin) [2009] Env LR 27

This case concerned a challenge to the grant of a number of permissions for a waste disposal facility that managed green waste through composting. The same site is also the subject of nuisance proceedings (see *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107). The main thrust of the challenge concerned a failure to carry out an EIA. As the grants of planning permission in issue were modifications/extensions to an already authorised

development it was argued that the further development did not cross the threshold contained in the EIA Regulations so that there was no need to screen (ie consider whether the permissions were likely to have significant effects) the further permissions for EIA. The threshold in the Regulations requires that in assessing whether a modification or extension exceeds the threshold one is required apply the threshold to the change or extension (and not to the development as changed or extended). The reason why this is important is that most of the thresholds are size thresholds and so the extent to which a threshold is going to be met is very much influenced by whether a threshold applies to the extended area which might be relatively small or the whole project as extended.

Collins J held, contrary to the arguments of the Secretary of State as intervener, that in this regard the EIA Regulations did not properly transpose the EIA Directive. The thresholds should not be applied by reference only to the modification/extension itself as opposed to the whole project as proposed to be modified/extended. The Secretary of State has not appealed the decision.

The consequence is, pending amendment of the EIA Regulations, that in applying the threshold for changes or extensions planning authorities should apply the thresholds to the development as changed or extended. The result is that if there is an existing development or permission which was itself over the threshold in schedule 2, any application for a change/extension of the same would also exceed the threshold and require screening. The impact is most likely to be felt in respect of very large developments where, having obtained permission, developers make an application which seems, even in a minor way, to amend the scheme. This is going to allow a whole string of cases to come in for even minor changes and it is going to give a whole new round of ways in which objectors will be able to challenge the further grants of permission. So it is a significant case and the implications will be felt, particularly in this difficult interim period where again we are going to have a difference between what the EIA Regulations say and the way the EIA Directive is actually being interpreted by the courts to mean.

IV In *Cooper v Attorney General* [2008] 3 CMLR 45, Plender J dismissed the first claim brought in the UK for damages pursuant to the ECJ's decision in Case C-224/01 *Köbler v Republik Österreich* [2003] ECR I-10239. *Köbler* is a very unusual type of jurisdiction. In that case the ECJ held that a Member State may be answerable in damages for failures by its courts of final instance to give effect to EC law, where the failure amounts to a sufficiently serious breach of EC law.

This case arises out of what are alleged to have been sufficiently serious/manifest errors of EC law by the Court of Appeal when dismissing judicial review proceedings commenced by Stephen Cooper and the other then trustees of the CPRE London Branch in October 1999 in respect of the Westfields development (see *R v London Borough of Hammersmith and Fulham* [2000] 2 CMLR 1021, [2000] Env LR 549 and [2000] Env LR 532).

Westfields is one of the largest shopping centres in Europe which, when it was consented back in the 1990s, was not required to be subject to environmental impact assessment.

In dismissing the claim for judicial review the Court of Appeal's reasoning was in part based on: (i) a finding that EIA could not be required at the reserved matters stage; and (ii) that the EIA Directive did not require the Council to revoke a permission if it was granted in breach of the EIA Directive. Both findings have in effect subsequently been overruled by the ECJ: see *R (Wells) v Secretary of State for Transport, Local Government and the Regions*, [2004] ECR I-723 on 7 January 2004; Case C-508/03 *Commission v UK* (Article 226 EC proceedings involving, inter alia, Westfields); C-590/03 *Barker* and the House of Lords' decision in *Barker* [2007] 1 AC 470.

As well as dismissing the judicial review in 2000 the Court of Appeal also awarded two sets of costs against the CPRE in favour of both the planning authority and the developer. Many years later, Mr Cooper brought a *Köbler* damages claim against the UK for recovery of these costs because the Court of Appeal had fundamentally misapplied European law. So although the Attorney General is the named defendant, the Attorney General is actually defending those various members of the Court of Appeal who reached those judgments in the CPRE case. So the question is, did the Court of Appeal get it fundamentally wrong?

Plender J concluded that the case fell far below the standard required to constitute a manifest infringement of the applicable law so as to give rise to a claim for damages. He said:

[a]ny contention that a court adjudicating at last instance can be said to have made a manifest error of Community law when its judgment is, in some respect, inconsistent with a later judgment of the ECJ is as misconceived as it is inconsistent with the judgment in *Köbler*. Community law is a system in the process of constant development. This is recognized in the many judgments of the ECJ that refer to the subsequent development of Community law applicable to this domain (see most recently Case C-375/05, *Erhard Geuting v Direktor der Landwirtschaftskammer Nordrhein-Westfalen für den Bereich Landwirtschaft*, 4th October 2007, § 18.) This being the case, inconsistencies between national decisions and subsequent judgments of the Court of Justice can be expected to arise. Claims based on the *Köbler* case are to be reserved for exceptional cases, involving errors that are manifest; and in assessing whether this is the case, account must be taken of the specific characteristics of the judicial function, which entails the application of judgment to the interpretation of provisions capable of bearing more than one meaning.

Plender J granted permission to appeal and the appeal is due to be heard in December 2009. The Court of Appeal is therefore to decide whether it itself got the law manifestly wrong! There has already been from the appellants a letter indicating which courts cannot hear the case.

V Case C–142/07 *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* [2009] Env LR D4. The projects in issue were part of a complex engineering scheme that involved improving and refurbishing the whole of the Madrid ring road. The project was split into 15 sub-projects and these were treated separately for the purposes of considering the need for EIA. The ECJ held that the EIA Directive did provide for assessment of projects for the refurbishment and improvement of urban roads 'either where they are projects covered by point 7(b) or (c) of Annex I to the Directive, or where they are projects covered by point 10(e) or Annex II or the first indent of point 13 thereof, which are likely by virtue of their nature, size or location ... to have significant effects on the environment' (see paragraph 46). Which, if any, part of Annex II governed the project was though a matter of fact to be examined by the referring court (see eg paragraph 37). The ECJ added that the EIA Directive could not be circumvented (see paragraph 44) by the splitting of projects.

VI Case C–215/06 *Commission v Ireland* [2009] Env LR D3. In this case the Commission brought infraction proceedings under Article 226 EC claiming that Ireland had failed to fulfil its obligations under the EIA Directive. One of the complaints related to legislation which allowed an application for retention permission to be made after a development had been executed in whole or in part without consent. Another complaint related to Ireland's enforcement regime which it was said did not guarantee the effective application of the EIA Directive. The Commission's application succeeded. This case and its implications for (i) enforcement decisions; and (ii) applications for retrospective planning permission for EIA development were considered in the *Ardagh* case (see above).

VII Case C–247/06 *Commission v Germany*. The UK intervened unsuccessfully to ask the ECJ to reconsider its previous decisions in *Commission v Italy* (C–486/04) [2006] ECR IA–11025 and *Commission v Italy* (C–255/05) on whether references in the EIA Directive to waste disposal include as well as operations leading to waste disposal operations for waste recovery.

VIII In *Friends of Basildon Golf Course v Basildon DC* [2009] EWHC 66 (Admin) Wyn Williams J held (in agreement with the view expressed by Richards J in *R (Fernback) v Harrow LBC* [2002] Env LR 10) that a local planning authority did have the power having issued a negative screening decision subsequently to determine that the development was nonetheless EIA development. However, the adoption of a further screening opinion was dependent upon a request from a proposed developer. There was no power for a local planning authority (unlike the Secretary of State) to consider such matters of their own motion. Accordingly, a local planning authority is not under a duty to revisit an opinion in the light of new information (in the *Basildon* case the expression of views by Natural England). The learned judge said that the view of Elias J in *R (Anderson) v York CC* [2006] Env LR 11 that

a screening opinion is final must be read in the context of the analysis in *Fernback*.

IX *Finn-Kelcey v Milton Keynes BC* [2008] EWCA Civ 1067 [2009] Env LR 17 concerned a proposed wind farm. The planning application had included an EIA and supplementary information was provided which included wind speed data, following a request on a non-regulatory basis by the Council. That information was provided to representatives of the local group opposing the development in hard copy, but not the accompanying CDs which held the raw data, including wind speeds, or the letter enclosing the supplementary information, which stated that the wind speed data was included on the CDs. Nor was this information placed on the public files although it was advertised in a local paper that the information was available for inspection and that copies could be purchased. The claimant complained about the lack of availability of the raw wind data to objectors.

The case had been dealt with on the erroneous legal basis before the Administrative Court. Collins J had proceeded on the basis that the applicable regulations were the 1999 Regulations as amended by the Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006. In fact the case was governed by the 1999 Regulations in their unamended form. The Court of Appeal held that there had been no breach of reg 19 of the 1999 Regulations in their original form. Regulation 19(4) required the recipient of further information to send a copy to each person to whom, in accordance with these Regulations, the statement to which it relates was sent. The court doubted if the objectors were such a person but in any event took the view that reg 19(4) applied only to information provided pursuant to a request under reg 19(1) and the provision of the wind data in this case had been in response to a non-regulatory request not an exercise of the Council's powers under reg 19.

The case is also of real interest on the issue of promptness and delay in judicial review challenges to the grant of planning permission. CPR r 54.5 requires that claims be brought promptly and in any event within three months. The planning permission was granted on 14 January 2008 and the claim lodged on 10 April 2008, ie just within the three months. The Court of Appeal upheld Collins J's view that the claim had not been made promptly. The court emphasised the importance of acting promptly in cases which sought to challenge the grant of planning permission and indicated that the need for promptness in challenging planning decisions was also particularly acute in the case of renewable energy projects. The de facto six week rule for planning challenges in judicial review was rejected by the House of Lords in *R (Burkett) v Hammersmith and Fulham LBC (No 1)* [2002] UKHL 23; [2002] 1 WLR 1593. However, in *Finn-Kelcey* the Court of Appeal considered the existence of a six week rule under the TCPA 1990 for challenges to the grant of permission by the Secretary of State was relevant in considering promptness. The House of Lords in *Burkett* also held that time ran from the grant of the permission not the resolution to grant but the Court of Appeal held that knowledge of

the resolution to grant remained relevant to the issue of promptness.

It is understood that a *Köbler* damages claim has been lodged in respect of the court's decisions in *Finn-Kelcey*.

SEA

1 In *City and District of St Albans v Secretary of State for Communities and Local Government* [2009] EWHC 670 (Admin) Mitting J has held, in response to a challenge by Hertfordshire County Council and St Alban's District Council under s 113 of the Planning and Compulsory Purchase Act 2004, that the Secretary of State's approval of the East of England Plan (RSS for the east of the country) has breached certain requirements for strategic environmental assessment in reg 12 of the Environmental Assessment of Plans and Programmes Regulations 2004.

The challenge concerned the decision to require significant additional housing to be met in Hemel Hempstead, Welwyn Garden City, Hatfield and Harlow by means of significant releases of land from the Green Belt without a lawful strategic environmental assessment which considered the reasonable alternatives to the proposals, given the changes made to the policies at the Proposed Changes stage. The judge rejected the claim so far as it related to Harlow, but upheld the claim relating to the other settlements (and the implications for St Albans).

The judge held that Article 5 of the SEA Directive and reg 12 of the Environmental Assessment of Plans and Programmes Regulations 2004 required that reasonable alternatives to development should be described and evaluated before a choice was made as to how a plan should be modified.

11 Some consideration to the timing of SEA was also given in the case of *R (Bard Campaign) v Secretary of State for Communities and Local Government* [2009] EWHC 624 (Admin), a challenge to the Government's eco-towns policy. The claimants sought a declaration that the SEA Directive is applicable to the eco-towns policies. However the Secretary of State indicated that she would voluntarily undertake a Sustainability Appraisal in full compliance with the SEA Directive. Accordingly, for the most part, the issue of whether the draft Planning Policy Statement (PPS) is subject to the SEA Directive was academic. The only other issue was whether the SEA Directive required the assessment prior to the draft PPS stage, eg when the Government was consulting on the policy in a Green Paper and related documents. The learned judge held that the SEA process was not required to have started earlier than it had. The relevant draft plan was the draft PPS. A renewed application for permission to appeal to the Court of Appeal in this case was refused in June 2009.

Waste

Despite Sir Robert Carnwath's best attempts to deal with the question of 'what is waste?' in *OSS* there have been at least six cases in the High Courts where the judges have had to wrestle, again, with what is waste, including my favourite, *Thames Water*, where the issue was whether

sewage spilt onto land from leaky pipes was waste. So difficult is this question about waste that in spite of the fact that this question surely has an obvious answer, that sewage *is* waste, that case has involved one Magistrates' Court decision, two Divisional Court decisions and the ECJ. This is perhaps a reflection of the state of the law on what is waste.

1 *Environment Agency v Inglenorth* [2009] EWHC 670 (Admin) [2009] Env LR33 saw the Divisional Court revisit the perennial question of what is waste. The Environment Agency (EA) appealed by way of case stated against a decision of the magistrates' court that the respondent excavation, demolition and recycling company Inglenorth was not guilty of two waste disposal offences. It had been contracted to collect materials from one garden centre and take them to another. When it collected the materials, the garden centre's owner informed them that he intended to use them to make good a car park at his other site. The owner did not have a waste management licence. Two informations were laid against Inglenorth for failure to comply with the Environmental Protection Act 1990 (the EPA 1990) s 34(1)(a), by failing to inform the owner of the need to hold a waste management licence in order to deposit waste on his site, and for depositing waste at the garden centre when there was no waste management licence in force.

The EA alleged that the magistrates had erred in law in considering whether the materials were waste. In particular the EA alleged that the magistrates had erred in interpreting discard narrowly to mean 'get rid of' and in considering that the intention to re-use material must be immediate for it not to be classed as waste whereas the real issue was whether the proposed reuse was immediate.

The Divisional Court said:

The question which this case stated by the Stockport Justices of 28th November 2007 raises is exemplified in most respects by the following example: if I get a lorry driver to deliver hardcore from a demolition site to my drive when I am going to use the hardcore to mend my drive, or it may be as a subbase for a concrete slab in the garage that I am constructing, is the hardcore as delivered to me waste and do I need a licence to receive it and does the lorry driver commit an offence by delivering it when I have no licence and does he have to warn me about the need for having a licence ... The common sense answer reached by the Justices is that it was not because the hardcore is material which I am going to use, not material which I am going to discard. I am not going to discard it, I am not going to throw it away or get rid of it.

On the issue of the need for reuse being immediate the Divisional Court said:

No doubt questions might arise as to whether a use of deposited material for purposes such as building works was to be immediate. No doubt if it were Mr Evans

that was being prosecuted that would be a question which might arise and might or might not have been decided in his favour or against him ... immediate use cannot be taken literally. As for example, if material is deposited at a site intending it to be used straight away for building operations, if it is not used straight away, because, for instance, the weather is bad and prevents building operations; or other and different material is required to be delivered first before this material can be used; or machinery has to be brought on to the site before it can be used and there is some delay before it is brought to the site; any of these examples would not, depending on the facts, prevent the material from being reused immediately, if that is the expression that needs to be addressed. The distinction in my judgment must be between depositing the material for storage pending proposed reuse and depositing it for use more or less straight away without it being, in any sensible use of the word, stored. Depending always on the facts, hardcore which is going to be used next week for current building operations is not being stored.

11 *R (Thames Water) v Bromley Magistrates* [2008] EWHC 1763 (Admin) [2009] IWL 1247 also arose out of Magistrates' Court proceedings. Thames Water was prosecuted for allowing sewage to leak on land from faulty pipes. Thames argued that the sewage was not controlled waste and the matter was subject to a reference to the ECJ.

The ECJ found that waste water which escaped from a sewerage network constituted waste within the meaning of the Waste Framework Directive and that the relevant EC legislation did not exclude such waters from the scope of that Directive through being covered by other legislation pursuant to Article 2(1)(b). To be regarded as other legislation, the rules in question had to not merely relate to a particular substance, but to contain precise provisions organising its management as waste within the meaning of Article 1(d) and to ensure a level of protection which was at least equivalent to that resulting from the Directive. The question of whether national legislation contained precise provisions organising the management of the waste and ensuring such a level of protection was left as a matter for the national courts.

The Divisional Court held that within the Water Industry Act 1991 and Urban Waste Water Treatment Regulations 1994 dealt with the handling and treatment of waste water within the system, including requirements designed to prevent escape. They did not contain provisions for management after it had escaped. There were no precise provisions governing the management of waste which escaped unintentionally from the sewerage system. Accordingly they were not covered by other legislation in the sense explained by the ECJ.

111 *Her Majesty's Revenue and Customs v Waste Recycling Group* [2008] EWCA Civ 849 [2009] Env LR 5. WRG was a waste company operating landfill sites across the UK. WRG also operated waste transfer stations which accepted waste from local authorities and others in exchange for

payments and civic amenity sites which were operated under agreements with local authorities and which accepted waste from members of the public free of charge. WRG submitted a claim for a refund of landfill tax which it argued had been overpaid. The claim was made in relation to inert materials such as construction and demolition waste which WRG had used on landfill sites for engineering purposes such as the construction of site roads or in compliance with waste management licence conditions requiring daily coverage of the site. HRMC refused to make the refund. WRG appealed to the VAT and duties tribunal which found that there had been a disposal of material as waste within the meaning of the Finance Act 1996 s 40(2)(a) (the 1996 Act). The tribunal found that the material was discarded as waste as the relevant intention was that of the person discarding the material and not of WRG. The inert material was waste notwithstanding the fact that it had been separated out from other waste in order to be used for engineering works or daily cover,

The Court of Appeal found that the tribunal had erred in law. The case again turned on the meaning of discard. The court held that the relevant intention might well not be that of the original producer of the materials. There was no principle that material once labelled as waste was always waste just because the original producer of it threw it away. It held that the use of the relevant materials by WRG was clear and such use was conclusive of its intention at the relevant time by whatever means and on whatever terms WRG acquired them. The materials used by WRG for daily cover and building roads were not the subject of a taxable disposal as defined in s 40(2) of the 1996 Act.

1V *Environment Agency v Thorn International UK Ltd* [2008] EWHC 2595 (Admin) [2009] Env LR 10 is another Divisional Court decision on a case stated from the Magistrates' Court. Thorn bought used household electrical goods such as refrigerators and computers for re-sale. These items had been taken by a company called Wincanton from retailers who had supplied a replacement product to consumers and had contracted to take the used appliance away. Thorn would attend Wincanton's warehouse and inspect the used appliances which were offered for sale. If it was satisfied that an appliance was still functioning or capable of repair, it would purchase the item. Thorn then transported these items and stored certain items outside for a short period – at most one week – prior to taking them inside for repair and refurbishment. Once repaired and refurbished, the items were purchased by second-hand retailers for sale to the public or sold in Thorn's own retail stores.

The EA considered that the electrical items stored outside were waste and in particular controlled waste for the purposes of the EPA 1990 s 75 and that the storage of the items without a waste management licence was contrary to s 33 of the EPA 1990 and accordingly prosecuted. The magistrates found that the items were not waste. EA appealed arguing that an item was discarded by the consumer, and became waste, at the moment the consumer made a contract with the retailer to exchange the old appliance for a new one and that it did not cease to be

waste by virtue of the process of selection by Thorn. It argued that it only ceased to be waste once it had been repaired.

The Divisional Court dismissed the appeal concluding that at the time that the items were stored by Thorn they were not waste. The court reviewed the familiar ECJ case law on the meaning of waste and said:

26 It seems to be suggested by the Environment Agency that every time a consumer no longer wishes to keep such an item it, by operation of principle of law consistent with the Directive, automatically becomes waste because the consumer no longer wants it. In my view, that is far too extreme a view and far too stringent a rule. As I have said, the issue in *ARCO*, *Epon* and *OSS* was merely whether items which were undoubtedly waste had ceased to be waste. It was contended that since they were waste, until further inspection of the premises by the trained engineers, the items remained waste until any necessary repair or refurbishment was complete. In my view, the justices were entitled to find that the items in question, even if they should have been regarded as waste at an earlier stage, were not by the time they had become selected by Thorn. None of the purposes of the Directive are achieved by so regarding them. Thorn regarded them as capable of reuse with some repair and refurbishment. The mere fact that that which in one form is undoubtedly waste remains waste until its character is changed by a process of recycling does not establish a rule of law that any item which requires repair or refurbishment is waste until that process is concluded. As the European Court of Justice pointed out at [97] in *ARCO*, and as the Court of Appeal endorsed at [59] in *OSS*, it depends on all the circumstances.

27 In the instant case, there was no change to the form of these goods at all. There was nothing hazardous within them whilst they awaited repair. They were retained for their original purpose. The justices were not purporting to lay down any rule; they merely applied the Directive according to its purpose to prevent hazardous materials harming either the environment or those humans who came into contact with them. Construing that purposively, they applied the Directive to the facts of this case. In my view, they were entitled to reach the conclusion that, certainly at the time those goods were held by Thorn, they were not waste.

V Case C-188/07 *Commune de Mesquer v Total France SA* concerned the sinking of *MV Erika* off the coast of France, which was the worst oil spillage in French history. The Advocate-General's opinion was considered in the hottest cases paper last year. The case involved a reference in proceedings brought by the local authority against Total for the clean up costs.

The ECJ held that heavy fuel oil sold as a combustible fuel does not constitute waste within the meaning of the Waste Framework Directive, where it is exploited or

marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing. However, when accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, it would constitute waste.

The ECJ also held that for the purposes of applying Article 15 of the Waste Framework Directive to the accidental spillage of hydrocarbons at sea causing pollution of the coastline of a Member State:

- the national court may regard the seller of those hydrocarbons and charterer of the ship carrying them as a producer of that waste within the meaning of Article 1 (b) of Directive 75/442, as amended by Decision 96/350, and thereby as a 'previous holder' for the purposes of applying the first part of the second indent of Article 15 of that Directive, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship;
- if it happens that the cost of disposing of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by the International Oil Pollution Compensation Fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the shipowner and/or the charterer, even though they are to be regarded as 'holders' within the meaning of Article 1 (c) of Directive 75/44, as amended by Decision 96/350, such a national law will then, in order to ensure that Article 15 of that Directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.

VI In *R v Kelleher* [2008] EWCA Crim 3055 [2009] Cr App R (C) 25 the appellant, who had no previous convictions, pleaded guilty to conspiracy to deposit controlled waste contrary to s 33 of the EPA 1990. He was sentenced to 14 months imprisonment. His co-accused was sentenced to 22 months. The Court of Appeal rejected the appeal against sentence. The court noted that the disposal of waste in accordance with the law was expensive and that commercial fly-tipping was a real issue. It noted that the unlawful depositing in this case was carefully organised and took place over an extended period. While the material deposited did not give rise to health risk or

long term environmental damage the judge was right to say this was a very serious case of its type and thus the sentence could not be said to be manifestly excessive.

VII In *Capel Parish Council v Surrey CC* [2009] EWHC 350 (Admin) [2009] Env LR D 11 Collins J quashed a decision of the County Council to include in the Surrey Waste Plan a brickwork site based in the Parish Council's area. It was proposed that an incinerator would be built on the brickwork site. The Plan was submitted to the Secretary of State for independent examination as required by the Planning and Compulsory Purchase Act 2004 s 20(1). The inspectors applied the guidance in the then planning policy statement (PPS 12) in accordance with s 19(2)(a) and their overall view was that the numbered tests set out in PPS 12 had all been met subject to a number of minor modifications. However, the guidance contained in PPS 12 had been amended as it contained a materially inaccurate statement amounting to an error of law.

The learned judge noted that the inspectors applied the guidance as it existed at the time. And while they could not be criticised for that, their recommendation could not stand. Under the guidance as applied it was stated that there was a presumption that the development plan document was sound unless it was shown to be otherwise as a result of evidence. That was an error of law; there was no presumption of soundness, *Persimmon Homes (North East) Ltd v Blyth Valley BC* [2009] JPL 335 applied. The inspectors referred to the presumption of soundness throughout their report. The presumption clearly played a part in the conclusions reached and, accordingly, the inclusion of the brickworks in the development plan documents had to be quashed.

EU ETS

Background

General

On 1 January 2005 the EU ETS came into force. It is the largest multi-country, multi-sector greenhouse gas emission trading scheme world-wide. In total approximately 11,500 installations are presently covered by the EU ETS and it accounts for nearly 45 per cent of total CO₂ emissions, and about 30 per cent of all greenhouse gases in the EU.²

The EU ETS is the key policy introduced by the EU to help reduce the EU's greenhouse gas emissions. The importance of the EU ETS is further emphasised by the recitals to Directive 2003/87 (see recitals (1) and (2)). Article 1 of Directive 2003/87/EC states: 'This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community (hereinafter referred to as the "Community scheme") in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'. The importance of the EU ETS has further been confirmed by the European Court of First Instance (CFI) in Case T-178/05 *UK v Commission*;

Case T-374/04 *Germany v Commission* and Case T-387/04 *EnBW*: see especially in Case T-374/04 *Germany v Commission* paragraphs 1-5. In his opinion in Case C-127/07 *Arcelor Advocate-General Maduro* referred to the EU ETS as being 'one of the cornerstones of Community environmental protection policy'.

Under the Kyoto Protocol the EU is required to make an 8 per cent reduction in emissions compared to 1990 by the first Kyoto Protocol commitment period (2008-2012).³ Recital (10) to Council Decision 2002/358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the UNFCCC and the joint fulfilment of commitments thereunder states:

In deciding to fulfil their commitments jointly in accordance with article 4 of the Kyoto Protocol, the Community and the Member States are jointly responsible, under paragraph 6 of that article and in accordance with article 24(2) of the Protocol, for the fulfilment by the Community of its quantified emission reduction commitment under Article 3(1) of the Protocol. Consequently, and in accordance with Article 10 of the Treaty establishing the European Community, Member States individually and collectively have the obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from action taken by the institutions of the Community, including the Community's quantified emission reduction commitment under the Protocol, to facilitate the achievement of this commitment and to abstain from any measure that could jeopardise the attainment of this commitment.

Decision 2002/358/EC binds only those 15 Member States that were part of the Community as at the date of the Decision (25 April 2002). Those Member States joining since have their own individual targets under the Kyoto Protocol.⁴

Directive 2003/87⁵

The EU ETS is based on Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community. All 27 Member States are bound by Directive 2003/87.

² See EU Action against Climate Change: EU Emissions Trading – An Open Scheme Promoting Global Innovation, CEC, Brussels http://ec.europa.eu/environment/climat/pdf/emission_trading2_en.pdf.

³ The Kyoto Protocol was adopted under the auspices of the Framework Convention on Climate Change (UNFCCC). The Kyoto Protocol was adopted at the third Conference of the Parties to the UNFCCC on 11 December 1997. The ultimate objective of the UNFCCC, which was approved on behalf of the Community by Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the UNFCCC, is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level which prevents dangerous anthropogenic interference with the climate system.

⁴ Article 4(4) of the Kyoto Protocol provides that any alteration in the composition of an international organisation jointly fulfilling commitments under the Kyoto Protocol is not to affect existing commitments thereunder unless the alteration in the commitments under the Kyoto Protocol is to take place after the alteration in the composition of the international organisation.

⁵ Directive 2004/101/EC amended Directive 2003/87 in respect of the Kyoto Protocol's project mechanisms.

The EU ETS has three phases: Phase I (2005–2007); Phase II (2008–2012) and Phase III (post 2012).

Directive 2003/87 as presently in force covers CO₂ emissions from:

- Energy activities: Combustion installations with a rated thermal input exceeding 20 MW (except hazardous or municipal waste installations); Mineral oil refineries; Coke ovens; Production and processing of ferrous metals; Metal ore (including sulphide ore) roasting or sintering installations; installations for the production of pig iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tonnes per hour.
- Mineral industry: Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tonnes per day or lime in rotary kilns with a production capacity exceeding 50 tonnes per day or in other furnaces with a production capacity exceeding 50 tonnes per; Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tonnes per day; Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tonnes per day, and/or with a kiln capacity exceeding 4 m³ and with a setting density per kiln exceeding 300 kg/m³.
- Other activities: Industrial plants for the production of (a) pulp from timber or other fibrous materials; (b) paper and board with a production capacity exceeding 20 tonnes per day.

Fixed installations (eg power stations and factories) covered by the EU ETS must have a permit in order to emit CO₂. When aviation is brought within the EU ETS (see below) aircraft operators will not be required to have permits in order to emit CO₂. However, such operators must submit plans to their appropriate regulator by 31 August 2009.

The EU ETS works on a 'cap and trade' basis. In Phases I and II for the current scheme, an overall cap is set by each EU Member State on the total number of allowances issued to installations within its jurisdiction which are within the EU ETS. The allowances are allocated to the installations in accordance with a National Allocation Plan (NAP) which must be published and notified to the Commission, which has the power to reject a NAP. Operators of installations must, by 30 April in each year, surrender allowances equal to their emissions for the previous year. Failure to do so results in significant financial penalties in addition to a requirement to make up the shortfall when surrendering allowances for the following year. Installations can trade by buying additional allowances or selling surpluses generated from reducing emissions. The trading of allowances takes place in an EU-wide market.

Thus an installation generating more CO₂ than it is allocated free allowances under a NAP is forced to purchase additional allowances in the market. The result is to induce

in such installations a demand for innovative, energy/carbon saving processes, products and services. The only alternative to reducing emissions is to bear the additional costs of purchasing the necessary allowances (which in turn secures reductions by others in the EU ETS).⁶

Aviation

The aviation sector is to be brought within the EU ETS from 2012, in Phase III: see Directive 2008/101/EC.⁷ Aviation activities of aircraft operators that operate flights arriving at and departing from Community airports are included in the EU ETS as of 1 January 2012, including therefore flights from and to the US which arrive and depart from Community airports.

On 11 February 2009 the Commission issued a consultation on a preliminary list of aircraft operators and their administering Member States. Looking just at the UK, this includes a large number of US-based operators. The previous US administration warned that it considered that the inclusion of airlines from outside the Community may contravene the Chicago Convention, the international treaty governing civil aviation. The Commission has taken the view that there is no such contravention. The Commission takes the view that the inclusion of aviation in the EU ETS is consistent with the Chicago Convention and bilateral air service agreements, which require aircraft to comply with the laws and regulations of the State to/from which they fly. Such laws and regulations could include laws requiring airlines to report their emissions and surrender allowances to cover those emissions, as the proposed Directive does.

The Commission has said that:

[t]he scheme will be enforced in the same way as for other sectors in the EU ETS. This means that if an operator fails to surrender sufficient allowances to cover its emissions in a given year, a financial penalty would be imposed (100€ for every tonne of CO₂ not covered by allowances) and the aircraft operator would no longer be able to sell allowances. As an ultimate sanction, the State responsible for administering the airline under the EU ETS can apply to the Commission for the imposition of an EU-wide operating ban.

The inclusion of aviation within the EU ETS (and the limits of this) was considered in *Barbone and Ross (on behalf of Stop Stansted Expansion) v (1) Secretary of State for Transport (2) Secretary of State for Communities and Local Government* (see below).

6 See 'The Stern Review on the Economics of Climate Change' 30. 10. 2006 http://www.hm-treasury.gov.uk/sternreview_index.htm.

7 The total cap on emissions from the sector and the level of allowances have been determined and agreed centrally and will be overseen by the EU Commission. The cap in 2012 will be 97% of the annual average level of emissions from the sector in the period 2004–2006. In 2013, the cap will tighten to 95% of average 2004–2006 emissions. There has been criticism of the provisions incorporating aviation on the basis that they do not provide for the effects of radiative forcing.

Further amendments for Phase III

A proposal for further amendments to Directive 2003/87 for Phase III (see COM(2008) 16 final) has recently been agreed. There is to be a centralised cap within the Community with National Implementation Measures replacing NAPs. There is also a fundamental shift in allocation methodology for Phase III in that auctioning, rather than allocation free of charge, will be the principal method of allocation.

Luxembourg cases

Challenges to the lawfulness of the EU ETS

In *Arcelor Atlantique et Lorraine* the Conseil d'Etat [2007] 2 CMLR the applicant was a steel producing company with installations for the production of pig iron and steel in France, Spain, Germany and Belgium. It sought judicial review of a decision by the French authorities not to revoke the decree implementing Directive 2003/87 in France.

In support of its application the applicant submitted that the contested provisions infringed its fundamental rights to property and the pursuit of an economic activity, by requiring it to operate its plants under economic conditions that were unsustainable. The applicant also invoked a breach of the principle of equality, alleging that other sectors in direct competition with the applicant and with comparable or even higher emissions of greenhouse gases, such as producers of non-ferrous metals and chemicals, are not subject to Directive 2003/87. The Conseil d'Etat dismissed the application in all respects save breach of the equality principle which it saw as a challenge to Directive 2003/87 itself rather than the constitutionality of the implementation. It referred the issue of equal treatment to the ECJ: Case C-127/07.

The ECJ in a judgment dated 16 December 2008 held that the principle of equal treatment did not affect the validity of the EU ETS in so far as it makes the greenhouse gas emission allowance trading scheme applicable to the steel sector without including the chemical and non-ferrous metal sectors in its scope. It held that:

- i. the steel, chemical and non-ferrous metal sectors are therefore, for the purposes of examining the validity of Directive 2003/87 from the point of view of the principle of equal treatment, in a comparable position while being treated differently;
- ii. the inclusion of an economic activity in the scope of Directive 2003/87 creates a disadvantage for the operators concerned in relation to those carrying on activities not so included;
- iii. as regards objective justification:
 - a. in the exercise of the powers conferred on it by the Community, legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations (see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 80);

- b. where the legislature is called on to restructure or establish a complex system, it is entitled to have recourse to a step-by-step approach (see, to that effect, Case 37/83 *Rewe-Zentrale* [1984] ECR 1229, paragraph 20; Case C-63/89 *Assurances du crédit v Council and Commission* [1991] ECR I-1799, paragraph 11; and Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraph 43) and to proceed in the light of the experience gained (reference was made to the review provided for by Article 30 of Directive 2003/87, see eg paragraph 49 of the judgment);
- c. The EU ETS 'is a novel and complex scheme whose implementation and functioning could have been disturbed by the involvement of too great a number of participants, and, second, that the original definition of the scope of the Directive was dictated by the objective of attaining the critical mass of participants necessary for the scheme to be set up'.

- iv. As regards the exclusion of the chemicals sector:

64 As regards, first, the chemical sector, it may be seen from the history of Directive 2003/87 that that sector has an especially large number of installations, of the order of 34,000, not only in terms of the emissions they produce but also in relation to the number of installations currently included in the scope of the Directive, which is of the order of 10,000.

65 The inclusion of that sector in the scope of Directive 2003/87 would therefore have made the management of the allowance trading scheme more difficult and increased the administrative burden, so that the possibility that the functioning of the scheme would have been disturbed at the time of its implementation as a result of that inclusion cannot be excluded. Moreover, the Community legislature was able to take the view that the advantages of excluding the whole sector at the start of the implementation of the allowance trading scheme outweighed the advantages of including it for attaining the objective of Directive 2003/87. It follows that the Community legislature has shown to the requisite legal standard that it made use of objective criteria to exclude the entire chemical sector from the scope of Directive 2003/87 in the first stage of implementation of the allowance trading scheme.

66 The argument of the applicants in the main proceedings that the inclusion in the scope of Directive 2003/87 of undertakings in that sector emitting a quantity of CO₂ above a certain threshold would not have caused administrative problems cannot call into question the above assessment.

v. As regards the non-ferrous metals sector:

70 As regards, second, the non-ferrous metal sector, it appears from the scientific report mentioned in paragraph 52 above, which, according to the observations of the Parliament, the Council and the Commission, the Community legislature made use of in drafting and adopting Directive 2003/87, that direct emissions from that sector amounted to 16.2 million tonnes of CO₂ in 1990, while the steel sector emitted 174.8 million tonnes of CO₂.

71 In view of its intention of defining the scope of Directive 2003/87 in such a way as not to upset the administrative feasibility of the allowance trading scheme in its initial stage by involving too many participants, the Community legislature was not required to have recourse solely to the method of introducing, for each sector of the economy that emitted CO₂, a threshold for emissions in order to attain its objective. Thus, in circumstances such as those in which Directive 2003/87 was adopted, it could when introducing the scheme legitimately delimit its scope by means of a sectoral approach without exceeding the bounds of its discretion.

72 The difference in the levels of direct emissions between the two sectors concerned is so substantial that the different treatment of those sectors may, in the first stage of implementation of the allowance trading scheme and in view of the step-by-step approach on which Directive 2003/87 is based, be regarded as justified without there having been any need for the Community legislature to take into consideration the indirect emissions attributable to the various sectors.

vi. Accordingly there was no breach of the principle of equal treatment.

The ECJ it appears considered the issues raised to be more difficult than did Advocate-General Maduro (opinion delivered on 21 May 2008). The Advocate-General referred to the fact (see paragraph 24 ff) that Arcelor sought to extend the scope of the reference to include the other arguments it had lost on before the Conseil d'Etat. The Advocate-General considered this impermissible even having regard to the fact that Arcelor had a pending CFI action challenging the validity of Directive 2003/87 on that basis: Case T-16/04 *Arcelor SA v European Parliament and the Council of the European Union*.

Standing

There have been numerous Article 230 EC challenges brought by operators seeking the annulment of Commission's decisions on NAPs. These have all been rejected by the CFI and ECJ on the basis of a lack of standing: see eg recently Case T-193/07 *Górażdże Cement v Commission*; Case T-241/07 *Buzzi Unichem SpA*

v Commission and Case T-208/07 *BOT Elektrownia Belchatów and Others v Commission*.

The pending CFI cases

Following Commission decisions rejecting their Phase II NAPs (principally on the basis that they have allocated to themselves far too many units) Article 230 challenges have been brought before the CFI against the Commission by:

- Poland (T-183/07)
- Estonia (T-263/07)
- Hungary (T-221/07)
- Latvia (T-369/07)
- Lithuania (T-368/07)
- Romania (T-484/07)
- Bulgaria (T-499/07).

A challenge brought by Slovakia (T/32/07) was withdrawn.

In these cases the common complaints (put in a number of ways) are that:

- the Commission in its decisions on the Phase II NAPs in issue acted *ultra vires* in determining an upper limit or total quantity of emission allowances which, consistent with Annex III of Directive 2003/87, the Member States concerned can allocate in their NAPs
- the Commission in its decisions acted unlawfully in using its own calculations, data and methodology to assess the NAPs. The bulk of the complaints focus on the use by the Commission of PRIMES data.

The challenges also have some other common features including:

- reliance on the fact that the Member States concerned are not bound by Decision 2002/358/EC but rather have their own separate Kyoto targets for Phase II which they are meeting
- a failure to take into account the particular position of the East European Accession States whose economies have recently undergone the process of transition to a market economy (see Annex B of the Kyoto Protocol) and some of whom have energy security issues linked to dependency on Russia for the supply of gas
- a failure to consult Member States on the use by the Commission of the PRIMES model
- a failure by the Commission in its decisions on the NAPs to give adequate reasons contrary to Article 253 EC.

A number of the challenges also allege that the time limit imposed on the Commission under Article 9(3) of Directive 2003/87 expired before the decisions were issued with the result that the NAPs submitted must stand as approved. These arguments rely heavily on the CFI's decision in *UK v Commission* (see above) at paragraph 55. The facts in relation to this aspect of the cases are unattractive as the Polish example illustrates. Poland notified an incomplete

NAP. The Commission within the three months reacted and in good faith declined to formally reject the incomplete NAP. Instead it sought further information. The Commission's letter so doing made clear that the three-month period would not start to run until the 47 questions posed to Poland were answered. The Commission asked for the information to be provided in a time frame that would still have been within three months of notification. Poland did not refute the suggestion that the NAP it submitted was incomplete but it negotiated extensions of time to respond. It was in fact not until many months later that Poland provided the necessary information. Poland then when its NAP was rejected turned around and sought to rely on the time limit having expired.⁸

The UK has intervened in all of these cases to support the Commission. The UK is concerned that in each case the Member State is seeking to achieve an over-allocation of allowances that, cumulatively, would result in average annual emissions in Phase II being greater than 2005 verified emissions. Thus for example in the case of Poland⁹ the Commission relying on verified data on gas emissions for Poland for 2005 takes the view that the Polish allocation could not – compatible with the criteria contained in Directive 2003/87 – exceed 208.6 million tonnes per annum for Phase II. Poland in its Phase II NAP proposes the allocation of 284.8 million tonnes per annum. In short, the aim of the Polish proceedings is to secure for Poland a 76 million tonne per annum over-allocation of allowances.

The UK's case is that such an increase in allocations would have very significant impacts. It would have a considerable adverse impact on the EU ETS price, possibly in a similar way to the price fall in Phase I in April 2006. As Phase I demonstrates, the key determinant for the success or otherwise of the EU ETS is how scarce¹⁰ the market considers allowances to be. Following a comparison with the verified emission figures for 2005 and 2006, it was found that the Member States had overestimated the total quantity of allowances for Phase I of the EU ETS. This unfortunate result was allowed to occur because for Phase I the Commission did not have independent and scientifically verified data when it came to assessing the NAPs for that period. The Commission was thus not able to prevent this over-allocation of allowances. The consequence was (as is recorded by the globally acclaimed Stern review) a sharp downward correction in prices, the effect of which was to discourage investment in energy-efficient technology that reduced CO₂ emissions. For Phase I the total EU-wide allocation was estimated to be only 1 per cent below projected business as usual emissions. As a result there was not the requisite scarcity for the market to function in such a way as to incentivise reducing CO₂ emissions.

8 In this regard the UK made reference to the opinion of Advocate-General Warner in Joined Cases 63/79 and 64/79 *Boizard*.

9 Poland unsuccessfully sought interim measures: see Case T-183/07R decision of the President of the CFI dated 9 November 2007.

10 See the decision of the ECJ in Case C-127/07 *Soci t  Arcelor Atlantique*:

The UK has estimated that the effect on carbon prices of 76 million tonnes of additional allowances being allocated to Poland would be to reduce market prices by up to one quarter. This would be a significant fall.

Moreover Poland is not, of course, the only Member State to challenge the Commission's Decisions in relation to their Phase II NAPs. Article 230 challenges have been brought by Bulgaria, the Czech Republic, Estonia, Hungary, Latvia and Romania. If all the pending Article 230 challenges against the Commission were successful, the total number of allowances on the market would be well above 2005 verified emissions. This would completely undermine Directive 2003/87 as a tool to reduce emissions, which is the principal objective of the Directive. It would also significantly undermine the concept of emissions trading as a powerful future way to reduce global carbon emissions.

The Polish case was heard on 10 February 2009 and the Estonian case on 11 February 2009 before two different Chambers of the CFI. While the UK was the only Member State to intervene to support the Commission, a number of East European Member States (including Lithuania, Hungary and Slovakia) intervened to support Poland and Estonia.

The decisions of the CFI are awaited. It is understood that the other challenges will not be determined before the outcome of these first two cases is known.¹¹

The Stansted challenge

In *Barbone v Secretary of State for Transport* [2009] EWHC 463 (Admin) [2009] Env LR D12 the claimants, representatives of Stop Stansted Expansion (SSE), applied under s 288 of the TCPA 1990 to quash the decision made by the Secretary of State for Transport and the Secretary of State for Communities and Local Government (the Secretaries of State) granting planning permission for BAA's proposals to increase the capacity of Stansted Airport by varying existing planning conditions that regulated the annual number of air traffic movements (ATMs) and the annual throughput of air passengers that the airport could lawfully accommodate under its existing planning permission. The planning permission granted by the Secretaries of State has had the effect of lifting the permitted annual throughput of passengers at Stansted Airport from 25 million passengers per annum (mppa) to 35 mppa and of increasing the ATMs to a figure not exceeding 264,000 overall in any period of 12 calendar months.

11 The Second and Seventh Chambers of the European Court of First Instance gave judgement on 23 September 2009 in Cases T-183/07 and T-263/07 *Poland v Commission and Estonia v Commission*. In both cases the Commission's decisions rejecting the Phase II National Allocation Plans for Poland and Estonia were annulled. In the *Poland* case the decision was annulled on the basis (i) of a failure to provide reasons and (ii) infringement of the provisions of Article 9(1) and (3) of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community. An argument based on the time limit for the Commission's decision having expired was rejected. In the *Estonia* case the Commission's decision was annulled for similar reasons to those in the *Poland* case. The other challenges are still pending before the Court of First Instance: Hungary (T-221/07); Latvia (T-369/07); Lithuania (T-368/07); Romania (T-484/07) and Bulgaria (T-499/07).

One of SSE's grounds related to the way in which climate change had been dealt with in the decision. It was common ground at the inquiry that no climate change effect directly linked to the proposed additional use of the existing runway could be demonstrated. SSE's case was principally to question the efficacy of Government policy in seeking to reconcile the expansion of aviation with its stated commitment to meet the challenge of global warming. SSE argued that the Government's proposals to manage the impact of aviation through concerted international action under an emissions trading scheme were unrealistic and uncertain as to the timing of their delivery. SSE therefore contended that, in determining BAA's planning appeal, the Secretaries of State had to choose between the competing policies of (i) expanding air traffic and (ii) addressing climate change.

The Inspector said that the Government had faced up to the need to reconcile these policy objectives, both in the Air Transport White Paper and in the Air Transport Progress Report. The Inspector concluded:

In conclusion on climate change policy, I consider that questions of the appropriateness and effectiveness of Government policies on aviation and climate change and their compatibility, while undoubtedly of great importance, are matters for debate in Parliament and elsewhere rather than through this appeal. I respectfully suggest that the Secretaries of State should not consider such questions in this context.

The Secretaries of State agreed with this approach.

Forbes J concluded that the approach adopted by the Inspector and the Secretaries of State on this aspect of the matter was legitimate and in accordance with established legal principles. He said that it was also consistent with the approach indicated by Lord Diplock's speech in *Bushell v Secretary of State for the Environment* [1981] AC 75. On analysis, SSE's argument on climate change was in the context of the inquiry an attack on national transport planning policy which seeks to offset that aspect of the environmental impact of the development of air transport against commensurate changes elsewhere in the economy.

A renewed application for permission to appeal to the Court of Appeal in this case was refused in June 2009.