



Neutral Citation Number: [2013] EWHC 4161 (Admin)

Case No: CO/5020/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2013

Before :

MRS JUSTICE PATTERSON

Between :

**THE QUEEN ON THE APPLICATION OF AN
TAISCE (THE NATIONAL TRUST FOR
IRELAND)**

Claimant

- and -

**THE SECRETARY OF STATE FOR ENERGY
AND CLIMATE CHANGE**

Defendant

**NNB GENERATION COMPANY LIMITED,
THE MINISTER FOR ENVIRONMENT,
COMMUNITY AND LOCAL GOVERNMENT,
IRELAND
THE ATTORNEY GENERAL, IRELAND**

**Interested
Parties**

David Wolfe QC and John Kenny B.L (instructed by Leigh Day) for the Claimant
Jonathan Swift QC, Rupert Warren QC and Jonathan Moffett (instructed by Treasury
Solicitor) for the Defendant
Nathalie Lieven QC and Hereward Phillpot (instructed by Herbert Smith Freehills) for the
Interested Party

Hearing dates: 5th and 6th December 2013

Approved Judgment

Mrs Justice Patterson :

1. This is an application by An Taisce, the National Trust for Ireland, to seek permission to apply for judicial review of a decision on the part of the Secretary of State for Energy and Climate Change (the defendant) to grant a development consent order on the 19th March 2013 for a new nuclear power station at Hinkley Point C (HPC). The case comes before the court as a “rolled up” hearing with the agreement of all parties.
2. An Taisce, the National Trust for Ireland, was founded as a charity in 1948. It is one of Ireland’s oldest and largest NGOs. The trust is a prescribed consultee for a number of different Irish government policy formulation and consent processes, including those relating to planning applications, that require an Environmental Impact Assessment (EIA). The Trust’s objectives include the protection of Ireland’s built and natural environment. It sees compliance with international, EU and national legislation as fundamental to that objective.
3. The Trust’s claim is that the defendant failed to comply with Regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 and/or Article 7 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment in considering whether HPC was likely to have significant effects on the environment in the Republic of Ireland, another member state. The Trust contends that transboundary consultation should have been undertaken with the Irish people.
4. In particular, the claimant alleges that,
 - i) the defendant misdirected himself as to the meaning of Regulation 24 and Article 7 in considering only impacts arising from the ordinary regulated operation of the nuclear power station and not “unlikely”, but nevertheless possible, impacts from other scenarios;
 - ii) the defendant failed to comply with Regulation 24 and Article 7 by omitting to take into account the possible impacts arising from unplanned or accidental effects of the development; and/or
 - iii) because the meaning of Article 7 is unclear the court should make a reference to the CJEU.

The first interested party (NNB) is wholly owned by NNB Holding Company which in turn is a wholly owned subsidiary of EDF Energy Holdings Limited, one of the largest power generation companies in the UK.

Factual background

5. On the 31st October 2011 NNB made an application to the Infrastructure Planning Commission (IPC) for a Development Consent Order (DCO) for a new nuclear power station at HPC. The proposed site is immediately to the west of the existing Hinkley Point power stations in Somerset.

6. The consent procedure for a new nuclear power station is understandably complex and involves various consents and permissions. The following paragraphs provide an outline of the background and processes.
7. In January 2008 the government published a White Paper entitled 'Meeting the Energy Challenge'. Under that, companies would be able to build new nuclear power stations which were to be subject to the same regulation of safety, security and environmental matters as existing nuclear installations. The government proposed to take steps to facilitate the development of such stations by using powers in the then planning bill (now the Planning Act 2008) to ensure that nationally significant infrastructure projects (NSIP), of which nuclear power stations were an example, were provided through the use of National Policy Statements (NPS) which set the national need and identified possible sites. Once a planning application was made, that was followed by an examination of the site-specific proposal. That was initially undertaken by the IPC.
8. The White Paper provided that a strategic siting assessment and strategic environmental assessment would have to be undertaken. In addition, there would be a generic design process that would set out the basis upon which the Office of Nuclear Regulation (ONR) and the Environment Agency (EA) would review new build nuclear reactor designs. To meet the requirements of EU and UK law new nuclear practises were to be required to demonstrate that their benefits outweighed any health detriment.
9. In November 2009 the government published its draft energy policy statements. There was an overarching draft NPS for energy proposals (EN-1) and a series of topic-specific policy papers. The draft NPS for nuclear generation (EN-6) contained a list of ten sites in England and Wales, including HPC, which the government considered to be potentially suitable for new nuclear power stations by 2025. The sites had been identified through a strategic siting assessment process. The draft NPS had been subject to an appraisal of sustainability to examine the likely social, economic and environmental effects of designating nuclear power stations and incorporated an assessment in accordance with the requirement of the EU Directive on strategic environmental assessment.
10. Between November 2009 and February 2010 public consultation on the draft NPS took place. Representations were received from the Irish government. The draft recognised the possibility of transboundary effects in the event of a significant unintended release of radioactive emissions but judged that the risk of such an accident was very small because of the strict regulatory regime in the UK. The claimant took no part in the consultation process.
11. In October 2010, after considering the consultation responses a revised draft, EN-6, was published, as was a revised appraisal of sustainability. The number of prospective sites was reduced to 8 (but still included HPC). Consultation on the draft ran until January 2011. The revised appraisal of sustainability noted that the Euratom Treaty would require the UK to submit to the EC information to enable the Commission to determine whether the implementation of a project was liable to result in radioactive contamination of water, soil or air space of another member state. Permission to make radioactive discharges and disposals would not be given in the UK unless a favourable opinion was received from the European Commission.

12. The draft continued,

“7.2.73 there is a risk of accidental release of radioactive emissions associated with new nuclear power stations which are built in line with the revised nuclear NPS. However, the risk of such an accident is judged to be very small because of the strict regulatory regime in the UK. The nuclear regulatory bodies will need to be satisfied that the radiological and other risk to the public associated with accidental releases of radioactive substances are as low as reasonably practicable and within relevant radiological risk limit. As part of the site licensing process, a potential operator will be required to demonstrate that the nuclear facility is designed and can be operated such that several layers of protection and defence are provided against significant faults or failures, that accident management and emergency preparedness strategies are in place and that all reasonably practicable steps have been taken to minimise the radiological consequences of an accident.”
13. On the 18th July 2011 the House of Commons debated and approved the six NPS for energy, including NPS EN-6. On the 19th July 2011 the Secretary of State designated the NPS under the Planning Act 2008.
14. NPS EN-6 explains the relationship between the regulatory justification process and the planning regime. It sets out the role of the regulators in the IPC’s consideration of applications for new nuclear power stations and the interaction that is required between the IPC and the other relevant regulators. Those regulators are the EA and ONR (which has taken over the role of the Department for Transport).
15. The document emphasises the separate nature of the licensing and permitting of nuclear power stations by the nuclear regulators which nuclear power stations have to undergo. In paragraph 2.73 it states,

“When considering a development consent application the IPC should act on the basis that;

 - the relevant licensing and permitting regime will be properly applied and enforced, and
 - it should not duplicate consideration of matters that are within the remit of the nuclear regulators;
 - It should not delay a decision as to whether to grant consent until completion of the licensing and permitting process.”
16. Matters which the IPC should not duplicate are the Generic Design Assessment (GDA), site licensing and environmental permitting processes. The nuclear regulators are to assess also external hazards to a proposed nuclear power station including the reasonably foreseeable effects of climate change.

17. Annex B to the NPS considers the sites listed as potentially suitable for new nuclear power stations. Section C5 considers HPC.
18. In October 2010 the Secretary of State made the Justification Decision (Generation of Electricity by the EPR Nuclear Reactor) Regulations 2010, SI 2010/2044. That means that the class or type of practice for the generation of electricity from nuclear energy using oxide fuel of low enrichment in fissile content in a light water cooled, light water moderated thermal reactor currently known as the EPR designed by AREVA NP was justified. The reasons given for the making of the Regulations continued, at paragraph 1.59,

“In summary, the Secretary of State is conscious of the extent of damage and health detriment that a release of radioactive material from an EPR would have. However, he has confidence in the regulatory regimes for safety and security of civil nuclear installations and materials in the UK. The regulatory bodies are all independent, experienced and held in high regard around the world. He is also conscious that the EPR included inherent safety and security features, based on years of international experience of nuclear power stations and which will be subject to approval by the UK regulators. He therefore considers that the likelihood of an accident or other incident occurring at an EPR giving rise to a release of radioactive material is very small.”
19. ONR was formed on the 1st April 2011 as an agency of the Health and Safety Executive (HSE). It comprises the HSE’s former Nuclear Directorate, including the office of Civil Nuclear Security and the UK Safeguards Office together with the Radioactive Materials Team from the Department of Transport. It is an independent statutory corporation.
20. Before any new nuclear power station can be constructed, commissioned or operated in the UK the operator requires various regulatory licences, permits and other consents. The most significant are a nuclear site licence (NSL) issued under the Nuclear Installations Act 1965 regulated by ONR and environmental permits issued under the Environmental Permitting Regulations regulated by the EA (in England). The licences and permits are granted if the agencies are satisfied that radiation doses comply with the regulatory principles of as low as reasonably practicable (ALARP) and that the best available techniques (BAT) have been used.
21. ONR and the EA have developed a process of GDA for new reactor designs. Under that system ONR assess the safety and security of a generic design for a type and make of reactor in advance of it being considered on a specific site. ONR uses its safety assessment principles and technical assessment guides to guide its regulatory decision making. The safety assessment principles are benchmarked against the international atomic agency standards.
22. The GDA is an iterative process. EDF made a submission to ONR and the EA in July 2007. It consisted of four steps - August to September 2007 initial discussion; September 2007 to March 2008 - overview of fundamental acceptability of the proposed reactor design; June 2008 to November 2008- safety design system and

security review; December 2009 to 2011- examination of evidence given by the safety analysis which included a severe accident analysis. A summary of the design assessment was published on the 14th December 2011. At that time 31 matters remained outstanding. They were resolved during the following year so that on the 13th December 2012 ONR confirmed no matters were outstanding and issued a design acceptance confirmation. The EA issued also a statement of design acceptability. Their issue confirmed that the regulators were satisfied that the evidence demonstrated that the risk to workers and the public had been reduced to ALARP.

23. The power to licence and regulate nuclear sites rests with the HSE whose functions are carried out by ONR on its behalf. No site is to be used for the purposes of installing or operating a nuclear reactor unless a licence has been granted by ONR and is in force. Licensing Nuclear Installations is a document which provides an overview of the processes that ONR follows. There are three main aspects which have to be satisfied before the grant of a site licence;
 - i) a site specific safety case (to show that the nuclear facility would have a robust defence against a range of local external hazards);
 - ii) the suitability of the location for an adequate emergency plan;
 - iii) that the proposal complies with government siting policy.
24. NNB applied for a nuclear site licence to install and operate a nuclear installation at Hinkley Point on the 29th July 2011. On the 31st October 2012 ONR issued a project assessment report which indicated its satisfaction subject to NNB carrying out substantial further analysis in several technical areas before ONR could give permission for nuclear safety related construction. That was done and a site licence granted which came into force on 3rd December 2012. It is subject to detailed licence conditions including one that provides that NNB will not commence construction, installation or operation without the consent of ONR.
25. Once a nuclear site licence is granted the licensee has to comply with all the conditions which are attached to it. In particular, those relating to nuclear safety are subject to expert assessment by ONR, known as the “permissioning” regime.
26. On the 8th April 2013 NNB published its pre construction safety report for its proposed development at HPC for assessment by ONR and the EA. That report will inform ONR’s decision on consents and permissions required for the next stage at HPC. Work is ongoing and a further report will be issued before regulatory consent is considered. If consent is issued for the construction stage a schedule for submission of further safety documents will be agreed for the period of installation, commissioning and operation.
27. Throughout each stage of the process up to and including decommissioning ONR have continued inspection and regulatory oversight of the plant, the safety case and compliance with conditions.
28. The EA regulates several aspects of the operation and construction of nuclear power stations in England. In March 2013 NNB applied for and obtained a consultation process permit for the disposal and discharge of radioactive waste for the normal

operation of the proposed nuclear station, operation of the combustion plant and discharge of trade effluent arising from the operation of the station. The EA considered the limits and conditions in those permits suitable to properly protect people and the environment.

The Euratom Treaty

29. The Treaty establishing the European Atomic Energy Community came into force on January 1 1958 and is known as the Euratom Treaty. Article 37 of the Euratom Treaty states that each member state shall provide the European Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form as will make it possible to determine whether the implementation of such a plan is liable to result in radioactive contamination of the water, soil or airspace of another member state. The Commission has to deliver an opinion within six months, after consulting with an independent group of experts.
30. In August 2011, the UK government submitted general data under Article 37 in respect of the operation of a new nuclear power station at Hinkley Point. It contained information about how discharges would be monitored including an evaluation of the consequences of discharge to the state closest to HPC, the Republic of Ireland. It included also details about unplanned releases of radioactive effluents and reviewed the various kinds of accidents which could potentially result in unplanned releases of radioactive substances. It set out also the plant safety principles, including a range of design measures, to keep risks as low as reasonably practicable.
31. On the 3rd February 2012 the European Commission published its opinion relating to the plan for the disposal of radioactive waste arising from the two EPR reactors on the Hinkley Point C nuclear power station. It said that the assessment was carried out under the provisions of the Euratom Treaty and was without prejudice to any additional assessments to be carried out under the Treaty on the Functioning of the European Union and obligations stemming from it and from secondary legislation. It continued,

“1. The distance from the site to the nearest member state is 185 kilometres for France and 250 kilometres for the Republic of Ireland.

2. Under normal operating conditions, the discharges of liquid and gaseous radioactive effluents are not likely to cause an exposure of population in another Member State that is significant from the point of view of health.

3. Solid low-level radioactive waste is temporarily stored on site for transfer to disposal facilities authorised by the United Kingdom regulatory authorities. Spent fuel elements and intermediate level solid waste are temporarily stored on site, awaiting the future availability of a geological repository. Reprocessing of spent fuel is not envisaged.

4. In the event of unplanned releases of radioactive effluents which may follow an accident of the type and magnitude

considered in the General Data, the doses likely to be received by the population in another member state would not be significant from the point of view of health.”

32. A further submission was made by the UK government in January 2012 in response to a request for more information about the interim storage of spent fuel and intermediate level waste on the site.
33. On the 30th May 2012, the European Commission published its opinion, stating that,
- “In conclusion, the Commission is of the opinion that both in normal operation and in the event of an accident of the type and magnitude considered in the General Data, the implementation of the plan for the disposal of radioactive waste in whatever form from the interim storage facilities for intermediate level waste and spent fuel at Hinkley Point C nuclear power station site, located in Somerset, United Kingdom, is not liable to result in radioactive contamination of the water, soil or airspace of another member state that would be significant from the point of view of health.”

The Espoo Convention

34. The United Nations Economic Commission for Europe (UNECE) Convention on Environmental Impact Assessment in a Transboundary Context was adopted in 1991 in Espoo and came into force on 10 September 1997. It is, therefore, known as the Espoo Convention. It has been implemented by the EIA Directive (Council Directive 85/337/EC as amended) and transposed into domestic law through Regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. That means that decisions taken by the Secretary of State on NSIPs under the Planning Act 2008 will be subject to the procedural requirements of Regulation 24. Where the Secretary of State is of the view that the development is likely to have significant effects on the environment of another EEA state he must take certain steps.

Assessment of Transboundary effects

35. In June 2011 the IPC published Advice Note 12: Development with Significant Transboundary Impacts consultation paper. That Note indicates that there are four aspects to the consideration of transboundary impacts:
- the obligations under Regulation 24 and the Espoo Convention and EU Directive 85/337/EEC as amended (the EIA Directive);
 - requests from other EEA states likely to be significantly affected;
 - the role of UK Government departments to ensure that other EEA states are appropriately consulted; and

- the role of developers in helping to ensure the relevant information is available at the appropriate time.
36. The document includes the suggestion that, unless there is compelling evidence to the contrary, the IPC may consider that nuclear power stations are likely to have significant transboundary effects.
37. On the 6th October 2011 NNB submitted a draft transboundary-screening matrix. That noted that airborne or water borne spread of impact was possible from the proposed reactor but assessed the probability of any accident or incident leading to offsite radiological or other impact as very low because of the effective regulatory framework in the United Kingdom. Transboundary impacts were, therefore, not considered likely.
38. On the 20th October 2011 the IPC prepared its own pre-application screening matrix. That recorded that through the design measures built into the development, the delivery of mitigation measures, effective control by other regulatory bodies, conditions and monitoring, impacts on another EEA state will not be significant. The probability of radiological impact was considered to be low on the basis of the regulatory regimes in place. It concluded that transboundary impacts from accidents during operation or decommissioning will be so low as to be exempt from statutory control. Accordingly, the IPC concluded that the proposed development was not likely to have significant effects on the environment in another EEA state. As a result nothing further was needed under Regulation 24 of the 2004 Regulations at that time.

Application for DCO

39. On the 31st October 2011 NNB made a formal application to the IPC for the DCO which is challenged in these proceedings. The application included a comprehensive 11 volume environmental statement which included analysis of air quality, radiological impacts and their mitigation and, in appendix 7E, an assessment of transboundary impacts. That concluded that the likely impacts determined did not extend beyond the County of Somerset and the Severn Estuary. The nearest Espoo Convention states outside the UK were the Republic of Ireland and France, well beyond the areas where impacts were likely. It was noted that the extent of any possible adverse effects on nature conservation sites of European and national importance did not extend beyond the Severn Estuary and, therefore, there was no possibility that any adverse effects would have a trans-boundary effect on another EEA area.

Screening decision by the Planning Inspectorate

40. On the 11th April 2012 a screening decision was issued by the Planning Inspectorate (PINS) that considered:
- i) the environmental statements;
 - ii) distances to other EEA states;
 - iii) submissions to the EC under Article 37 of the Euratom Treaty;

- iv) the Secretary of State's decision on regulatory justification for the EPR;
 - v) statements in EN-6 and its appraisal of sustainability to the effect that significant transboundary effects arising from new nuclear power stations are not considered likely; as due to the robustness of the regulatory regime there is a very low probability of unintended release of radiation.
41. It concluded that significant transboundary environmental effects were not likely. The totality of the evidence about the reactor together with information about the regulatory framework within the UK was felt by PINS to amount to "compelling evidence" that there would be no likely significant effects on the environment as set out in Advice Note 12.

Communications with the Irish Government

42. On the 13th November 2009 the Government sent copies of the NPS consultation to all other EU member states including Ireland. They were informed that there was a possibility of transboundary effects in the event of a significant unintended release of radiation emissions. However, due to the robustness of the UK regulatory regime there was a very low probability of an unintended release of radiation.
43. In February 2010 the Irish government responded and reserved its position. In June 2010 detailed information was provided to the Irish government from the appraisal of sustainability. The Irish government raised various queries to which the Secretary of State responded but noted that the Irish request was more appropriate at the site-specific proposal stage.
44. On the 28th July 2010 the defendant sent a further letter. It set out the government position that the only significant transboundary effects were likely to come through an unintended release of radioactive emissions. The regulators viewed that as a very low probability based on both expert judgment and the GDA.
45. On the 28th October 2010 the UK government published for re-consultation a further draft of the NPS EN-6 and produced a revised appraisal of sustainability which again concluded that the construction and operation of new nuclear power stations in line with the NPS were not likely to result in significant transboundary effects. On the same day the government sent a copy of the revised NPS to all EU member states including Ireland.
46. On the 24th January 2011 the Irish government responded saying that their questions were better answered at a site-specific stage. They did not ask for formal transboundary consultation. They made it clear that their concerns were best pursued through ongoing dialogue with the UK government.
47. In September 2011 the UK government informed the Irish government that NNB considered that there would be no significant transboundary effects from the proposed reactor and that a transboundary consultation was not needed. The Irish government was advised to register an interest in HPC when the DCO application was registered with the IPC. At no point has the Irish government requested transboundary consultation. It also did not take part in the examination process.

48. Instead, the Irish government asked the Radiological Protection Institute of Ireland (RPII) to carry out an assessment of the potential radiological impacts on Ireland from the proposed programme of nuclear plants including HPC. Five of the proposed locations are on the Irish Sea coast. The principal findings were summarised as being,
- “ Given the prevailing wind direction in Ireland, radioactive contamination in the air, either from routine operation of the proposed nuclear power plants or accidental release, will most often be transported away from Ireland.
 - The routine operations of the proposed nuclear power plant will have no measurable radiological impact on Ireland or the Irish marine environment.
 - The severe accident scenarios assessed ranged in their estimated frequency of occurrence from 1 in 50,000 to 1 in 33 million per year. The assessment used a weather pattern that maximised the transfer of radioactivity to Ireland. For the severe accident scenarios assessed, food controls or agricultural protective measures would generally be required in Ireland to reduce exposure of the population so as to mitigate potential long-term health effects. In the accident scenario with an estimated 1 in 33 million chance of occurring, short-term measures such as staying indoors would also be advised as a precautionary measure. In general, the accidents with higher potential impact on Ireland are the ones least likely to occur.
 - Regardless of the radiological impact, any accident at the proposed nuclear power plants leading to an increase in radioactivity levels in Ireland would have a socio-economic impact on Ireland.
 - A major accidental release of radioactivity to the Irish Sea would not require any food controls or protective actions in Ireland.
 - There is a continuing need for the maintenance of emergency plans in Ireland to deal with the consequences of a nuclear accident abroad.”

Communications with the Austrian Government

49. The Austrian government was informed of the consultation on the NPS EN-6 and appraisal of sustainability. It responded in generic terms during those consultation periods.
50. On the 18th September 2012 the Austrian government wrote to the Department for Communities and Local Government requesting information “to allow for an examination as to whether or not the project was likely to have significant adverse effects on Austria’s environment.” That request was forwarded to the Planning Inspectorate. It replied on the 8th October 2012 explaining why it had not undertaken transboundary consultation and that, as the examination of the application had closed, the Austrian government should raise any concerns under the Espoo Convention with the Secretary of State. On the 19th October 2012 the Austrian government wrote to the Secretary of State indicating that it wished to participate in the process of considering the application according to the Espoo convention and the EIA Directive.

51. On the 16th November 2012 the Secretary of State provided the Austrian Government with a copy of the application documents and invited them to comment. Information was provided about the extensive public participation that had taken place on the project with just over 1,200 representations made to the Examining Authority which had held thirteen hearings.
52. In January 2013 the Austrian Government wrote to the Secretary of State to inform him that it had decided to initiate a public participation procedure in accordance with Article 7 paragraph 3 of the EIA Directive and Article 4 of the Espoo Convention. On the 17th January 2013 the Secretary of State replied requesting comments from the Austrian consultation by the 5th March 2013 as he had a statutory duty to announce his decision on the application no later than the 19th March 2013.
53. On the 5th March 2013 the Austrian Government wrote to the Secretary of State enclosing comments received from the provinces and the public. It also submitted a technical report assessing the likelihood and effects of a major accident at HPC. The technical report asserted that severe accidents with high releases of caesium-137 cannot be excluded, and there would be a need for official intervention in Austria after such an accident. However, the report recognised that the calculated probability of such an accident is below $1e-7/a$ (which means that such an accident would not be expected to occur more frequently than once in every 10 million years of reactor operation).

The Grant of Development Consent

54. The examination by the Panel of the application for development consent at HPC began on the 21st March 2012 and was completed on the 21st September. It included a series of accompanied site inspections by the panel, receipt of written evidence in response to panel questions and a series of issue specific hearings and open floor hearings held in the locality. The Planning Inspectorate prepared a report on the application on the 19th December 2012 for submission to the Secretary of State which recommended that the order be made.
55. On the 19th March 2013 the Secretary of State announced his decision under Section 114 of the Planning Act 2008 to grant development consent for the proposals in the application.
56. In his Decision Letter the Secretary of State referred to the opinion of the European Commission under the provisions of the Euratom Treaty the conclusions of which are set out above and which were quoted in the Decision Letter at paragraph 6.6.1(ii).
57. The Secretary of State also referred to the position with regard to Austria and the Espoo Convention. Having set out that Austria had been sent a set of the application documents and invited to comment it recorded that Austria had responded on the 5th March 2013 with representations comprising an expert report and a number of submissions from groups and individuals opposed to the project. The Decision Letter continued,
 - “6.6.2 (ii) The expert report focuses on nuclear safety issues and as such has been reviewed by the Office of Nuclear Regulation (ONR). It draws heavily on documents published by

the ONR during the Generic Design Assessment of the EPR. Although broadly technically sound, it tends to over emphasise the significance of those areas where ONR has in any event determined that more work needs to be done during any subsequent construction and commissioning of a power station based on the EPR (i.e. such as at Hinkley Point) as part of its own regulatory processes.

6.6.2 (iii) The Austrian expert contends that in assessing the likely environmental effects of the HPC project, I should take into account the effects of very low probability, extreme (or severe) accidents. Effectively the report says that unless it can be demonstrated that a severe accident (including significant radiological release) cannot occur, then no matter how unlikely it is, I must consider its consequences as part of the development consent process, having regard, in particular, to the possible deleterious effects on Austria. However in my view such accidents are so unlikely to occur that it would not be reasonable to “scope in” such an issue for environmental impact assessment purposes.”

58. The Secretary of State continued that his decision to make the order was only one of a number of decisions that needed to be made by government or the regulators before the HPC project could go ahead, and it was only concerned with one aspect of approval for the project (albeit an important one), namely, whether it should be given development consent under the Act. It is essentially a decision about the use of land.
59. The Secretary of State reiterated that the nuclear safety aspects of the project were regulated by the ONR and the EA, that a nuclear site licence had been granted (26 November 2012) and the GDA process concluded (13 December 2012). Paragraph 6.7.3 and 6.7.4 state,

“Also relevant from the nuclear safety point of view is Secretary of State’s Regulatory Justification decision of 2010. I note that NPS EN-6, paragraphs 3.12.9 and 3.12.11 state that I should have regard to this when considering potential effects on human health and well being and act on the basis that the risk of adverse effects resulting from exposure to radiation for workers, the public and the environment would be adequately mitigated because of the need to satisfy the requirements of the UK’s strict legislative regulatory regime as well as the ONR’s implementation of the governments policy on demographics. I am satisfied that in the light of the justification decision and the work done by ONR and EA as nuclear safety regulators in connection with the HPC project, there is no need to consider these issues further in a context of the application.

It may also be noted, for the sake of completeness, that the EA has issued various non nuclear safety authorisations for which it is responsible in respect of the HPC project, most recently the Environmental Permit issued on 13 March 2013.”

The Claimant's Involvement

60. On the 18th April 2013 the claimant wrote to the Secretary of State asking that the development consent be set aside and the decision making process be revisited. The claimant expressed concerns about the environmental impact assessment and decisions taken regarding transboundary consultation so that there was no consultation with Ireland or the public. The claimant asked the Secretary of State to confirm,
- i) Whether Ireland had been formally consulted under Directive 85/337 as amended, under the Espoo Convention, or under the Aarhus convention;
 - ii) If so, evidence of the consultation and any response; and
 - iii) If not, the basis on which the UK determined that such consultation was not required.
61. The Secretary of State replied on the 26th April 2013. He confirmed that the Irish government had not been formally consulted in relation to those matters set out in question one of the claimant's letter. He explained his decision and provided links to the transboundary screening report completed by PINS which had concluded that in the absence of a likelihood of significant effect on the environment of another EEA state there was no need to carry out transboundary consultation. The Secretary of State referred to information supplied by the developer and the conclusions by the European Commission under the Euratom Treaty. He emphasised also to the claimant that the safety and design features of the reactor were beyond the remit of the Planning Act process. Further, the Secretary of State noted that although the Screening Report had concluded that the development was not likely to have a significant effect on the environment of another EEA state it remained open to governments, organisations or members of the public in such states to take part in the examination process for the application for development consent. The Austrian government had asked to be consulted and the Secretary of State took those representations into account when making his decision. There was no representation from the Irish government.
62. The Secretary of State confirmed that the government did not intend to revisit the decision making process on the DCO. Nevertheless, there remained opportunities for organisations and individuals to participate on the potential effects of the HPC development in relation to site-specific design issues such as nuclear safety related construction. The claimants were informed that if they wished to participate in that process they could subscribe to ONR's free email service.

The Legal Framework

63. The Planning Act 2008 established a new system for the grant of consent for NSIP. It was designed to rationalise the different development consent processes and to create, as far as possible, a unified single consent regime with a harmonised set of requirements and procedures. Under part 2 of the Act an NPS can be designated which sets out national policy in relation to one or more specified descriptions of

development. That is to be accompanied by an appraisal of sustainability. The document has to have been through public consultation and approved by resolution of the House of Commons.

64. By virtue of Section 15 nuclear power stations are a category of NSIP.
65. An application for a DCO was made to the IPC but, as set out, since their abolition, as a result of changes made under the Localism Act from the 1st April 2012 the decision is now made by the Secretary of State. The application is processed through the Major Infrastructure Planning Unit (now the Major Applications and Plans Directorate) within the PINS. There is a defined pre application procedure to be followed. Once an application is received, an Examining Panel is appointed with the function of examining the application and making a report to the Secretary of State setting out its findings and conclusions on the application together with a recommendation on the decision to be made. Once there is a start day for the examination the entire procedure is to be completed within six months. There are further provisions as to procedures to be followed which are not material to the current case.
66. Section 104(3) of the Planning Act 2008 provides that, in cases where an NPS has effect in relation to the development for which the DCO is applied for:
 - “(3) The Secretary of State must decide the application in accordance with any relevant policy statement, except to the extent that one or more of subsections (4) to (8) apply.”
67. Subsections (4) to (8) apply only where the Secretary of State is satisfied that,
 - “(4) deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations;”
 - (5) deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment;
 - (6) deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment;
 - (7) the adverse impact of the proposed development would outweigh its benefits;
 - (8) any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.”
68. Under Section 114 the Secretary of State must either grant or refuse the application and, by virtue of Section 116, give reasons for his decision. A legal challenge is brought by way of judicial review within 6 weeks from the date of the publication of the order or the statement of reasons if that is later: Section 118.

69. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (the 2009 Regulations) came into force on the 1st October 2009. By virtue of Regulation 3 an order granting development consent must not be made by the Secretary of State unless he has first taken the environmental information into consideration. Under Regulation 4 development is EIA development if there has been the adoption by the Secretary of State of a screening opinion to that effect: regulation 4(2) (b).
70. Regulation 2 provides the following definitions,
- “ ‘Environmental information’ means the environmental statement (or in the case of subsequent application, the updated environmental statement) including any further information, and other information any representations made by anybody required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development and of any associated development;
- ‘Environmental statement’ means a statement-
- a) that includes such of the information referred to in part 1 of schedule 4 as is reasonably required to assess the environmental effects of the development and of any associated development and which the applicant can, having regard in particular to the current knowledge and methods of assessment, reasonably be required to compile; but
 - b) That includes at least the information referred to in part 2 of schedule 4.”
71. Regulation 24 is headed ‘Development with significant transboundary effects’. Because of its significance in this case I have set it out in full. It reads,
- “(1) This regulation applies where—
- (a) one of the events mentioned in regulation 4(2) occurs; or
 - (b) it otherwise comes to the attention of the Secretary of State that development proposed to be carried out in England, Wales or Scotland is the subject of an EIA application, and the Secretary of State is of the view that the development is likely to have significant effects on the environment in another EEA State; or
 - (c) another EEA State likely to be significantly affected by such development so requests.
- (2) Where this regulation applies, the Secretary of State must—
- (a) send to the EEA State as soon as possible and no later than their date of publication in The London Gazette referred to in sub-paragraph (b), the particulars required by paragraph

(3) and, if it thinks fit, the information referred to in paragraph (4);

(b) publish the information in sub-paragraph (a) in a notice placed in—

(i) the London Gazette, in relation to all proposed development; and

(ii) the Edinburgh Gazette, in relation to development proposed to be carried out in Scotland,

indicating the address where additional information is available; and

(c) give the EEA State a reasonable time in which to indicate whether it wishes to participate in the procedure for which these Regulations provide.

(3) The particulars mentioned in paragraph (2)(a) are—

(a) a description of the development, together with any available information on its possible significant effect on the environment in another EEA State; and

(b) information on the nature of the decision which may be taken.

(4) Where an EEA State indicates, in accordance with paragraph (2)(c), that it wishes to participate in the procedure for which these Regulations provide, the Secretary of State must as soon as possible send to that EEA State the following information—

(a) a copy of the application concerned;

(b) a copy of any environmental statement in respect of the development to which that application relates; and

(c) relevant information regarding the procedure under these Regulations,

but only to the extent that such information has not been provided to the EEA State earlier in accordance with paragraph (2)(a).

(5) The Commission must also ensure that the EEA State concerned is given an opportunity, before development consent for the development is granted, to forward to the Secretary of State, within a reasonable time, the opinions of its public and of the authorities referred to in Article 6(1) of the Directive on the information supplied.

(6) The Commission must in accordance with Article 7(4) of the Directive—

(a) enter into consultations with the EEA State concerned regarding, inter alia, the potential significant effects of the development on the environment of that EEA State and the measures envisaged to reduce or eliminate such effects; and

(b) determine in agreement with the other EEA State a reasonable period of time for the duration of the consultation period.

(7) Where an EEA State has been consulted in accordance with paragraph (6), on the determination of the application concerned the Secretary of State must inform the EEA State of the decision and must forward to it a statement of—

(a) the content of the decision and any requirements attached to it;

(b) the main reasons and considerations on which the decision is based including relevant information about the participation of the public; and

(c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development.”

72. Development is EIA development if it is included within schedule 1 to the regulations, which nuclear power stations are by virtue of Regulation 2(b).

73. Schedule 4 sets out information for inclusion in environmental statements. Part 1, where relevant, reads,

“17. Description of the development, including in particular—

(a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;

(b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;

(c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.

19. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

20. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

(a) the existence of the development;

(b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant of the forecasting methods used to assess the effects on the environment.

21. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.”

74. The 2009 Regulations give effect in English law to Council Directive 85/337/EEC. The Directive has been amended to take account of the Espoo and Aarhus Conventions. The current Directive is 2011/92/EU which is a consolidating Directive.

75. The relevant recitals of the Directive are as follows,

“(2) Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.

(7) Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.

(8) Projects belonging to certain types have significant effects on the environment and those projects should, as a rule, be subject to a systematic assessment.

(15) It is desirable to lay down strengthened provisions concerning environmental impact assessment in a transboundary context to take account of developments at international level. The European Community signed the Convention on Environmental Impact Assessment in a Transboundary Context on 25 February 1991, and ratified it on 24 June 1997.

(18) The European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) on 25 June 1998 and ratified it on 17 February 2005.”

76. Article 2 has been described by the ECJ as containing the fundamental objectives of the Directive: see Case C-215/06 *Commission v Ireland* [2008] ECR I-04911 at 49. It reads,

“Article 2

1. Member States shall 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 a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3. Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.

4. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In that event, the Member States shall:

- (a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the European Parliament and to the Council on the application of this paragraph.”

77. Article 3 provides that subject to Article 2(4) projects listed in Annex 1 are to be made subject to an assessment in accordance with Articles 5 to 10. Nuclear power stations and other nuclear reactors including the dismantling and decommissioning of such power stations or reactors are listed in Annex 1. A footnote explains that nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

78. Article 7 now reads,

“Article 7

1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken.

The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to points (a) and (b) of Article 6(3).

3. The Member States concerned, each insofar as it is concerned, shall also:

(a) arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and

(b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.”

79. Article 7.1 has been considered once by the CJEU and only in relation to a project which straddled the border between two countries. The issues raised are entirely different to those which are raised here.

80. I turn now to deal with the issues raised by this application.

The Submissions in Outline

81. The claimant describes the focus of the first complaint as,

“The particular focus of the complaint is the way in which the Secretary of State says he dealt - in the screening decision - with the potentially very severe impacts nuclear accidents, which although agreed (thankfully) to be unlikely, could have were they to happen.” (Claimant’s skeleton [11])

82. The claimant contends that the approach of the Secretary of State in deciding that consultation under Article 7 with the people of Ireland was not required is flawed. That raises the following issues,

a) What is the correct approach to likelihood?

b) What is the correct approach to assessment?

83. On likelihood, Mr Wolfe QC submits that transboundary consultation is necessary if a significant transboundary impact may occur (i.e. is possible) or if such impacts cannot be excluded on a proper basis, in effect using a worst case assessment. Accordingly,

the defendant asked himself the wrong question when it came to likelihood by “scoping out” events that could have significant transboundary impact.

84. The defendant and NNB submit that such an interpretation is inconsistent with Article 7 of the Directive or of any material provisions in either the Aarhus or the Espoo Convention.
85. On the correct approach to assessment the claimant submits that even if the defendant and NNB are right on the approach to likelihood then that decision cannot rely on incomplete information and assumed success of future regulatory controls.
86. The defendant and NNB submit that planning decision makers are entitled to rely on the proper operation of other regulatory regimes and that, in the context of nuclear safety, with the highly technical and highly regulated regime consisting of a combination of expert bodies it would be nonsensical for the defendant to have to scrutinise, appraise and judge the past work of those regulators and also not to be able to rely on their future work. Further, the defendant submits that the regulation by ONR penetrates the entire design so that it is inseparable from the scheme which is being advanced. As such, it is an integral part of the proposal and an actual characteristic of the development itself. The problem suggested by the claimant, therefore, does not arise.
87. In any event, provided the right test is applied by the decision maker the proper approach to a challenge to development consent is not a merits review but on *Wednesbury* principles.

Ground One: The Meaning of Article 7 of the EIA Directive and Regulation 24 of the 2009 Regulations

Likelihood: The Claimant’s Case

88. The claimant carried out an extensive referencing exercise to set the background to their submissions on “likely”.
89. The Treaty on the Functioning of the European Union in Article 191 sets out that the union policy on the environment shall aim at a high level of protection and be based on the precautionary principle and on principles that preventive action should be taken, that environmental damage should as a priority be rectified at the source. The approach to environmental policy was, therefore, one to be based on precautionary preventive principles. Further, international agreements concluded by the union were binding on the institutions of the union and on its member states: Article 216.
90. Domestic law was to be interpreted in the light of the wording and purpose of a Directive: see Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] and Case C-62/00 *Marks & Spencers Plc v Commissioners of Customs and Excise*.
91. The member state must ensure compliance with international agreements entered into by the community which form an integral part of the EU legal system. The meaning of an agreement is EU law which the CJEU must ensure is interpreted uniformly: see Case 104/81 *Hauptzollamt Mainz v Ca Kuferberg and CIE* [1982] ECR 3641. Further,

preference should be given to the meaning which accords with an international treaty which prevails over EU secondary legislation: see Case C-61/94 *Commission v Germany* [1996] ECR I-3989. The general rule was that an EU Directive should be interpreted in a manner that is consistent with the international agreements concluded by the EU: Case C-341/95 *Bettati v Safety High Tech* and *R (Edwards and Another) v Environment Agency and Others No 2* [2011] 1 WLR 79 at paragraph 25.

92. The Planning Inspectorate Advice Note 12: Development with Significant Transboundary Impacts consultation recognised that the Espoo Convention had been implemented by the EIA Directive and transposed into UK law specifically under Regulation 24. It recognised in relation to screening that,

“In reaching a view the precautionary approach will be applied and following the court’s reasoning in the *Waddenzee* case such that “likely to have significant effects” will be taken as meaning there is a probability or risk that the development will have an effect, and not that a development will definitely have an effect.

To determine the likelihood of significant effects the Secretary of State will require certain information. This will enable screening of the proposed development as to the likelihood of such significant effects. A screening matrix will be used to assist the determination of the environmental significance of activities.

... As a rule of thumb (taking the precautionary approach) unless there is compelling evidence to suggest otherwise, it is likely that the Planning Inspectorate may consider the following NSIPs as likely to have significant transboundary impacts:

- nuclear power stations.”

93. Guidance on the Application of Environmental Impact Assessment Procedure for Large Scale Transboundary Projects published by the EU required notification by the party of origin of projects listed in appendix 1 and likely to cause a significant adverse transboundary impact. The document recites the Espoo Convention’s primary aim to “prevent, reduce and control significant adverse transboundary environmental impact from proposed activities” but continues that the party of origin is obliged to notify affected parties even if there is only a low likelihood of such an impact. That means that notification is always necessary unless significant transboundary impact can be excluded with certainty.

94. In the Espoo Convention itself Article 1 defines impact as meaning,

“Any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction amongst these factors; it also

includes effects on cultural heritage or socio-economic conditions resulting from alteration to those factors.”

95. Article 2 sets out general provisions and provides,
- “2.1 The parties shall either individually or jointly, take all appropriate effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.
- 2.2 Each party shall take the necessary legal, administrative or other measures to implement the provisions of this convention, including, with respect to proposed activities listed in appendix 1 that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of environmental impact assessment documentation described in appendix 2.”
96. Article 3 deals with notification. It provides that for a proposed activity listed in appendix 1 that is likely to cause a significant adverse transboundary effect the party of origin shall notify any party which it considers may be an affected party as early as possible and no later than when informing its own public about the proposed activity. The notification is to contain information on the proposed activity including any available information on its possible transboundary impact. If the parties cannot agree then the question of whether there is likely to be a significant adverse transboundary impact may be submitted to an inquiry commission to advise on that likelihood.
97. Article 11 provides for a meeting of the parties to keep under continuous review the implementation of the convention. If there are disputes between two or more parties about the interpretation or application of the convention then, if not settled by negotiation or some other method of dispute settlement, they can be referred to the International Court of Justice or arbitration by virtue of Article 15. Article 20 provides that the authentic texts of the Convention are English, French and Russian.
98. The Vienna Convention on the Law of Treaties provides in Article 31 that any subsequent agreement between the parties regarding the interpretation of the treaty or any subsequent practice which establishes the agreement of the parties about the interpretation of the treaty shall be taken into account.
99. Meetings of the parties under the Espoo Convention have taken place. At the fourth meeting of the parties in 2008 it was recorded that the Implementation Committee were of the view that “even a low likelihood of such an impact should trigger the obligation to notify affected parties in accordance with Article 3... this means that notification is necessary unless a significant adverse transboundary impact can be excluded.”
100. The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters under Article 6 headed Public Participation in Decisions on Specific Activities reads in Article 6.1(b),

“Each Party

Shall, in accordance with its national law, also apply the provisions of this Article to decisions on proposed activities not listed in annex 1 which may have a significant effect on the environment...”

Annex 1 includes nuclear power stations and other nuclear reactors.

101. The claimant then referred to the EIA Directive which I have set out above.
102. The case of *Kraaijeveld BV and others v Gedeputeerde Staten Van Zuid-Holland* Case C-72-95 [1996] ECR I-4355 was relied upon as providing a parallel to the current position as in that case the Dutch court relied on the Dutch text and argued that the Dutch version of the Directive was the only authentic language version. The court held that different language versions were to be looked at and the divergence to be resolved by reference to the purpose and general scheme of the Directive.
103. In *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others* Case C-437/97 [1999] ECR I-5613 the court held that the criteria and/or thresholds mentioned in Article 42 of the Directive were designed to facilitate examination of the “actual characteristics” of any given project. Although dealing with legislative exemption, no project was to be excluded other than on the basis of a comprehensive assessment. A future study to be carried out for the purposes of environmental impact assessment could not be relied upon. The project needed to be precisely assessed on the date of any proposed exemption.
104. That approach was confirmed in relation to the consent procedure in the case of *R(on the application of Delena Wells) v Secretary of State for Transport the Local Government and the Regions* Case C-201/02 [2004] ECR I-723 at [52]. The approach for comprehensive assessment was confirmed further in the case of *Commission v Italy* Case C-87/02 [2004] ECR I-4911 at [44]. Paragraph 49 of the judgement made it clear that the screening decision should be accompanied by all information that makes it possible for the court to check that it is based on adequate screening.
105. The case of *Waddenzee* Case C-127/02 [2004] ECR I-7405 referred to in Advice Note 12 (supra) whilst dealing with the issue of the Habitats Directive and the requirement for an appropriate assessment was highly relevant. The Advocate General concluded that an appropriate assessment is always necessary where reasonable doubt exists as to the absence of significant adverse effects [74]. The judgement of the court was that the triggering of the environmental protection mechanism was as a result of a mere probability or risk that such an effect attaches to the plan or project. Accordingly, a negative opinion can only be advanced if a risk has been excluded on the basis of objective information.
106. In the *Commission v Ireland* [2008] ECR I-4911 the court said,

“Nothing precludes Ireland’s choice to entrust the attainment of that Directive’s aims (Direction 85/337) to two different authorities, namely the planning authorities on the one hand and the agency on the other, that is subject to those authorities

respective powers and the rules governing their implementation and ensuring that an environmental impact assessment is carried out fully and in good time, that is to say before the giving of consent, within the meaning of that Directive.”

107. The claimant submits that supports its submissions that the vice in the ONR process is because it is ongoing. The judgment continues that the agency responsible for licensing a project with regard to pollution aspects may make its decision without an environmental impact assessment which creates a gap.
108. The case of *Solvay and Others v Région Wallonne* Case C-182/10 confirmed the approach of *WWF v Bozen* (supra) in cases which involve the Aarhus Convention. At the time of the decision authorising implementation of the project there must be no reasonable scientific doubt as to the absence of adverse effects on the integrity of the site in question.
109. *Peter Sweetman, Ireland v An Bord Pleanála* Case C-258/11 concerned the Habitats Directive. The Advocate General’s opinion was that the threshold for assessment at Article 6(3) is very low. The court pointed out that the assessment carried out under Article 6(3) of the Habitats Directive cannot have lacuna and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the works proposed on the protected site concerned... It was for the national court to establish whether the assessment of the implications for the site met those requirements.
110. On domestic jurisprudence the claimant submits that the decision maker must take reasonable steps to acquaint himself with the right information relying on *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014. That is relevant here, as the defendant has not evaluated transboundary impact of accidents and other unplanned events.
111. The claimant then proceeds to review domestic jurisprudence relating to the EIA Directive and/or the similarly worded Habitats Directive. The cases establish, it is submitted, the following propositions;
 - The fact that had the EIA Directive been followed it would not have affected the decision is no basis for not quashing the decision. A directly enforceable right of the citizen is not just a right to fully inform the decision on the substantive issue but a requirement that the decision was reached on the appropriate basis which required the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded in its views may be, is given an opportunity to express its opinion on environmental issues: *Berkeley v Secretary of State for Environment* [2001] 2 AC 603.
 - It is not appropriate for a person making a screening opinion to start from the premise that although there may be significant impacts they can be reduced to insignificance as a result of the implementation of conditions of various kinds: *R(on the application on Lebus) v South Cambridgeshire District Council* [2003] ENV LR 17 [46].

- In deciding whether an EIA was necessary in a screening direction the Secretary of State was not obliged to ignore the remedial measures submitted as part of the planning proposal: *Gillespie v First Secretary of State* [2003] 3 PLR 20.
- Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact which there can only be one possible correct answer in any given case. The role of the court should be limited to one of review on *Wednesbury* grounds: *R (on the application of Jones) v Mansfield District Council* [2004] 2 P&CR 233.
- Since *Waddenzee*, applying the precautionary principle, significant harm to an SPA is likely for the purposes of Article 6 of the Habitats Directive if risk of it occurring cannot be excluded on the basis of objective information: *R (on the application of Hart DC) v Secretary of State for Communities and Local Government* [2008] 2 P&CR 16.
- “Likely to have significant effects on the environment” is a phrase that has to be construed as a whole... as well as any inevitable environmental consequences that will flow from a development, the phrase requires consideration of future environmental hazards or risks. That, in turn, requires consideration of both the chance of an effect occurring and also the consequences if it were to occur: *R (on the application of Miller) v North Yorkshire County Council* [2009] EWHC 2172.
- “Likely” connotes real risk and not probability: *R (Morge) v Hampshire County Council* [2010] PTSR .Something more than a bare possibility is probably required, though serious possibility would suffice: *R (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157.
- The decision on a screening opinion is a matter of judgment: *R (on the application of Loader) v Secretary of State for Communities and Local Government and Others* [2012] 3 CMLR 29, *R (on the application of Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114 although the claimant makes a point that the decision does depend on information available;
- A screening opinion that the impacts “should be... controllable” was contrary to the underlying purpose of the regulation: *R(on the application of Birch) v Barnsley NBC* [2011] Env LR 15.

Discussion and conclusions

The meaning of “likely”

112. It is common ground that in the ordinary course of its operation there is no prospect of HPC being “likely to have significant effects on the environment” of another EEA state. The claimant’s case is premised on the basis of a severe accident occurring. Because the effect of such an event will be significant the claimant submits that a broad interpretation should be given to the word “likely” in Article 7 of the Directive and in Regulation 24.
113. The defendant submits that the odd consequence of the claimant’s position is that it would mean that “likely” equals “cannot be excluded” or, in other words, means

unlikely. Further, in considering whether the prospect of unplanned releases can be excluded one would need to exclude the role of the statutory regulators. As a matter of law they are there to exclude accidents. The claimant submits that is the consequence of applying the Directive and European jurisprudence.

114. In my judgement the claimant's approach is not consistent with the scheme or language of the Directive or the 2009 Regulations. Regulation 24 applies when the Secretary of State is of the view that the development is "likely to have significant effects" on the environment of another EEA state. That wording is materially the same as Article 7 of the Directive. That raises the question as to whether there is any linguistic divergence that requires one to look at the different language versions at all. I deal with that argument below. What is clear is that Article 7, in the material part, is identical in its wording to Article 2 in considering projects "likely to have significant effects" on the environment.

115. Starting with Directive 2011/92/EU the word "likely" appears in recital 7, Article 1, Article 2 and Article 5 as well as Article 7. In addition, it appears in Annex 4 which sets out the information required as part of an EIA. There the wording is,

"3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including in particular population, fauna, flora, soil, water, air, climatic factors, material assets including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.

4. A description of the likely significant effects of the proposed project on the environment resulting from;

a) the existence of the project;

b) the use of natural resources;

c) the emission of pollutants, the creation of nuisances and the elimination of waste."

116. Using the claimant's interpretation would mean that, in this case, Irish citizens would get the right to be consulted but would then receive a document or documents describing "likely significant effects" that would be unlikely to affect them. That is because the claimant's case is that any effect that cannot be ruled out must be regarded as "likely". In my judgement, such an approach is highly artificial and runs contrary to the plain language used in both the Directive and the 2009 Regulations. In each case when it is used the word acts as a trigger for environmental assessment.

117. As *Commission v Ireland* makes clear [49],

"Member States must implement Directive 85/337, as amended, in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that before development consent is given projects likely to have significant effects on the

environment by virtue inter alia, of their nature, size or location should be made subject to a requirement for development consent and an assessment with regard to their effect.”

118. The fundamental objective described must reflect the scope and purpose of the Directive which is to ensure that prior to any development consent being granted in cases where the application is likely to have a significant effect on the environment the application is properly assessed. The provisions are designed and have been amended (post Espoo and Aarhus) to provide the opportunity for the public to be engaged and participate in environmental decision-making.
119. The claimant contends that what is “likely” is easily identifiable and is to be taken from the approach to Article 6 of the Habitats Directive as exemplified in the case of *Waddenzee*. That means that if a risk of significant effect exists that cannot be excluded that is sufficient to trigger the requirements under Article 7.
120. It has to be recalled that the purpose of the screening direction under the Habitats Directive is to invoke a substantive process and not a procedural one as in the EIA Directive. Further, Article 6 is highly targeted in looking to protect special areas of conservation (SAC). Article 6(2) inculcates member states to take appropriate steps to avoid the deterioration of habitats as well as disturbance of species for which the areas have been designated. Article 6(3) permits development to proceed, but only after an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the site concerned. That is why a “no risk” approach is adopted.
121. That leads to a difficulty in a simple reading over of the judgments in the Habitats Directive cases of *Waddenzee*, *Solvay* and *Sweetman* to those under the EIA Directive. They are all cases concerned to make decisions on the basis of the most complete, precise and definitive findings and conclusions capable of removing all scientific doubt as to the effect of the proposed works on the protected site concerned. That is a different approach to that which is required under the EIA Directive which is looking at the likely significant effects on the environment. One imposes a site-specific test whilst the other is a broader approach.
122. Further, the claimant’s argument is akin to that which was made in *Evans*, namely, that a positive screening decision is required unless it can properly be said that there is no reasonable doubt about the potential for significant environmental effects. In that case it was argued that because of differing views on the part of the various interest groups there had to be reasonable doubt about environmental impact. That was rejected on the basis that the reference to reasonable doubt was to that on the part of the primary decision maker. Beatson LJ found that there was no support in the *Waddenzee* case for the view that where somebody else had taken a different view to the primary decision maker that it was not possible to demonstrate there is no reasonable doubt: [27].
123. The phrase “likely significant effects on the environment” has been considered by the Court of Appeal on various occasions. In Article 2 the Court of Appeal has held that “likely” is (i) more than a bare possibility: *Bateman* [17], (ii) a real risk: *Morge* [80], and (iii) that a real risk embodies the precautionary approach: *Evans* [21]. The word “likely” was considered in a different environmental context (the Habitats Directive) by Sullivan J (as he then was) in *Hart*. He said there [78],

“To an English lawyer, a need to establish a likelihood imposes a more onerous burden than a need to establish a risk. The concept of a ‘standard of proof’ is of little if any assistance in environmental cases, but the nearest analogy would be the difference between the balance of probability more likely than not and the real risk standards of proof.”

124. What is clear is that whilst the cases have not considered Article 7, given the similarity in wording between Articles 2 and 7, there is no basis for interpreting Article 7 in a different way to that in which Article 2 has been understood. The starting point should be to interpret the Directive as a whole to give it consistent effect and enable it to work as a whole. Applying that approach gives the Directive a sensible and comprehensible meaning.

125. To interpret Article 7 in a discrete way would be to have a scheme under the EIA Directive which worked inconsistently. The claimant’s contention would mean, if “likely” was to be construed consistently throughout the Directive in accordance with Mr Wolfe’s submission, a change in the well established EIA process. That is because the claimant’s approach would not be limited to development with transboundary effects such as accidents. Its interpretation of ‘likely’ would have to apply to other aspects of the environment such as fauna, flora, landscape, air and all the other factors. There are, therefore, significant ramifications if the claimant’s contention is correct. As Beatson LJ said in the case of *Bateman* at [19],

“The main difficulty I have with this part of Mr Drabble’s argument is that, if his submissions are both correct, an EIA would be required in virtually all cases in which a development might possibly have some effect on the environment, which does not seem to me to be what the directive intended.”

126. For exactly that reason I have the same reservations about this part of the claimant’s argument. The claimant’s interpretation would bring about an approach to the EIA Directive which is not what was intended. As Pill LJ said in *Loader* at [46] ,

“The proposed test does not accord with the overall purpose and tenor of the procedure initiated by the Directive. A formal and substantial procedure is contemplated, potentially involving considerable time and resources. It is contemplated for a limited range of schedule 2 projects, those which are likely to have significant effects on the environment. To require it to be followed in all cases where the effect would influence the development consent decision would devalue the entire concept.”

Linguistic Divergence

127. The claimant contends that there is a linguistic divergence between the various versions and, therefore, relies on other language versions of Article 7(1) of the EIA Directive to assist its interpretation. In that context the claimant relies upon the case of *Kraaijeveldt* (supra). In my judgment, that does not assist the claimant. That deals

with the situation where there is divergence and one must go to the purpose and general scheme of the Directive giving it a wide scope and a broad purpose.

128. Here, however, there is no significant doubt on the terms used in the different language translations. Just because the language used in other language versions is capable of being translated into English in words which are marginally different from those used by parliament does not mean that the English language version of Article 7 is any way defective. Each language version of a Directive is considered to be authentic and authoritative. That applies as much to the English language version as to any other language version of it. The question is whether, when legislating, parliament used words most naturally appropriate to convey the meaning that it intended? In my judgement it did. Further, if “likely” is understood consistently with the jurisprudence of the Court of Appeal as connoting the idea of “real risk” or “serious possibility”, there is no divergence in language between the various versions. There is no need, therefore, to go to the different language versions of the Directive.

The role of the Aarhus and Espoo Conventions

129. The claimant argues that the wording of the Aarhus Convention and the Espoo Convention support its submissions. I do not agree. As set out, the consolidating Directive takes into account both Conventions.
130. The Aarhus provision referred to by the claimant, namely Article 6(4) is a general provision about the conduct and timing of public consultation. It says nothing about circumstances in which an obligation to consult arises and does not deal with when cross boundary considerations are material. It does not help on what the correct meaning of ‘likely’ in the Directive is. Even when Article 7 of the EIA Directive applies the member state of origin is required to provide information to the other state and take account of representations made by it. The obligation to consult the public, if it arises, is upon the second or receiving member state. The conduct and timing of that consultation exercise is unaffected.
131. Article 3 of the Espoo Convention contains language which is materially the same as the language in the EIA Directive. It talks about notifying any proposed activity to another state party when, “... a proposed activity... is likely to cause a significant and adverse transboundary impact...” There is, therefore, no material difference between Article 3 of the Espoo convention, Article 7 of the EIA Directive and Regulation 24 of EIA Regulations.

Meetings under the Espoo Convention

132. The claimant relies upon a decision of the Espoo Convention Implementation Committee to provide a meaning under that Convention which can then be read across into the EIA Directive. Article 3(7) of the Convention permits, but does not require, parties to the Convention to submit disputes on the application of the provisions of the convention to an inquiry commission. However, the Convention does not provide either that the decisions of the inquiry commission are binding or that such decisions represent an authoritative interpretation on the meaning of the convention. Annex (IV) of the decision (III/4) contains paragraph 28 which reads.

“It may advisable to notify neighbouring Parties also of activities that appear to have a low likelihood of significant transboundary impacts. It is better to inform potentially affected Parties and let them decide on their participation instead of taking the risk of ending up in an embarrassing situation in which other Parties demand information on activities that have already progressed past the EIA phase.”

133. That decision is footnoted in the guidance on the application of environmental impact assessment procedures for large-scale transboundary projects.

134. It is referred to also in decision (IV/2) in annex 1 dealing with the Implementation Committee’s findings and recommendations further to the submission by Romania regarding Ukraine’s compliance with its obligations under the Convention with respect to the Danube Black Sea deep water navigation canal. Paragraph 54 reads,

“Article 3, paragraph 1 of the Convention stipulates that parties shall notify any party of a proposed activity listed in appendix 1 that is likely to cause a significant adverse transboundary impact. The committee is of the opinion that, whilst the Convention’s primary aim, as stipulated in Article 2, paragraph 1, is to “prevent reduce and control significant adverse transboundary environmental impact from proposed activity”, even a low likelihood of such impact should trigger the obligation to notify effective parties in accordance with Article 3. This would be in accordance with the guidance on the practicable applications of the Espoo Convention, paragraph 28, as endorsed by decision III/iv... this means that notification is necessary unless a significant adverse transboundary impact can be excluded.”

135. In my judgment the meeting was not purporting to determine the legal position. What the meeting is doing is setting out a pragmatic approach for parties to the Convention to follow. The committee has no status to give a legal ruling.

136. Article 11 of the Espoo Convention deals with Meetings of the Parties. Paragraph 2 sets out that the parties shall keep under continuous review the implementation of the Convention and then prescribes what can be done. It reads, in part,

“(e) Consider and, where necessary, adopt proposals for amendments to this convention.”

137. Although the meeting can propose amendments the Conventions there is nothing which gives the meeting the power to make a definitive ruling on what the Convention means.

138. The Implementation Committee was established at the second meeting of the parties in 2001. Its structure and functions are set out in annex ii to the third meeting of the parties in 2004. It reads,

“Objective and functions of the Committee

4. The objective of the Committee shall be to assist Parties to comply fully with their obligations under the Convention, and to this end it shall:

(a) Consider any submission made in accordance with paragraph 5 below or any other possible non-compliance by a Party with its obligations that the Committee decides to consider in accordance with paragraph 6, with a view to securing a constructive solution;

(b) Review periodically, in accordance with guidelines or criteria formulated by the Meeting of the Parties, compliance by the Parties with their obligations under the Convention on the basis of the information provided in their reports;

(c) Prepare the reports referred to in paragraph 11 with a view to providing any appropriate assistance to the Party or Parties concerned, for example by clarifying and assisting in the resolution of questions; providing advice and recommendations relating to procedural, technical or administrative matters; and providing advice on the compilation and communication of information; and

(d) Prepare, at the request of the Meeting of the Parties, and based on relevant experience acquired in the performance of its functions under subparagraphs (a), (b) and (c) above, a report on compliance with or implementation of specified obligations in the provisions of the Convention.”

139. It is clear from that that there is nothing to suggest that the committee has a normative function.

140. Article 31 of the Vienna Convention sets out general rules of interpretation. Paragraph one is to the effect that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and their context in the light of its object and purpose. Paragraph 2(a) reads,

“The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty...”

141. As Article 11 of the Espoo Convention contains nothing to indicate that a meeting of the parties is able to give an authoritative meaning to the wording of the Convention there can be no normative force to the decision of the meeting.

142. The claimant’s case is thus dependant upon the meaning and effect of paragraph 54 of the Implementation Committee’s findings and recommendations further to a

submission by Romania regarding Ukraine. The position is directly analogous to that which was raised in the case of *Solvay* when the question was whether Articles 2(2) and 9(4) of the Aarhus convention had to be interpreted in accordance with the guidance in the Aarhus Convention implementation guide. The aim of the guide was to provide an analysis of the Aarhus Convention which introduced the reader to the convention and to what it can mean in practice. Whilst the guide could be regarded as an explanatory document, being capable of being taken into consideration as appropriate amongst other relevant material for the purpose of interpreting the Convention, the observations in the guide were held to have no binding force and did not have the normative effect of the provisions of the Aarhus convention. That is exactly what the position would be here if reliance were placed upon the meetings held under the Espoo Convention.

Other matters

143. As to the published guidance on the application of the environmental impact assessment procedure for large-scale transboundary projects by the European Commission that is only guidance. As the disclaimer at the front of the document sets out the definitive interpretation of Union law is the sole prerogative of the European Court.
144. The same point can be made about the reliance placed on Advice Note 12 published by the IPC. It is only guidance. If it is saying that *Waddenzee* has to be followed then it is in error. If, on the other hand, it is saying that the effect of the development is to be gauged by when there is more than a bare possibility of an effect then that is entirely consistent with the cases of *Bateman*, *Morge*, and *Evans*.

Conclusion

145. It follows that for all of the reasons set out above the claimant's submission as to the meaning of Article 7 in the Directive and regulation 24 in the Regulations is rejected.

Ground Two: Did the Defendant fail to comply with Regulation 24/Article 7? What approach should the court take to its consideration?

146. The claimant submits that although the environmental statement included appendix 7E headed 'Assessment of transboundary impacts' the contents of it were inadequate to discharge the burden that had to be satisfied. It was incomplete and imprecise as an assessment.
147. The screening opinion conducted by PINS dated 11th April 2012 under Regulation 24 of the 2009 Regulations suffered from similar significant deficiencies. In considering appendix 7E to the ES the screening opinion concluded,

“Potential transboundary effects are identified as air quality, marine water quality, marine ecology and radiological impacts. Air quality impacts are assessed in Volume 2 Chapter 12 of the ES: marine water quality and ecology are assessed in Chapters 18 and 19 and radiological effects are assessed at chapter 21. Potential impacts identified are assessed as not extending beyond the county of Somerset and the Severn Estuary. Any

residual effects on human beings and sensitive ecological species/habitats would also be minimised and/or controlled through the imposition of appropriate licensing and monitoring conditions by the regulatory agencies. On the basis that licensing and monitoring conditions are effective, impacts will not be significant.”

In terms of magnitude the opinion concluded,

“The magnitude of effects are controlled through the design measures built into the development, the delivery of mitigation measures, effective control by the relevant regulatory bodies, conditions and monitoring, no significant impacts on other EEA states are anticipated.”

148. On probability it concluded,

“The probability of a radiological impact is considered to be low on the basis of the regulatory regimes in place. There could be direct impacts related to the discharge of water during normal operational conditions. However the discharge of water is expected to be controlled by appropriate licensing conditions and regular monitoring, and hence the probability of any adverse impacts is likely to be low. The Developer has indicated that information is included in the Government’s submission to the European Commission under Article 37 of the Euratom treaty to show that transboundary impacts from accidents during operation or decommissioning will be solo as to be exempt from regulatory control.”

149. As a result the claimant submits that the screening opinion was entirely premised on future regulatory control. As such, it was not based on the actual characteristics of the project, it was not based on a comprehensive assessment of its potential transboundary impacts, the impact could not be assessed precisely in a definitive manner based on information available at that time, PINS could not exclude doubt as to the absence of significant effects and their conclusion was not based on its independent judgment. Those were matters which the court had to consider.

150. The reference to the Article 37 submission was misleading as all there was was an awareness of its existence but nothing further by way of information that could allow it to be checked. In any event PINS expressed no view on the potential transboundary impact if an accident or unplanned release was to happen. As a result they did not apply the Article 7 test as they should.

151. The Development Consent issued on the 19th March 2013 noted the Euratom Opinion but the Secretary of State did not form a judgment upon it as he was obliged to do. The decision relied upon an assumption that the future regulatory processes would deal with the risks involved. It contained a mis- direction as to likelihood as evidenced in paragraph 6.6.2(iii) in scoping out accidents and did not involve the Secretary of State making a decision on the screening question under Article 7.

152. On the UK regulatory regime it is evident, as ONR themselves acknowledge in the project assessment report of the 31st October 2012, that there is no relationship in law between the DCO and licensing. Their scope is to deal with the organisation, the site, the safety report and the licence condition compliance arrangements. Their report recognised,
- “that not all resources, arrangements and safety reports to support construction and operation will be in place at the point of licensing and that NNB Gen Co will continue to develop its arrangements as the corporate and site-based organisations evolve towards those required for full operation. The key consideration for ONR is that, at the point of licensing, the licence is in control of all activities that have the potential to effect nuclear safety, and has adequate arrangements in place to provide confidence that this will continue to be the case.”
153. On the safety report it was evident that post licensing, substantial further analysis work will be necessary in several technical areas to justify permissioning of nuclear safety related construction. The severe accident analysis assessment which contributed to the assessment report noted that NNB Gen Co’s severe accident lead engineer is actively engaged with the proposed design changes arising from lessons learnt from the Fukushima incident.
154. In the HPC fault studies and severe accident analysis topic report for licensing it was evident that work was still ongoing as it is also in the report on external hazards assessment dated the 14th December 2012. That report considered only external hazards from the point of view of their definition of severity, frequency and other characteristics that define their effect on nuclear safety. They were considered in terms of the way they are analysed to develop a basis for plant design. More detailed assessment would need to be undertaken. The site-specific preconstruction safety report was recorded as developing.
155. The claimant submits that all demonstrates that whilst ONR is doing its job the regulatory regime is still very open with lots of design changes including consideration of fault, accident and safety matters to a degree which leaves it too uncertain for the requirements of Article 7.
156. On the Euratom opinion the general data was compiled by NNB Gen Co and seen by the relevant UK regulators before being provided by the UK government to the Commission. The letter from the Treasury Solicitor, dated 18th October 2013, makes it clear that the Secretary of State did not go behind the findings of the Commission under Article 37, by considering information underlying the Article 37 general data and it was not necessary for him to do so. That means, submits the claimant, that the assumptions which underpinned the submission and opinion are by no means complete and certainly not a worst case. They were, in any event, given in early 2012 considerably before the December 2012 ONR decisions which have the flaws set out above. In any event the principles which underlie the EIA assessment are not those which underlie the Euratom provisions.
157. Finally, the claimant submits that impact includes effects on socio-economic conditions resulting from alterations to environmental factors. The case of *Leth v*

Republik Osterreich and Another [2013] 3 CMLR 2 makes it clear that the EIA process is concerned with direct economic consequences of effects on the environment. It does not have to be a significant effect. Where there is damage which is of direct economic consequence of the environmental effects of a public or private project that is covered by the object of protection pursued by Direction 85/337: paragraph 36. In that regard the claimant relies upon the report of RPII which concludes that in the event of the most severe accident scenario of 1 in 33 million chances in any given year there would be significant socio-economic implications and costs, possibly lasting for months or years following such an accident.

158. Accordingly the development consent was granted without the compliance with the requirements of Article 7 and cannot stand.

The standard of review

159. The approach of the court was considered in the case of *R (Jones) v Mansfield District Council*. Dyson LJ (with whom Laws and Carnwath LJ) agreed, said at paragraph 17,

“Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact to which there can only be one possible correct answer in any given case. The use of the word "opinion" in regulation 2(2) is, therefore, entirely apt. In my view, that is in itself a sufficient reason for concluding that the role of the court should be limited to one of review on *Wednesbury* grounds.”

160. It follows that the approach of the court should be one of *Wednesbury* review.
161. Considering the approach to future events and their consequences in the case of *Miller Hickinbottom J* at paragraph 31, said,

“In the context of the EIA Directive and Regulations, "likely to have significant effects on the environment" is a phrase that has to be construed as a whole: and I respectfully agree with Dyson LJ in *Jones* that, rather than a hard-edged question of fact, it involves a question of planning judgment and opinion such that, in any set of circumstances, there is a range of valid answers. For a development to be likely to have significant environmental effects, it is certainly not necessary for it to be more likely than not that the development will have particular environmental consequences. For example, if a development has the potential for an environmental catastrophe, before the relevant provisions are brought into play it does not have to be more probable than not that such an event will occur in the future. As well as any inevitable environmental consequences that will flow from a development, the phrase requires consideration of future environmental hazards or risks. That in turn requires consideration of both the chance of an effect occurring, and also the consequences if it were to occur.”

162. I agree with the approach of Hickinbottom J but note that he did not have to consider, in looking at future environmental hazards or risks, the role of the relevant regulator and its relationship with the development consent decision maker.

The basis of the Secretary of State Decision

163. Dealing with the documents which have considered the likelihood of accidents the first in time was the White Paper on nuclear power published in January 2008. Within that, the government made it clear that it continued to believe that “new nuclear power stations would pose very small risks to safety, security, health and proliferation. We also believe that the UK has an effective regulatory framework that ensures that these risks are minimised and sensibly managed by industry.” It recognised also that regulatory assessment required all foreseeable threats, including aircraft crash to be considered: paragraph 2.96.

164. In the appraisal of sustainability the draft NPS EN6 it said,

“The construction of new nuclear power stations, in line with the revised draft NPS, is not likely to have any significant transboundary effects. The appraisal of sustainability identified the possibility of transboundary effects in the event of a significant unintended release of radioactive emissions e.g. as a result of an accident. The appraisal of sustainability has been informed by the views that both the environment agency and the nuclear installations inspectorate, who advise that due to the robustness of the regulatory regime, there is a very low probability of unintended release of radiation. This is based on expert judgment and experience supported in the case of the new nuclear power reactor designs by the regulators’ findings so far from Generic Design Assessments.”

165. In the reasons for the making of the Justification Decision (Generation of Electricity by an EPR Nuclear Reactor) Regulations 2010 the Secretary of State said, at paragraph 6.209,

“Extensive safety precautions are taken in order to protect those that work in nuclear power stations and members of the public from the health detriments arising from these by-products. The EPR has been designed to prevent the unplanned release of radioactivity during normal operations and in the event of an accident, both through a system of protective barriers and through a system of defences to protect these barriers from failure. In addition to these inherent safety features, any EPR that is built in the UK will be subject to the regulatory regime in place. This is internationally recognised as being mature transparent with highly trained and experienced inspectors.”

166. In appendix 7E of the environmental statement the screening matrix it says,

“Our assessment is that transboundary impact from accidents during operation or decommissioning will be so low that

according to UN IAEA guidelines the time and effort to exercise control by a regulatory process may not be warranted, i.e. they are effectively so low as to be exempt from regulatory control. This information is included in the Government's submission to the European Commission under Article 37 of the Euratom Treaty."

167. NPS EN-6 published in July 2011 set out at paragraph 1.7.4 that,

"Significant transboundary effects arising from the construction of new nuclear power stations are not considered likely. Due to the robustness of the regulatory regime there is a very low probability of an unintended release of radiation, and routine radioactive discharges will be within legally authorised limits."

168. The severe accident analysis for the GDA process considered that,

"A severe accident is considered highly unlikely... accident situations with core melt... are practically eliminated... low pressure core melt sequences necessitate protective measures for the public which are very limited in both area and time.... The safety approach for EPR reactors is deterministic, complimented by probabilistic analyses, based on the concept of defence in depth. Within this framework, a number of design provisions... are made to preserve the integrity of the containment in severe accidents and hence reduce the accident consequences."

169. The EU Commission decision under Article 37 of the Euratom Treaty was reached after receipt not only of the general data but written and oral contribution from experts.

170. The same conclusion was reached in the PINS screening exercise in April 2012.

171. In November 2012 the preconstruction safety case for EPR considered whether, as part of the GDA process, the design was fit for purpose. It considered protection from earthquakes, aircraft crash, external explosion, external flooding, extreme climatic conditions and lighting and electromagnetic interference.

172. The supplementary report which addressed the outstanding 31 GDA issues was accepted by ONR in their letter of the 13th December 2012 with the issue of final design acceptance confirmation. That meant that ONR was fully content with both the security and safety aspects of the generic design.

173. On the same day the EA issues a statement of design acceptability. That included work prior to its issue to take into account issues arising from Fukushima. They issued a notice on the day that that GDA process had demonstrated the acceptability of the EPR design for environmental permitting.

174. The examining panel for the DCO did not duplicate consideration of matters that were within the remit of bodies responsible for the nuclear regulation. The report of the

Austrian expert indicated that “severe accidents... could not be excluded although their calculated probability was below one in every 10 million years of reactor activity.”

175. The RPII report of May 2013 concluded as set out above but that was on the basis of an earthquake of an assumed magnitude which the authors of the report considered to be unlikely. Further, their report was not on the basis of the EPR design but on the basis of a PWR design used in an American study published in 2012. That study was the main source of information on accident scenarios and release source terms used in the assessment carried out by RPII. In the RPII report there was no assessment of the safety features or regulatory regime in the UK.
176. Whilst all of the above are policy or design related documents they do demonstrate a remarkable consistency of opinion and come from a variety of expert sources. They clearly provide, taken into account as they were, a sound and reasoned rational basis for the Secretary of State to come to his decision. They show also that the Secretary of State did take into account the prospect of a severe accident. He regarded it though as no more than a bare possibility.

The Relevance of the Regulatory Regime.

177. The claimant submits that the decision maker cannot have regard to the future role of the regulatory regime. The defendant submits that it would be odd if that was indeed the case. There is nothing in the Directive or Article 7 to require regulatory standards to be disregarded. Further, regulation by ONR penetrates the entire design so that it is inseparable from the scheme being advanced. As a result ONR is an integral part of the proposal and a key characteristic of the development itself.
178. The existence of another regulatory regime with powers which overlap with the regime of control under the Town and Country Planning Act is not new. The case of *Gateshead MBC v Secretary of State for the Environment* [1995] Env LR 37 dealt with an application to construct and operate an incinerator for the disposal of clinical waste. Under the Town and Country Planning Act 1990 planning permission was required for the construction and use of the incinerator. Incineration was a prescribed process under section 2 of the Environmental Protection Act 1990 and authorisation was required to carry out the process of incineration. The enforcing authority responsible for granting that authorisation was HM Inspectorate of Pollution (HMIP). An appeal against a decision of Gateshead Metropolitan Borough Council to refuse planning permission was heard at inquiry after which the inspector recommended refusal but the Secretary of State granted planning permission. The council appealed to the High Court. In dismissing that appeal the Deputy High Court Judge said,

“Just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent regime under the EPA of preventing or mitigating that impact for rendering any emissions harmless. It is too simplistic to say, “The Secretary of State cannot leave the question of pollution to the HMIP.”

179. Glidewell LJ in the Court of Appeal agreed. He went on to say,

“The decision which was to be made on the appeal to the Secretary of State lay in the area in which the regimes of control under the Planning Act and the Environmental Pollution Act overlapped. If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by HMIP to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission. But that was not the situation... Once the information about air quality at both of those locations was obtained, it was a matter for informed judgment, i) what, if any, increases in polluting discharges of varying elements into the air were acceptable, and ii) whether the best available techniques etc would ensure those discharges were kept within acceptable limits. Those issues are clearly within the competence and jurisdiction of HMIP. If in the end the Inspectorate conclude that the best available techniques etc would not achieve the results required by section 7(2) and 7(4) it may well be that the proper course would be for them to refuse an authorisation... The Secretary of State was, therefore, justified in concluding that the areas of concern which led to the Inspector and the assessor recommending refusal were matters which could properly be decided by EPA, and that their powers were adequate to deal with those concerns.”

180. The position in *Gateshead* is analogous to the situation here. First, there is no doubt that the existence of a stringent regime for authorisation and planning control is a clear material consideration. Second, where, as here, at the time of the development consent determination the matters to be left over for determination by another regulatory body were clearly within the competence and jurisdiction of that body, as they are here within the remit of ONR it is, in principle, acceptable for the Secretary of State not only to be cognisant of their existence but to leave those matters over for determination by that body.
181. At the time of the Secretary of State’s consideration of whether to grant development consent there was no evidence to suggest that the risk of an accident was more than a bare and remote possibility. In the instant case the regulatory regime is in existence precisely to oversee the safety of nuclear sites. There is nothing in the Directive and Article 7, in particular, to require the regulatory regime to be disregarded. NPS EN-6 refers to reliance being placed in the DCO process on the licensing and permitting regulatory regime for nuclear power stations, to avoid unnecessary duplication and delay and to ensure that planning and regulatory processes are focused in the most appropriate areas. It would be contrary to the accepted principle in *Gateshead* not to have regard to that regime, and in my judgement it would also be entirely contrary to common sense.
182. The claimant has relied upon a large number of cases as set out above. The defendant and interested party submit that the claimant has either misread or misapplied them.
183. The case of *Lebus* (supra) concerned whether there was a screening opinion for EIA development. But the case also concerned a further error of law which was that the

question was not asked whether the development described in the application would have significant environmental effects but rather whether the development as described and subject to certain mitigation measures would have certain environmental effects. It was held not to be appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts they could be reduced in significance as a result of implementation of conditions of various kinds. What was required was a clear articulation in the application of the characteristics of the development proposed and mitigation to offset any harm.

184. The case of *Gillespie* established that the Secretary of State was not obliged to ignore remedial measures submitted as part of the planning proposal when making his screening decision. Pill LJ said (at paragraph 36),

“In making his decision, the Secretary of State is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision.”

185. The submission that when considering a screening decision the proposed development was the proposal shorn of remedial measures incorporated into it was rejected on the basis that it would be to ignore the “actual characteristics” of some projects. The problem there was that the disputed condition 6 required future site investigations to be undertaken to establish the nature, extent and degree of contamination present on site. Until that was done a scheme for remediation could not be proposed. That was held to be too open and too uncertain. That is very different from the instant case where extensive design work, licensing work and site investigation has been carried out, the overall design and site licence have been approved and the final solutions are in the process of being worked up.

186. The case of *Blewett* concerned an application for judicial review of a planning permission for the third phase of a large landfill site. The application was accompanied by an environmental statement in accordance with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. The argument was that the environmental statement was defective as it did not include an assessment of the potential impact on the use of the proposed landfill on groundwater. The planning authority had left those matters to be assessed after planning permission and had granted the permission assuming that complex mitigation measures would be successful. The measures described refer to the appropriateness of the lining system and site design being assessed as part of the integrated pollution prevention and control permit application. It was held that,

“Reading the environmental statement and the addendum report as whole, it is plain that a particular cell design, which is not in the least unusual, and a lining system were being proposed. The details of that system could be adjusted as part of the IPPC authorisation process... The defendant had placed constraints upon the planning permission within which future details had to be worked out.”

187. The role of the EA, as the authority that would be in charge of the IPPC process was considered. They had initially been concerned that existing contamination had not been adequately addressed. There was an addendum report to address that concern. After receipt of that they acknowledged that the issue had been discussed but said that no final remediation strategy had been proposed. Sullivan J continued [66],

“If the Environment Agency had had any concern in the light of the geological and hydrogeological information provided in the addendum report as to the remediation proposals contained therein, then it would have said so. Against this background the defendant was fully entitled to leave the detail of the remediation strategy to be dealt with under condition 29.”

188. The role of the authorising body was thus clearly taken into account and, given their lack of objection, the decision maker had been fully entitled to leave the detail of the measures to deal with ground water pollution to be assessed after planning permission had been granted. As a matter of law, therefore, the role of another regulatory body is clearly a material consideration in the determination of development consent.
189. In European jurisprudence the claimant places significant reliance upon *WWF and Others v Bozen* (supra). The submission is that that judgement requires a comprehensive assessment that was just not possible in the circumstances as they were before the Secretary of State. The case concerned the restructuring of Bolzano airport, which had been used as a private airfield since 1925, into an airport which would be used for commercial flights. To enable that to be done various works had to be carried out including the extension of the runway from 1,040 to 1,400 metres. It was argued that the project was outside the reach of the EIA Directive because it did not involve the construction of a new airport but was the alteration of an existing airfield. Amongst the matters at issue was whether the member states had discretion to exclude such a project. It was held that whatever method was adopted by a member state to determine whether a specific project needed to be assessed the method must not undermine the objective of the Directive unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effect. Further, whilst Article 4(2) of the Directive conferred a measure of discretion the criteria and thresholds mentioned in Article 4(2) were designed to facilitate examination of the actual characteristics of any given project in order to determine whether it was going to be the subject of a requirement to carry out an assessment. The question, therefore, was whether, in the circumstances of this case, the Secretary of State had sufficient information to enable him to carry out a comprehensive assessment.
190. By the time of the screening decision on the 11th April 2012 the Justification Decision for EPR had been made and the project assessment report had been issued by ONR dealing with progress on the site licence on the 31st October 2011. Those were clearly material matters in coming to that decision.
191. By the time of the decision granting development consent on the 19th March 2013 the site licence had been issued on the 3rd December 2012 as had the GDA on the 13th December 2012. Those were clearly an integral part of the proposal before the Secretary of State. Put another way they were part of the “actual characteristics” of

the project. To ignore any part of what had gone before would be a failure to carry out the “comprehensive assessment” required under the Directive.

192. That leaves the issue of future regulation and what relevance that has, if any, to the Secretary of State in making his decision. There is a critical distinction between a decision on a screening decision where the decision maker has insufficient information to come to a lawful determination and the situation here where the Secretary of State is on record as expressing his view that he had adequate information to enable him to determine the application. That information enabled him to conclude that accidents were very unlikely and that the issue of safety was appropriately left to the relevant regulators. That is entirely consistent with the approach of the courts in *Gateshead, Blewett and R (Morge) v Hampshire County Council* [2011] UKSC2 at [29] and [30].
193. In my judgment there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. In short, the Secretary of State had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the Directive. The fact that there were some matters still to be determined by other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon.

The Relevance of the Euratom Opinion

194. In taking his decision to grant development consent the Secretary of State made it clear that he had considered all the environmental information in line with his duties under regulation 3(2) of the 2009 regulations. Attached to his decision letter was a brief summary of his consideration of the likely significant effects as reported in the ES together with the key findings contained in the panel’s report in respect of those effects. Where there was a difference between the two he preferred the analysis of the panel. He saw no need for the ES to be further supplemented.
195. The decision letter referred also to matters that had arisen after the close of examination on the 19th September 2012. One part of that was dealing with Austria and the Espoo Convention. Another part was dealing with communication that had been received from the Minister of Environment in Northern Ireland on the 21st October 2012. The Minister was particularly concerned about the environmental impact the HPC project would have on protected habitats in Northern Ireland. He was informed that his concern should be addressed to the Secretary of State as the examination of the application had closed. The Minister did not follow up his concerns. The decision letter continued,

“6.6.1 (ii) However, as noted above (section iv), I undertook a Habitats Regulations Assessment in respect of the Application. I concluded that there would be no adverse effect on any European site as a result of the HPC project. That assessment was further borne out by the facts that the distance between the site of the HPC and the range of its likely impacts are such that

granting consent would have no impact on a European site in Northern Ireland (over 300 miles distant) or in the Republic of Ireland (over 155 miles distant). In addition the European Commission carried out an assessment of HPC under the provisions of the Euratom Treaty, which concluded:

“the Commission is of the opinion that, both in normal operation and in the event of an accident of the type and magnitude considered in the General Data, the implementation of a plan for the disposal of the radioactive waste in whatever form from the two EPR reactors on the Hinkley Point C nuclear power station, located in Somerset, United Kingdom is not liable to result in a radioactive contamination of the water, soil or airspace of another member state that would be significant from the point of view of health.”

196. The defendant submits that that reference did not mean the Secretary of State was not taking the opinion into account. Indeed, the reverse, the Secretary of State was. He was entitled to take the opinion at face value. The position has to be looked at with a degree of reality. I agree. The Commission is a body which had received significant levels of information, had held oral hearings, received expert advice and then published its considered view. It was stating a conclusion which, despite the somewhat different remit of the Commission in considering the issue, was directly relevant to the issue of transboundary impacts.
197. The claimant contends, firstly, that the Secretary of State was simply noting the Commission opinion which was not the same as taking it into account. Secondly, the Secretary of State had to view the general data submitted to the Commission prior to decision being issued so that he was able to work out the situation for himself and come to his own conclusion.
198. I reject both of those submissions. I have dealt already with the first of those. As to the second, although the claimant relies on *Tameside* (supra) that is not authority for the Secretary of State having to do the work himself to enable him to come to his own independent conclusion. As Lord Diplock said about the Secretary of State’s decision in that case,

“it is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider... or put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?”

199. The answer in the instant case is that the Secretary of State did ask himself the right question and, as the review set out above shows, took reasonable steps to enable himself to answer it correctly.
200. Although the claimant relies upon *Commission v Italy* (supra) to show that there is no latitude on the part of the Secretary of State that case is dealing with an entirely different set of circumstances where no reasons at all were expressed as to whether screening of the project was carried out. The government there was relying upon an opinion by the Civil Engineering Department which was not an opinion on the environmental effects of the project but an authorisation solely for hydraulic purposes to cross the Tordera River and carry out certain works. There is nothing in the case which is authority for the proposition that a court should be placed in the role of a primary evaluator.
201. The claimant has served witness statements from Professor John Sweeney, Dr Paul Dorfman and Mr Large in November 2013 all purporting to put into issue the basis upon which the European Commission reached its opinion. The claimant does not have permission to rely upon such expert evidence. But, as the Secretary of State has not claimed to have taken into account the data submitted to the European Commission directly, such evidence is not in any event relevant.

Socio Economic Impacts

202. The claimant submits that there has been an omission to consider socio economic impacts which have to be taken into account under the EIA Directive. That takes into account effects on socio economic conditions resulting from environmental factors.
203. The reality is that it is the same event that will give rise to significant environmental harm that will give rise to any consequential harm, in this case to material assets or socio economic impacts. It follows that whether there is a breach in relation to that depends again upon whether the occurrence is likely. For reasons set out above, in my view, it is not.

Reference to the CJEU

204. The claimant contends that there is sufficient uncertainty about the meaning of the trigger test in Article 7 as to warrant making a reference to the CJEU.
205. The parties are agreed on the authorities. The starting point is *R v International Stock Exchange Ex Parte Else* [1993] QB 534 at page 545,
- “If the national court has any real doubt it should ordinarily refer.”
206. In *Trinity Mirror plc v Commissioners of Customs and Excise* [2001] EWCA Civ 65 at paragraph 52 Chadwick LJ said,
- “Where the national court is not a court of last resort, a reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote a uniform application of the law throughout the united union. A

reference will be least appropriate where there is an established body of case law which could relevantly be transposed to the facts of the instant case, of where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case. Beyond those two extremes is a wide spectrum of possibilities”

207. In my judgment there is no need for a reference. There is no real doubt about the interpretation of Article 7. I have found that the case law on Article 2 is directly transferable to Article 7 for reasons set out above. There is no substance to the Espoo point arising from paragraph 54 of the Implementation Committee’s decision again for reasons set out above. In these circumstances I can see no reason for making a reference.

Conclusion

208. I have not dealt expressly with each and every authority relied upon by the claimant. I have dealt with those relevant to the main issues above. I have taken the others into account. They do not affect my decision on either ground or overall.
209. As this is a rolled up hearing I have heard full argument. Having heard that I would not have granted permission to bring judicial review proceedings in this case. The claimant’s case is dismissed.
210. I invite submissions from the parties as to the final order and costs.