PETER SWEETMAN & ASSOCIATES
ROSSPORT SOUTH
BALLINA
COUNTY MAYO
sweetmanplanning@gmail.com

Environmental Protection Agency
Johnstown Castle
Wexford

2014-03-19

RE: P0738-03 Shell E&P Ireland Limited

Dear Sir/Madam

The response to the request for information to The Department forEnvironment, Community and Local Government.

They responded as follows;

> *As requested, please find enclosed a copy of the Environmental Impact Assessment, carried out for the part of the construction of the Corrib Gas pipeline for which a Foreshore Licence was granted on 22 July 2011. A copy of the Foreshore Licence is also enclosed. The Environmental Impact Assessment was carried out, on behalf of the Minister, by the Marine Licence Vetting Committee*.

The MLVC report states;

> *8. Compliance with Environmental Impact Assessment (EIA) Legislation*
>
> *The MLVC reviewed both technical and scientific aspects of the EIS. Overall, the Onshore and Offshore Environmental Impact Statements and Additional Information submitted by the developer in relation to the proposed gas pipeline development covers all key parameters required to be assessed under the relevant legislation. The MLVC is satisfied that the relevant EU and National EIA legislative requirements have been met. The MLVC is also satisfied that the Onshore and Offshore Environmental Impact Statements, including the Natura Impact Statement, and Additional Information submitted by the developer provides sufficient details to allow an assessment of the impacts of the proposed works on the foreshore on Natura 2000 sites to be carried out.*

9.13. Project Splitting

The MLVC acknowledge that multiple consents are needed for this complex project but are satisfied that project splitting has not occurred.

10. Conclusions and Recommendations
The MLVC reviewed both technical and scientific aspects of the documentation supplied by SEPIL. The Committee is satisfied that the purpose and objective of the proposed works on the foreshore are adequately explained. In addition, the committee is satisfied that the environmental information provided is sufficient to make a recommendation on the proposed development.

The MLVC is satisfied that the works on the foreshore would not have significant adverse impacts on human health and safety, the marine environment or designated Natura 2000 sites in the area and that there are no substantive grounds for a refusal, based upon environmental considerations. The MLVC recommends that the Minister issues the necessary Foreshore permit to allow the proposed works on the foreshore to proceed subject to compliance with the specific conditions below:

Article 3 of Directive 85/337 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:
– human beings, fauna and flora,
– soil, water, air, climate and the landscape,
– material assets and the cultural heritage,
– the interaction between the factors mentioned in the first, second and third indents.'

The judgement of the CJEU states;

"development consent" means:
the decision of the competent authority or authorities which entitles the developer to proceed with the project

It also states at 27;

Thus, section 173 of the PDA, which requires planning authorities to have regard to the information contained in an environmental impact statement submitted by a developer, relates to the obligation, under Article 8 of Directive 85/337, to take into consideration the information gathered pursuant to Articles 5 to 7 thereof. By contrast, section 173 does not correspond to the wider obligation, imposed by Article 3 of Directive 85/337 on the competent authority, to ensure that there is carried out an environmental impact assessment which identifies, describes and assesses all the matters referred to in that article

It is our submission that no Environmental Impact Assessment was carried out by The Department for Environment, Community and Local Government.

The CJEU found in Case C-66/06:

75. There is consequently no guarantee that, should those projects be likely to have significant effects on the environment, the competent authority will necessarily be able to require that an environmental impact assessment as provided for by Directive 85/337 be carried out before the decision entitling the developer to proceed with the project.

The CJEU found in Case C-215/06 at 61;

> 61. It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and
>
> 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive.

We attach the guidelines on the carrying out of Environmental Impact Assessment under Article 3.

This development has been substantially carried out without Environmental Impact Assessment makes it unauthorised.

At this time there is no evidence before the Agency that an Environmental Impact Assessment has been carried out by any of the various consent authorities.

Yours faithfully

Peter Sweetman and on behalf of
Monica Muller

Please respond by email to sweetmanplanning@gmail.com

62006C0066j C v Ireland Consent given without an assessment.

Title and reference

Judgment of the Court (Second Chamber) of 20 November 2008.

Commission of the European Communities v Ireland.

Failure of a Member State to fulfil obligations - Directive 85/337/EEC - Assessment of the effects of projects on the environment - Consent given without an assessment.

Case C-66/06.

Parties

In Case C-66/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 6 February 2006,

Commission of the European Communities, represented by F. Simonetti and X. Lewis, acting as Agents, F. Louis, avocat, and C. O'Daly, Solicitor, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, J. Connolly SC and G. Simons BL, with an address for service in Luxembourg,

defendant,

supported by:

Republic of Poland , represented by E. Ośniecka-Tamecka, acting as Agent,

intervener,

THE COURT (Second Chamber),

composed of K. Schiemann, acting for the President of the Second Chamber, J. Makarczyk (Rapporteur), P. Kūris, L. Bay Larsen and C. Toader, Judges,

Advocate General: J. Mazák,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 May 2008,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

Grounds

1. By its application, the Commission of the European Communities requests the Court to declare that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337'), all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the category of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive.

Legal context

Community legislation

2. In accordance with Article 1(2) of Directive 85/337:

'...

"project" means:

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

...

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

3. Article 2(1) and (3) of Directive 85/337 provide:

'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. These projects are defined in Article 4.

...

3. 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.

...'

4. Article 4 of the directive provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

5. Annex II to the directive lists the projects subject to Article 4(2).

6. Point 1 of Annex II is worded as follows:

'Agriculture, silviculture and aquaculture

(a) Projects for the restructuring of rural land holdings;

(b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;

(c) Water management projects for agriculture, including irrigation and land drainage projects;

(d) Initial afforestation and deforestation for the purposes of conversion to another type of land use;

(e) Intensive livestock installations (projects not included in Annex I);

(f) Intensive fish farming;

(g) Reclamation of land from the sea.'

7. Annex III to the directive, which lists the selection criteria referred to in Article 4(3), states as follows:

'1. Characteristics of projects

The characteristics of projects must be considered having regard, in particular, to:

– the size of the project,

– the cumulation with other projects,

– the use of natural resources,

– the production of waste,

– pollution and nuisances,

– the risk of accidents, having regard in particular to substances or technologies used.

2. Location of projects

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

– the existing land use,

– the relative abundance, quality and regenerative capacity of natural resources in the area,

– the absorption capacity of the natural environment, paying particular attention to the following areas:

...

3. Characteristics of the potential impact

The potential significant effects of projects must be considered in relation to criteria set out under 1 and 2 above, and having regard in particular to:

– the extent of the impact (geographical area and size of the affected population),

...'

National legislation

8. Directive 85/337 has been transposed into Irish law by, in particular, the Planning and Development Act, 2000 ('the PDA'), and the Planning and Development Regulations, 2001 (S.I. No 600/2001; 'the PDR'), as amended.

9. Under the PDA, the carrying out of development in principle requires planning permission.

10. An exemption from the obligation to obtain planning permission is laid down in Article 6 of the PDR for development falling within certain classes that are set out, in particular, in Part 3 of Schedule 2 to the PDR. This exemption is, however, subject to the requirement under Article 9 of the PDR that the development concerned must not be likely to have significant effects on the environment.

11. Article 9 of the PDR accordingly lists a number of cases in which the exemption cannot apply on account of the application of safeguard clauses.

12. As provided in Article 9(1)(a), that is so inter alia if the development in question would:

`...

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan,

(vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan, save any excavation, pursuant to and in accordance with a licence granted under section 26 of the National Monuments Act, 1930 ...,

...

(x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility,

(xi) obstruct any public right of way,

(xii) further to the provisions of section 82 of the [PDA], consist of or comprise the carrying out of works to the exterior of a structure, where the structure concerned is located within an architectural conservation area or an area specified as an architectural conservation area in a development plan for the area or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan and the development would materially affect the character of the area'.

13. Also, it is clear from section 176 of the PDA, in conjunction with Article 93 of the PDR and paragraph 1 of Part 2 of Schedule 5 thereto, that Ireland has chosen, for projects falling within point 1(a) to (c) of Annex II to Directive 85/337, to set, in respect of each project category, a threshold based exclusively on project size, below which an environmental impact assessment is not obligatory.

14. Article 103 of the PDR empowers the planning authority to require submission of an environmental impact statement for a development where a planning application is not accompanied by such a statement. This applies in particular to development which does not exceed certain thresholds laid down by national law but which the planning authority considers would be likely to have significant effects on the environment.

15. In deciding whether or not a development is likely to have significant effects on the environment, the planning authority takes account of the criteria laid down in Schedule 7 to the PDR, which corresponds to Annex III to Directive 85/337.

16. In addition it is apparent from sections 9(1) and 10(2)(c) of the PDA that each planning authority must include objectives relating to conservation and protection of the environment in the development plan which it is required to make every six years.

Pre-litigation procedure

17. After sending Ireland a request for information dated 13 September 2001, on 23 October 2001 the Commission sent it a letter of formal notice relating to a trial salmon farm on the Kenmare estuary in County Kerry. Ireland replied to that letter on 21 May 2002.

18. On 18 October and 19 December 2002, the Commission sent Ireland further letters of formal notice.

19. The first of these letters set out the Commission's position that Ireland's transposition of Directive 85/337 was deficient with regard to the project categories set out in point 1(a) to (c) of Annex II to the directive. The second referred to deficient transposition of the directive with regard to projects falling within point 1(f) of Annex II. Ireland replied to those letters by letters of 9 April and 26 May 2003.

20. On 11 July 2003 the Commission sent Ireland a reasoned opinion calling on it to take the necessary measures to comply with the reasoned opinion within two months of its receipt.

21. The Commission, after finding the position adopted by Ireland in a letter of 7 November 2003 in response to the reasoned opinion to be unsatisfactory, brought the present action under the second paragraph of Article 226 EC.

22. By order of the President of the Court of 11 May 2007, the Republic of Poland was granted leave to intervene in the present case in support of the form of order sought by Ireland.

The action

23. The Commission's action is based on two complaints. According to its first complaint, the Irish legislation transposing Directive 85/337 is deficient as it does not provide, in respect of the project categories covered by point 1(a) to (c) of Annex II to the directive, for effective measures to achieve the results required by Articles 2(1) and 4(2) and (3) of the directive. In the second complaint, the Commission submits that the competent Irish authorities are not expressly required to take account of the selection criteria set out in Annex III to Directive 85/337 so far as concerns intensive fish farming installations falling within point 1(f) of Annex II to the directive and that this infringes Community requirements.

24. Before considering the merits of these complaints, it is necessary to rule on Ireland's plea that the present action is inadmissible.

Admissibility of the action

Arguments of the parties

25. Ireland contends that the present action is inadmissible, especially as it is not properly pleaded since the Commission failed, in particular, to identify precisely the provisions of national legislation against which the action is brought, in a situation where Directive 85/337 was transposed into Irish law by various legal instruments.

26. Ireland further contends that the Commission did not particularise its grounds of complaint sufficiently, having moreover relied on separate reasoned opinions. This caused a large measure of confusion that did not allow Ireland a proper opportunity to prepare its defence as it was unable to ascertain the precise reasons why it had allegedly failed to fulfil its obligations under Directive 85/337.

27. Furthermore, in Ireland's submission the Commission has not produced to the Court the material needed for the latter to determine that Ireland has failed to fulfil its obligations as alleged. The Commission has failed to adduce evidence as to the existence of development projects claimed by it to belong to a category of projects subject to the requirement for an environmental impact assessment in so far as they are likely to have significant environmental effects.

28. Since projects covered by the action are likely to have significant environmental effects only by reason of their particular characteristics, the Commission's failure to indicate specific development projects is fundamental and does not allow Ireland to defend itself effectively.

29. The Commission submits in response to this plea of inadmissibility that the present proceedings are based on a single reasoned opinion and that it and the application initiating the proceedings clearly define the grounds of complaint that are the subject-matter of the action. It adds that the application sets out the applicable national legislation and specifies the types of development at issue.

Findings of the Court

30. It is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule ultra petita or indeed fail to rule on a complaint (see, inter alia, Case C-195/04 Commission v Finland [2007] ECR I-3351, paragraph 22, and the judgment of 21 February 2008 in Case C-412/04 Commission v Italy , not yet published in the ECR, paragraph 103).

31. The Court has also held that, in the context of an action brought under Article 226 EC, the reasoned opinion and the action must set out the Commission's complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the scope of the infringement of Community law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged (see, in particular, Case C-98/04 Commission v United Kingdom [2006] ECR I-4003, paragraph 18).

32. In the present case, it is clear from the documents before the Court that the Commission indicated in the pre-litigation procedure, when it sent the request for information dated 13 September 2001 to Ireland, that the Irish legislation transposing Directive 85/337 which it was taking into consideration in that procedure was constituted primarily by the PDA and the PDR.

33. Moreover, in so far as the letters of formal notice of 18 October and 19 December 2002 expressly referred to certain of the complaints received that were cited in that letter of 13 September 2001, they left no remaining doubt as to the Irish legislation with which the Commission was concerned.

34. Furthermore, the single reasoned opinion, issued on 11 July 2003 at the end of the pre-litigation procedure, does not display any ambiguity either, while the application initiating the proceedings expressly cites the Irish legislation transposing Directive 85/337 – namely the PDA and the PDR – which is said to show that Ireland has not taken all the measures necessary in order for certain projects to be subject to an environmental impact assessment as established by the directive.

35. Finally, the projects in respect of which, according to the Commission, the Community requirements are not complied with are perfectly identifiable in the light of the project categories set out in Annex II to Directive 85/337.

36. It follows from the foregoing that the Commission's contentions in the course of the pre-litigation procedure and the procedure before the Court were sufficiently clear to enable Ireland to defend itself.

37. Accordingly, Ireland's plea of inadmissibility must be dismissed.

Substance

The first complaint

– Arguments of the parties

38. The Commission submits that the Irish legislation transposing Directive 85/337 is deficient in that it does not provide, in respect of project categories covered by point 1(a) to (c) of Annex II to the directive, for effective measures to achieve the objectives laid down in Article 2(1) and Article 4(2) and (3) of the directive.

39. Article 4(2) of Directive 85/337 permits Member States, in respect of projects listed in Annex II, to determine through a case-by-case examination and/or through thresholds or criteria set by the Member State whether a given project requires an environmental impact assessment in accordance with Articles 5 to 10 of the directive.

40. However, the thresholds based on project size adopted by Ireland fail to take account of sensitive locations, such as archaeological sites. They are, moreover, set arbitrarily and unrelated to the reality of the size of Irish land holdings. Finally, they do not permit cumulation with other projects to be taken into account.

41. Irish legislation therefore does not comply with the means for determining which projects falling within Annex II to Directive 85/337 must be subject to an environmental impact assessment, means which must take account of the selection criteria laid down in Annex III to the directive.

42. In support of its argument, the Commission sets out a number of examples which, in its submission, show that the use of uniform thresholds means that no examination at all is carried out in respect of the environmental effects of projects which are, however, likely to have significant such effects.

43. Thus, it submits that certain projects for the restructuring of rural land holdings which lead to the removal of hedgerows, in particular for agricultural purposes, are not the subject of an environmental impact assessment although the removal of hedgerows is liable to have adverse effects on biodiversity in the countryside and significant effects on the natural environment.

44. The same is true of projects for the restructuring of rural land holdings that involve the demolition of stone walls constituting field boundaries in certain regions, although their removal can result in significant archaeological loss.

45. The Commission finally makes the same criticism with regard to projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes and to water management projects for agriculture, including irrigation and land drainage projects.

46. Ireland submits first of all that the Commission has misinterpreted the scope of the Irish legislation and refers in particular to certain provisions of the PDR.

47. It adds that the interpretation of Article 4 of Directive 85/337 advocated by the Commission is irreconcilable with the wording of that article since it would effectively make reliance on thresholds impossible.

48. Directive 85/337 provides, by way of an alternative to a case-by-case examination of projects falling within Annex II, that a Member State may set thresholds for determining whether an environmental impact assessment is necessary.

49. Ireland states that it adopted the latter approach and set various thresholds, indeed at fairly low levels, including for the restructuring of rural land holdings, and that this system of thresholds is supplemented by Articles 103 and 109 of the PDR.

50. In deciding whether or not a development would be likely to have significant effects on the environment, the competent authority has regard to the criteria set out in Schedule 7 to the PDR, which corresponds to Annex III to Directive 85/337.

51. Ireland explains that detailed guidelines addressed to the competent local authorities deal with the screening of developments whose size is below the thresholds set by the applicable legislation and points out that those authorities can require the submission of an environmental impact statement, pursuant to Article 103 of the PDR.

52. Furthermore, the categories of development project at issue cannot be regarded per se as likely to have significant effects on the environment, so that it is only in the light of the characteristics specific to a given project that the possibility of such effects can be assessed.

53. Ireland adds that while certain classes of development, corresponding to minor development, are in principle exempted from the requirement to obtain permission, that exemption is, however, limited since, under Article 9 of the PDR, it cannot apply where a proposed development is likely to have significant effects on the environment. Article 9 of the PDR thus sets out six instances where the exemption cannot apply.

54. The Republic of Poland submits that the setting of uniform thresholds on the basis of the criterion of project size referred to in Annex III to Directive 85/337 does not of itself mean that the directive has been incorrectly transposed.

55. It observes that the Member States are entitled, for the purpose of determining which projects must be subject to an environmental impact assessment, to set thresholds without any requirement for a case-by-case examination. It adds in that regard that it is necessary, when adopting threshold values in respect of the criterion of project size, to take account of the other aspects of projects, in particular their nature and location.

56. The Republic of Poland concludes that Directive 85/337 can be infringed only by the setting of a threshold at a level which will fail to ensure that the objectives of the directive are achieved; a single threshold can therefore be set provided that it guarantees that all projects below the value thereby adopted have no significant effects on the environment.

57. Finally, the Republic of Poland states that all the selection criteria listed in Annex III to Directive 85/337 must be taken into account in the process of setting the threshold values.

– Findings of the Court

58. A preliminary point to note is that, by the present complaint, the Commission criticises certain provisions of the Irish legislation transposing Directive 85/337 and does not seek a declaration that Ireland has failed to fulfil its obligations under the directive in relation to specific factual situations.

59. Consequently, Ireland's line of argument that the Commission has not adequately established the factual basis for its action can only be rejected. Since the action for failure to fulfil obligations is concerned with the way in which Directive 85/337 has been transposed, and not with the actual result of the application of the legislation transposing it, it must be determined whether that legislation itself harbours the insufficiencies or defects in transposition of the directive which the Commission alleges, without any need to establish the actual effects of the legislation with regard to specific projects (see, to this effect, Case C-392/96 Commission v Ireland [1999] ECR I-5901, paragraphs 59 and 60).

60. In that regard, it must be stated first of all that the project categories covered by the present action fall within Annex II to Directive 85/337. The action therefore concerns projects in respect of which, pursuant to Article 4(2) of the directive, the Member States determine, either through a case-

by-case examination or through thresholds or criteria, whether an environmental impact assessment is required. Article 4(2) provides that Member States may also decide to apply both those procedures.

61. In accordance with settled case-law, where Member States have decided to have recourse to the establishment of thresholds and/or criteria, the limits of the measure of discretion which is thus conferred upon them are to be found in the obligation set out in Article 2(1) of Directive 85/337 that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment before consent is given (see, to this effect, in particular Case C-72/95 Kraaijeveld and Others [1996] ECR I-5403, paragraph 50, and the judgment of 28 February 2008 in Case C-2/07 Abraham and Others , not yet published in the ECR, paragraph 37).

62. In addition, pursuant to Article 4(3) of Directive 85/337, the Member States are under an obligation to take into account, when establishing those criteria or thresholds, the relevant selection criteria set out in Annex III to the directive.

63. Among those criteria, Annex III distinguishes (i) the characteristics of projects, which must be considered having regard, in particular, to their size, the cumulation with other projects, the use of natural resources, the production of waste, p ollution and nuisances and the risk of accidents, (ii) the location of projects, so that the environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to the existing land use and the absorption capacity of the natural environment, and (iii) the characteristics of the potential impact, having regard inter alia to the geographical area and the size of the population.

64. It follows that a Member State which, on the basis of Article 4(2) of Directive 85/337, established thresholds and/or criteria taking account only of the size of projects, without taking into consideration the criteria noted in paragraph 63 of the present judgment, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the directive (see, to this effect, Case C-392/96 Commission v Ireland , paragraph 65).

65. Furthermore, a Member State which established those thresholds and/or criteria at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would likewise exceed the limits of that discretion, unless all the projects excluded could, when viewed as a whole, be regarded as not likely to have significant effects on the environment (see Case C-392/96 Commission v Ireland , paragraph 75 and the case-law cited).

66. It is clear from section 176 of the PDA, in conjunction with Article 93 of the PDR and paragraph 1 of Part 2 of Schedule 5 thereto, that Ireland has chosen, for projects falling within point 1(a) to (c) of Annex II to Directive 85/337, to set, in respect of each project category, a threshold based exclusively on project size, below which an environmental impact assessment is not obligatory.

67. Under paragraph 1(a) and (b) of Part 2 of Schedule 5 to the PDR, the threshold is 100 hectares in relation to projects for the restructuring of rural land holdings and the use of uncultivated land or semi-natural areas for intensive agricultural purposes and, under paragraph 1(c), the threshold is a catchment area of 1 000 hectares, or 20 hectares of affected wetland, in relation to water management projects for agriculture.

68. With a view to demonstrating that Ireland has failed to fulfil its obligations with regard to the present complaint, the Commission has set out some of the characteristics of the Irish countryside which show that projects of a size below the thresholds set by the Irish legislation are nevertheless likely to have significant effects on the environment by virtue of their nature or location, since they are liable to have a substantial, or even irreversible, impact on environmental factors such as fauna and flora, land or cultural heritage.

69. Thus, the Commission has established that projects for the restructuring of rural land holdings and projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes

may, regardless of their size, result in the loss of field boundaries, and therefore of hedgerows, a loss which is likely, in parts of the Irish countryside, to have significant effects on biodiversity. Nor does Ireland seriously contest that water management projects for agriculture are liable to entail significant effects on the environment, since they may lead to a loss of biodiversity.

70. It should be noted that, according to information supplied by the Commission and confirmed by studies, the average field size in Ireland is approximately 2.4 hectares. As the Commission has demonstrated, in particular at the hearing, the effect of setting, in particular for the restructuring of rural land holdings, a threshold of 100 hectares is that a project relating to the consolidation of around 40 fields, which would entail the destruction of numerous hedgerows and other means of enclosure, could be granted consent without having been subject to an environmental impact assessment, although it is such as to have significant effects on biodiversity.

71. Likewise, it is common ground that, in certain areas, stone walls predominate and may have a certain archaeological importance, as is attested in particular by a case study concerning the Dingle Peninsula in County Kerry (F.H.A. Aalen, K.Whelan and M. Stout, Atlas of the Irish Rural Landscape, Cork University Press, 1997). Other studies establish a risk of accelerated destruction of archaeological remains that is directly connected with projects for the restructuring of rural land holdings and land drainage projects, although, in Annex III to Directive 85/337, subparagraph (h) of the third indent of point 2 mentions, among the selection criteria referred to in Article 4(3) of the directive, consideration of the environmental sensitivity of geographical areas likely to be affected by a given project in the light of the absorption capacity of the natural environment, paying particular attention to landscapes of historical, cultural or archaeological significance.

72. It is also common ground that, in practice, projects falling within point 1(a) to (c) of Annex II to Directive 85/337 are closely linked; the drainage of wetland thus often results in the use of semi-natural areas for intensive agricultural purposes.

73. While, as Ireland asserts, in the case of projects falling within point 1(a) to (c) of Annex II to Directive 85/337 that are of a size below the thresholds laid down by Schedule 5 to the PDR, planning authorities may apply Article 103 of the PDR in conjunction with Schedule 7 thereto and thus require submission of an environmental impact statement, such a possibility cannot be considered equivalent to a case-by-case examination complying with the Community requirements.

74. Those provisions of Irish legislation will be capable of applying only if the planning authorities have become aware of a project before it is carried out, and specifically if an application for consent has been made to them.

75. There is consequently no guarantee that, should those projects be likely to have significant effects on the environment, the competent authority will necessarily be able to require that an environmental impact assessment as provided for by Directive 85/337 be carried out before the decision entitling the developer to proceed with the project.

76. Furthermore, as Ireland acknowledges, it is apparent from Article 6 of the PDR in conjunction with Part 3 of Schedule 2 thereto that certain projects falling within point 1(a) to (c) of Annex II to Directive 85/337 are exempt from any requirement for prior consent, a fact which in principle precludes, in their regard, compliance with the procedure involving development consent and the assessment of their effects on the environment that is established by Article 2(1) of Directive 85/337.

77. Ireland submits, however, that such exemptions, which thus have the effect in particular that no application for planning permission is required in respect of the projects concerned, do not apply where one of the safeguard clauses contained in Article 9 of the PDR is applicable to the carrying out of the project envisaged and that the effect of the application of the safeguard clauses is that only projects which are not likely to have significant effects on the environment can benefit from those exemptions.

78. It should be remembered at this point that while, in proceedings under Article 226 EC for failure to fulfil obligations it is for the Commission to prove the existence of the alleged infringement and to place before the Court the information necessary for it to determine whether the infringement is made out, and in so doing the Commission may not rely on any presumption (see, to this effect, inter alia Case C-494/01 Commission v Ireland [2005] ECR I-3331, paragraph 41 and the case-law cited, and Case C-441/02 Commission v Germany [2006] ECR I-3449, paragraph 48), the Member States are required, under Article 10 EC, to facilitate the achievement of the Commission's tasks (see, inter alia, Case C-494/01 Commission v Ireland , paragraph 42). It follows in particular that, where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is incumbent on the latter to challenge in substance and in detail the information produced and the consequences flowing therefrom (Case C-494/01 Commission v Ireland , paragraph 44).

79. With regard to application of the safeguard clauses contained in Article 9 of the PDR, Ireland has not demonstrated that those clauses are such as to ensure compliance with the requirements imposed by Directive 85/337; it acknowledged moreover in the course of the procedure that recourse to an alternative strategy to implement the relevant provisions of the directive would have very significant implications for Irish agriculture and also stated that one of the Irish Government's objectives is to minimise the regulatory burden on all sectors of the economy, particularly the agricultural sector.

80. Those clauses are subject to the fulfilment of a number of conditions which make their application too uncertain to be capable of being regarded as limiting the operation of the exemptions in such a way that projects likely to have significant effects on the environment are systematically subject, before consent is given, to a requirement for development consent and an assessment of their environmental effects.

81. Most of those clauses are operative only where they fall within the framework of development plans drawn up by the planning authorities specifying that the protection of the matters of archaeological, geological, historical or ecological interest constitutes one of their objectives.

82. The carrying out of an environmental impact assessment in respect of a given project accordingly depends on the inclusion of those objectives in the development plan, and not solely on the effects which the project may have on the environment. Moreover, it should be pointed out that Ireland has supplied no information regarding the conservation objectives which development plans may have contained on the date when the period laid down in the reasoned opinion expired.

83. These factors are sufficient to establish that the application of the safeguard clauses contained in Article 9 of the PDR does not guarantee that the requirements of Directive 85/337 are observed with regard to projects falling within point 1(a) to (c) of Annex II to the directive which are likely to have significant effects on the environment and in particular that they will be subject to a requirement for development consent and an assessment of their environmental effects in accordance with Articles 5 to 10 of the directive, despite the fact that, as is recalled in recital 1 in the preamble to Directive 97/11, the assessment procedure is a fundamental instrument of environmental policy.

84. The first complaint is therefore well founded.

85. It follows that, by setting thresholds which take account only of the size of projects – to the exclusion of the other criteria laid down in Annex III to Directive 85/337 – for project categories covered by point 1(a) to (c) of Annex II to the directive and by not providing for a case-by-case examination for those project categories ensuring that projects likely to have significant effects on the environment do not escape an assessment of their environmental effects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the directive and has consequently not adopted all necessary measures to ensure that projects likely to have significant effects on the environment are made subject to a requirement for development consent and to an assessment of their environmental effects in accordance with Articles 5 to 10 of the directive.

The second complaint

– Arguments of the parties

86. The Commission states with regard to intensive fish farming installations that the Aquaculture (Licence Application) Regulations, 1998 (S.I. No 236/1998), which transposed Directive 85/337 in relation to aquaculture, allow an environmental impact assessment to be carried out for such an installation if the competent minister considers that the proposed aquaculture is likely to have significant effects on the environment.

87. Since that legislation does not, however, contain any reference to the criteria set out in Annex III to the directive, the minister is under no express obligation to take account of them in his appraisal.

88. The Commission cites by way of example a trial salmon farm at Kenmare Bay in County Kerry.

89. Ireland acknowledges that, initially, Irish legislation did not expressly provide that, when the competent minister considered whether the proposed aquaculture was likely to have significant effects on the environment, he had to have regard to the selection criteria set out in Annex III to Directive 85/337.

90. Ireland explains, however, that following the entry into force of the Aquaculture (Licence Application) (Amendment) Regulations, 2006 (S.I. No 197/2006), the applicable provisions henceforth expressly state that the minister must have regard to those criteria.

– Findings of the Court

91. First of all, it should be recalled that, in accordance with settled case-law, amendments to national legislation are irrelevant for the purposes of giving judgment on the subject-matter of an action for failure to fulfil obligations if they have not been implemented before the expiry of the period set by the reasoned opinion (see, in particular, Case C-392/96 Commission v Ireland , paragraph 86). It is thus inappropriate to take into account, for the purpose of assessing the merits of the present complaint, the amendments made to the Irish legislation in 2006.

92. As to the remainder, while the legislation referred to in paragraph 86 of the present judgment provides that the competent minister may require the submission of an environmental impact statement in the context to which the present complaint refers, it is not disputed by Ireland that the minister's decision-making power is in no way circumscribed by that legislation.

93. In particular, it does not follow from the legislation itself that, when the competent minister examines on a case-by-case basis applications for permission relating to intensive fish farming installations, which are projects that fall within point 1(f) of Annex II to Directive 85/337, he must take account of the selection criteria laid down in Annex III to the directive.

94. Consequently, the second complaint is also well founded.

95. It follows from all of the foregoing considerations that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Directive 85/337, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the categories of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive.

Costs

96. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful, the latter must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the intervener in the present proceedings is to bear its own costs.

Operative part

On those grounds, the Court (Second Chamber) hereby:

1. Declares that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the categories of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive;

2. Orders Ireland to pay the costs of the Commission of the European Communities;

3. Orders the Republic of Poland to bear its own costs.

62006C0215j C v Ireland Regularisation after the event.

Title and reference

Judgment of the Court (Second Chamber) of 3 July 2008.

Commission of the European Communities v Ireland.

Failure of a Member State to fulfil obligations - No assessment of the environmental effects of projects within the scope of Directive 85/337/EEC - Regularisation after the event.

Case C-215/06.

Summary

1. Given that the wording regarding the developer's acquisition of entitlement to proceed with the project, further to the obtaining of development consent from the competent authority under Article 1(2) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11, is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.

That analysis is valid for all projects within the scope of that directive, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II of that directive and as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.

A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by that directive, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.

(see paras 50-53)

2. A Member State fails to fulfil its obligations under Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11, which after the event gives to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of that directive, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment.

While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the condition that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

A system of after-the-event regularisation may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of that directive, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337, however, states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

(see paras 57-58, 61)

3. A Member State fails to fulfil its obligations under Articles 2, 4 and 5 to 10 of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment if it has failed to take all measures necessary to ensure that the grant of development consents relating to the first two phases of construction of a wind farm was preceded by an environmental impact assessment in conformity with Articles 5 to 10 of Directive 85/337 and which merely attached to the applications for consent environmental impact statements which did not satisfy those requirements.

In that regard, while installations for the harnessing of wind power for energy production are not listed in either Annex I or Annex II to Directive 85/337, the first two phases of construction of the wind farm required a number of works, including the extraction of peat and of minerals other than metalliferous and energy-producing minerals, and also road construction, which works are listed in Annex II to that directive, respectively in point 2(a) and (c) and in point 10(d). The fact that the projects falling under Annex II to that directive may be of secondary importance vis-à-vis the wind farm construction project taken as a whole does not mean that, by virtue of that fact alone, those projects are not likely to have significant effects on the environment. The purpose of carrying out an environmental impact assessment in conformity with the requirements of Directive 85/337 is to identify, describe and assess in an appropriate manner the direct and indirect effects of a project on factors such as fauna and flora, soil and water and the interaction of those factors.

(see paras 96, 101, 104-105, 112, operative part)

4. A Member State fails to fulfil its obligations under Articles 2, 4 and 5 to 10 of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11, if it has failed to take all measures necessary to ensure that the grant of the amending consents and the consent relating to the third phase of construction of a wind farm was preceded by an assessment of their effects on the environment, and which merely attached to the applications for consent environmental impact statements which did not satisfy those requirements.

Point 3(i) of Annex II to that directive refers to installations for the harnessing of wind power for energy production (wind farms) and point 13 of that annex refers to any change or extension of projects listed in Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.

In addition, the relevant selection criteria in Annex III to that directive, which are applicable to the projects listed in Annex II to that directive and are referred to in Article 4(3) of that directive, include the risk of accidents having regard inter alia to the technologies used. Noteworthy among those criteria is the environmental sensitivity of the geographical area, which must be considered having regard, inter alia, to 'the absorption capacity of the natural environment', paying particular attention to mountain and forest areas.

(see paras 108-109, 111-112, operative part)

Parties

In Case C-215/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 11 May 2006,

Commission of the European Communities, represented by D. Recchia and D. Lawunmi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, J. Connolly SC and G. Simons BL, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, J. Makarczyk (Rapporteur), P. Kūris and J.-C. Bonichot, Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 February 2008,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

Grounds

1. By its action the Commission of the European Communities seeks a declaration from the Court that:

– by failing to adopt all measures necessary to ensure that projects which are within the scope of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) either before or after amendment by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and

– by failing to adopt all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of Directive 85/337,

Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

Legal context

Community legislation

2. By its action the Commission seeks a declaration that Ireland has failed to fulfil its obligations under Directive 85/337 both in its original version and in the version as amended by Directive 97/11.

Directive 85/337

3. The wording of Article 1(2) and (3) of Directive 85/337 is as follows:

'2. For the purposes of this Directive:

"project" means

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

"developer" means:

the applicant for authorisation for a private project or the public authority which initiates a project;

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

3. The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this Directive.'

4. Article 2(1) and (2) and the first subparagraph of Article 2(3) of Directive 85/337 provide:

'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 an assessment with regard to their effects.

These 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, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.'

5. Article 3 of Directive 85/337 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora,

– soil, water, air, climate and the landscape,

– the inter-action between the factors mentioned in the first and second indents,

– material assets and the cultural heritage.'

6. Article 4 of that directive is worded as follows:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

7. Article 5 of Directive 85/337 states:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

– a description of the project comprising information on the site, design and size of the project,

– a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

– the data required to identify and assess the main effects which the project is likely to have on the environment,

– a non-technical summary of the information mentioned in indents 1 to 3.

3. Where they consider it necessary, Member States shall ensure that any authorities with relevant information in their possession make this information available to the developer.'

8. Article 6 of Directive 85/337 is worded as follows:

'1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or in each case when the request for consent is made. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. Member States shall ensure that:

– any request for development consent and any information gathered pursuant to Article 5 are made available to the public,

– the public concerned is given the opportunity to express an opinion before the project is initiated.

...'

9. Article 7 of Directive 85/337 provides:

'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 forward the information gathered pursuant to Article 5 to the other Member State at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.'

10. Article 8 of Directive 85/337 states:

'Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.'

11. Article 9 of that directive is worded as follows:

'When a decision has been taken, the competent authority or authorities shall inform the public concerned of:

– the content of the decision and any conditions attached thereto,

– the reasons and considerations on which the decision is based where the Member States' legislation so provides.

The detailed arrangements for such information shall be determined by the Member States.

If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question.'

12. Article 10 of that directive provides:

'The provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national regulations and administrative provisions and accepted legal practices with regard to industrial and commercial secrecy and the safeguarding of the public interest.

Where Article 7 applies, the transmission of information to another Member State and the reception of information by another Member State shall be subject to the limitations in force in the Member State in which the project is proposed.'

13. Annex II to Directive 85/337 lists projects subject to Article 4(2) of that directive, namely those for which an environmental impact assessment is necessary only where the Member States consider that their characteristics so require. Projects referred to in that annex include, in point 2(a), extraction of peat, and in point 2(c), extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash.

14. Projects listed in point 10(d) of Annex II include the construction of roads.

Directive 97/11

15. Article 3 of Directive 97/11 is worded as follows:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 March 1999 at the latest. They shall forthwith inform the Commission thereof.

...

2. If a request for development consent is submitted to a competent authority before the end of the time-limit laid down in paragraph 1, the provisions of Directive 85/337/EEC prior to these amendments shall continue to apply.'

Directive 85/337 as amended by Directive 97/11 ('Directive 85/337 as amended')

16. In the interests of clarity, reference will be made only to the amendments to Directive 85/337 which have direct relevance to the alleged failure by Ireland to fulfil its obligations. Accordingly, reference will not be made to amendments introduced by Directive 97/11 to Art icles 5 to 10 of Directive 85/337, since those have no bearing on the determination of this action which the Court is called upon to make.

17. Under Article 2(1) and (2) and the first subparagraph of Article 2(3) of Directive 85/337 as amended:

'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. These 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. 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.'

18. Article 3 of Directive 85/337 as amended provides:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.'

19. Article 4 of Directive 85/337 as amended provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

20. Point 3(i) of Annex II to Directive 85/337 as amended specifies installations for the harnessing of wind power for energy production (wind farms).

21. By virtue of point 13 of Annex II, any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (being a change or extension not listed in Annex I) must be regarded as a project within the scope of Article 4(2) of Directive 85/337 as amended.

22. Annex III to Directive 85/337 as amended, relating to the selection criteria referred to in Article 4(3) of that directive, provides that the characteristics of projects must be considered in relation, inter alia, to pollution and nuisances, and to the risk of accidents having regard in particular to technologies used. That annex also indicates that the environmental sensitivity of geographical areas likely to be affected by projects must be considered having regard, inter alia, to the absorption capacity of the natural environment, paying particular attention to certain areas, including mountain and forest areas.

National legislation

23. The requirements of Directive 85/337 as amended have been transposed into national law by, in particular, the Planning and Development Act, 2000, as amended ('the PDA'), and the Planning and Development Regulations, 2001.

24. Section 32(1)(a) of the PDA lays down a general obligation to obtain consent for all development projects within the scope of Annexes I and II to Directive 85/337 as amended; the application for permission must be lodged and the permission obtained before the commencement of works. In addition, section 32(1)(b) of the PDA provides that permission can be obtained to regularise unauthorised development (retention permission).

25. On receipt of an application for permission, the planning authority must decide whether the proposed development should be subject to an environmental impact assessment.

26. Section 151 of the PDA provides that any person who has carried out or is carrying out unauthorised development is guilty of an offence.

27. It is clear from sections 152 and 153 of the PDA that, on receipt of a complaint, planning authorities are, as a general rule, under an obligation to issue a warning letter, and must then decide whether or not it is appropriate to issue an enforcement notice. Failure to comply with the requirements of an enforcement notice constitutes an offence.

28. Under section 160 of the PDA:

'(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.'

29. Section 162 of the PDA makes clear that an application for retention permission does not entail any ongoing enforcement action being stayed or withdrawn.

Pre-litigation procedure

30. After sending a letter of formal notice on 5 April 2001, the Commission sent to Ireland a reasoned opinion dated 21 December 2001.

31. On 7 July 2004, the Commission sent an additional letter of formal notice to Ireland.

32. On 5 January 2005, after the receipt of Ireland's observations as set out in a letter dated 6 December 2004, an additional reasoned opinion was sent to Ireland.

33. Since the Commission considered that Ireland's response to that reasoned opinion, in letters of 8 March, 17 June and 1 December 2005, was unsatisfactory, it brought this action under the second paragraph of Article 226 EC.

The action

The first complaint

34. The Commission's complaint is that Ireland has not taken all the measures necessary to comply with Articles 2, 4 and 5 to 10 of Directive 85/337 either in its original version or as amended by Directive 97/11. This complaint will be examined, first, in relation to Directive 85/337 as amended.

35. The first complaint, that transposition of Directive 85/337 as amended is incomplete and that, as a result, the directive is not properly implemented is based on three pleas in law.

36. First, the Commission claims that Ireland has not taken the measures necessary in order to ensure that checks are made to ascertain, in accordance with Article 2(1) of Directive 85/337 as amended, whether proposed works are likely to have significant effects on the environment, and, if that is the case, in order to render it obligatory that an environmental impact assessment be carried out, as laid down by that provision, before the grant of development consent.

37. Secondly, the Commission considers that the Irish legislation which allows an application for retention permission to be made after a development has been executed in whole or in part without consent undermines the preventive objectives of Directive 85/337 as amended.

38. Thirdly, the Commission claims that the enforcement regime established by Ireland does not guarantee the effective application of the directive, and that Ireland has thereby failed to fulfil its general obligation under Article 249 EC.

39. In support of the third plea in law, the Commission reports a number of examples which, in its opinion, illustrate the deficiencies in the application of the system of enforcement.

The first two pleas in law

– Arguments of the parties

40. The Commission claims that since it is possible, under the national legislation, to comply with the obligations imposed by Directive 85/337 as amended during or after execution of a development, there is no clear obligation to subject developments to an assessment of their effects on the environment before they are carried out.

41. In accepting that projects can be scrutinised, in an environmental impact assessment, after their execution, when the principal objective pursued by Directive 85/337 as amended is that effects on the environment should be taken into account at the earliest possible stage in all planning and decision-making processes, the national legislation in question recognises a possibility of regularisation which results in the undermining of that directive's effectiveness.

42. The Commission adds that the rules relating to retention permission are incorporated within the general provisions applicable to normal planning permission, and that there is nothing to indicate that applications for retention permission and the grant of such permission are limited to exceptional cases.

43. Ireland contends that the Commission's analysis of the Irish legislation which transposes Directive 85/337 as amended is not accurate. Ireland states that Irish law expressly requires that permission be obtained for any new development before the commencement of works and that, as regards

development which must be subject to an environmental impact assessment, the assessment must be carried out before the works. Failure to comply with those obligations is, moreover, a criminal offence and may result in enforcement action.

44. Ireland contends, in addition, that retention permission, established by the PDA and the Planning and Development Regulations, 2001, is an exception to the general rule which requires permission to be obtained before the commencement of a development, and best meets the objectives of Directive 85/337 as amended, in particular the general objective of protection of the environment, since the removal of an unauthorised development may not be the most appropriate measure to achieve that protection.

45. According to that Member State, the requirements of Directive 85/337 as amended are wholly procedural and are silent as to whether there may or may not be an exception by virtue of which an environmental impact assessment might, in certain cases, be carried out after commencement of works. Ireland adds that nowhere in the directive is it expressly stated that an assessment can solely be carried out before the execution of a project, and refers to the definition of the term 'development consent' given by Directive 85/337 as amended to argue that the use of 'proceed' is significant, that term not being confined to the commencement of works but also applying to the continuation of a development project.

46. Ireland contends, in addition, that retention permission is a reasonable fall-back mechanism to be resorted to in exceptional circumstances, designed to take account of the fact that some projects will inevitably, for various reasons, commence before the grant of development consent within the meaning of Directive 85/337 as amended.

47. On that point, Ireland relies on Case C-201/02 Wells [2004] ECR I-723 to argue that a remedial assessment may be carried out at a later stage, by way of exception to the general rule that the assessment must be carried out at the earliest possible stage in the decision-making process.

48. That Member State considers also that it would be disproportionate to order the removal of some structures in circumstances where, after consideration of an application for retention permission, retention is held to be compatible with proper planning and sustainable development.

– Findings of the Court

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 effects (see, to that effect, Case C-287/98 Linster [2004] ECR I-723, paragraph 52, and Case C-486/04 Commission v Italy [2006] ECR I-11025, paragraph 36).

50. Further, development consent, under Article 1(2) of Directive 85/337 as amended, is the decision of the competent authority or authorities which entitles the developer to proceed with the project.

51. Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.

52. That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by

the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.

53. A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.

54. As the Irish legislation stands, it is undisputed that environmental impact assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitutes under Irish law a contravention of the planning rules.

55. However, it is also undisputed that the Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed.

56. In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.

57. While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

58. A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

59. Lastly, Ireland cannot usefully rely on Wells . Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60. This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.

61. It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and

4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive.

62. Consequently, the first two pleas in law are well founded.

The third plea in law

– Arguments of the parties

63. According to the Commission, there are shortcomings in the Irish legislation relating to enforcement measures and in the resulting enforcement practices which undermine the proper transposition and implementation of Directive 85/337 as amended, when, under that directive, an effective system of control and enforcement is mandatory.

64. First, the Commission claims that the enforcement measures provided for by Irish planning legislation do not offset the absence of provisions requiring compliance with the obligations as to an environmental impact assessment before development is carried out.

65. Secondly, the Commission claims that enforcement practices undermine the proper transposition of Directive 85/337 as amended. The Commission refers to specific situations which illustrate, in its opinion, the deficiencies of the Irish legislation regarding supervising compliance with the rules established by that directive.

66. As regards the procedure relating to enforcement, Ireland contends the choice and form of enforcement is a matter within the discretion of Member States, in particular as there has been no harmonisation at Community level of planning and environmental controls.

67. In any event, Ireland states that the system of enforcement established by the Irish legislation is comprehensive and effective. The Member State adds that, under environmental law, the applicable provisions are legally binding.

68. Thus, the legislation places planning authorities under the obligation of sending a warning letter when they learn that an unauthorised development is being carried out, unless they consider that the development is of minor importance.

69. Once the warning letter has been sent, the planning authorities must decide whether it is appropriate to issue an enforcement notice.

70. The warning letter is intended to enable the persons responsible for unauthorised developments to undertake remedial action before the enforcement notice and the other stages of enforcement proceedings.

71. If an enforcement notice is issued, that sets out obligations and failure to comply with its requirements constitutes an offence.

72. Ireland adds that the enforcement regime must take account of various competing rights held by developers, landowners, the public and individuals directly affected by the development, and the weight of those various rights must be measured in order to reach a fair result.

73. Lastly, Ireland does not accept that the examples reported by the Commission prove the alleged failure to fulfil its obligations, since the Commission limits itself to general assertions.

– Findings of the Court

74. It is undisputed that, in Ireland, the absence of an environmental impact assessment required by Directive 85/337 as amended can be remedied by obtaining a retention permission which makes it possible, in particular, to leave projects which were not properly authorised undisturbed, provided that the application for such a permission is made before the commencement of enforcement proceedings.

75. The consequence of that possibility, as indeed Ireland recognises, may be that the competent authorities do not take action to suspend or put an end to a project that is within the scope of Directive 85/337 as amended and is being carried out or has already been carried out with no regard to the requirements relating to development consent and to an environmental impact assessment prior to issue of that development consent, and that they refrain from initiating the enforcement procedure provided for by the PDA, in relation to which Ireland points out that the powers are discretionary.

76. The inadequacy of the enforcement system set up by Ireland is accordingly demonstrated inasmuch as the existence of retention permission deprives it of any effectiveness, and that inadequacy is the direct consequence of the Member State's failure to fulfil its obligations which was found in the course of consideration of the first two pleas in law.

77. That conclusion is not affected by the fact that, according to Ireland, the enforcement regime must take account of the various competing rights held by developers, landowners, the public and individuals directly affected by the development. The need to weigh those interests cannot in itself provide justification for the ineffectiveness of a system of control and enforcement.

78. Accordingly, it becomes superfluous to analyse the various examples put forward by the Commission to illustrate the deficiencies in application of the enforcement measures, since those deficiencies are the direct result of the inadequacies of the Irish legislation itself.

79. Consequently, the third plea in law is also well founded, and therefore the first complaint must be upheld on all of the pleas in law.

80. Lastly, the decision that the first complaint is well founded holds good both with regard to Directive 85/337 as amended and with regard to Directive 85/337. Under both the original and the amended version of the directive, projects likely to have significant effects on the environment must be subject to an assessment of their effects before the grant of development consent, the definition of development consent moreover remaining unchanged. In addition, the characteristics of the retention permission that are specified by the Irish legislation have remained the same.

81. It follows from the foregoing that, by failing to adopt all measures necessary to ensure that projects which are within the scope of Directive 85/337 either before or after amendment by Directive 97/11 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of that directive, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

The second complaint

82. This complaint relates to the circumstances obtaining for the construction of a wind farm at Derrybrien, County Galway, in relation to which it is useful first to note the various consents obtained.

83. As is clear from the documents before the Court, applications for consent relating to the first two phases of the development, each involving 23 wind turbines, were submitted on 4 and 18 December 1997. Fresh applications were lodged on 23 January 1998, since the earlier applications for consent were held to be invalid. Permission was issued on 12 March 1998. On 5 October 2000, an application was made for consent for a third phase of works relating, inter alia, to 25 turbines and service

roadways, which was approved on 15 November 2001. On 20 June 2002, the developer applied for consent to alter the first two phases of the development, and those changes were authorised on 30 July 2002. In October 2003, when the consent granted for the first two phases of the works had expired, the developer applied for renewal of that consent, which was granted in November 2003.

Arguments of the parties

84. By this complaint, the Commission claims that Ireland did not take all the measures necessary to ensure that the development consents relating to the wind farm and associated works were preceded by an assessment of the environmental effects of the project, in accordance with Articles 5 to 10 of Directive 85/337 and of Directive 85/337 as amended.

85. The Commission argues that, while, pursuant to the Irish legislation, environmental impact assessments were carried out for various constituent parts of the development, those assessments were deficient.

86. In particular, the environmental impact assessment carried out in 1998 did not properly address the environmental risks attached to execution of the various constituent parts of the development. The impact assessment carried out for the third phase of the development was vitiated by the same inadequacies.

87. The Commission adds that the wind farm is the largest terrestrial wind-energy development ever planned in Ireland and one of the largest in Europe.

88. The Commission claims also that the construction of the wind farm required the destruction of large areas of coniferous forest amounting to 263 hectares, a felling licence having been granted on 20 May 2003. However, no environmental impact assessment was carried out for that operation, contrary to the very requirements of the Irish legislation.

89. The Commission adds that, after the landslide which occurred on 16 October 2003 and the consequent ecological disaster, when the mass of peat which was dislodged from an area under development for the wind farm polluted the Owendalulleegh river, causing the death of about 50 000 fish and lasting damage to the fish spawning beds, Ireland carried out no fresh environmental impact assessment of this construction before the resumption of work on the site by the developer in 2004.

90. Ireland contends that, when consents were applied for, in 1997 and in 1998, for the first two phases of construction of the wind farm, neither Annex I nor Annex II to Directive 85/337 referred to that category of project as being among those within its scope. Accordingly, it was not necessary that consent be preceded by an environmental impact assessment as governed by that directive. Ireland adds that the applications submitted in 1998 were, however, accompanied, in accordance with the Irish legislation, by an environmental impact statement.

91. Ireland considers, moreover, that it is artificial to attempt to suggest that ancillary aspects of the wind farm project, such as road construction, peat extraction, quarrying or electricity transmission, were of such importance that they made an environmental impact assessment within the meaning of Directive 85/337 necessary.

92. Ireland considers, in addition, that an application to extend the duration of a planning permission does not constitute 'development consent' within the meaning of Directive 85/337 as amended.

93. Ireland contends lastly that the landslide was caused by the construction methods used and that there was no question of difficulties which could have been anticipated by an environmental impact assessment, even one in conformity with the Community requirements. It also states that, in order to ensure the safe completion of the wind farm, construction work practices were changed, after construction work had been suspended and an investigation carried out.

Findings of the Court

94. First, as regards the circumstances in which the consents relating to the first two phases of construction of the wind farm project were granted on 12 March 1998 following applications submitted on 23 January 1998, it is necessary to begin by deciding whether Directive 85/337 is applicable.

95. It is clear from Article 3 of Directive 97/11 that if an application for development consent was submitted to a competent authority before 14 March 1999, the provisions of Directive 85/337 continued to apply.

96. Moreover, while it is common ground that installations for the harnessing of wind power for energy production are not listed in either Annex I or Annex II to Directive 85/337, it is not disputed by Ireland that the first two phases of construction of the wind farm required a number of works, including the extraction of peat and of minerals other than metalliferous and energy-producing minerals, and also road construction, which are listed in Annex II to that directive, respectively in point 2(a) and (c) and in point 10(d).

97. Consequently, Directive 85/337 was applicable to the first two phases of construction of the wind farm in so far as they involved specifically the carrying out of work on projects referred to in Annex II to that directive.

98. It follows that Ireland was bound to subject the work on the projects to an impact assessment if they were likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location (see, to that effect, Case C-72/95 Kraaijeveld and Others [1996] ECR I-5403, paragraph 50, and Case C-2/07 Abraham and Others [2008] ECR I-0000, paragraph 37).

99. However, Ireland states that the competent authorities took the view that Annex II to Directive 85/337 was not applicable, since the ancillary works of peat extraction and road construction were minor aspects of the project of wind farm construction itself.

100. The competent authorities therefore considered that there was no need either to investigate whether the intended projects were likely to have significant effects on the environment or, accordingly, to conduct an environmental impact assessment meeting the requirements of Directive 85/337 prior to granting the consents.

101. However, the fact that the abovementioned projects falling under Annex II to that directive may have been of secondary importance vis-à-vis the wind farm construction project taken as a whole did not mean that, by virtue of that fact alone, those projects were not likely to have significant effects on the environment.

102. The intended projects of peat and mineral extraction and road construction were not insignificant in terms of scale by comparison with the overall area of the wind farm project which covered 200 hectares of peat bog and which was the largest project of its kind in Ireland, and they were moreover essential both to the installation of the turbines and to the progress of the construction works as a whole. In addition, those works were carried out on the slopes of Cashlaundrumlahan Mountain, where there are layers of peat up to 5.5 metres in depth, largely covered by plantation forestry.

103. It follows from those factors, which are not disputed by Ireland, that the location and size of the projects of peat and mineral extraction and road construction, and the proximity of the site to a river, all constitute specific characteristics which demonstrate that those projects, which were inseparable from the installation of 46 wind turbines, had to be regarded as likely to have significant effects on the environment and, accordingly, had to be subject to an assessment of their effects on the environment.

104. The purpose of carrying out an environmental impact assessment in conformity with the requirements of Directive 85/337 is to identify, describe and assess in an appropriate manner the direct and indirect effects of a project on factors such as fauna and flora, soil and water and the interaction of those factors. In the present case, the environmental impact statements supplied by the developer had certain deficiencies and did not examine, in particular, the question of soil stability, although that is fundamental when excavation is intended.

105. Consequently, by failing to take all measures necessary to ensure that the grant of development consents relating to the first two phases of construction of the wind farm was preceded by an environmental impact assessment in conformity with Articles 5 to 10 of Directive 85/337 and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under that directive.

106. Secondly, as regards the application for consent relating to the third phase of construction of the wind farm, submitted on 5 October 2000, and the application for consent to alter the first two originally authorised phases of construction, lodged on 20 June 2002, the complaint must be considered in the light of Directive 85/337 as amended, since the applications for consent concerned were submitted after 14 March 1999.

107. It is not disputed, first, that the competent authorities gave their approval to the change in the type of wind turbines originally planned without requiring an environmental impact assessment in conformity with Directive 85/337 as amended and, secondly, that the consent given for the third phase of construction was also not accompanied by such an assessment. In addition, such an assessment did not precede the deforestation authorised in May 2003, contrary to the requirements of the Irish legislation.

108. However, point 3(i) of Annex II to Directive 85/337 as amended refers to installations for the harnessing of wind power for energy production (wind farms) and point 13 of that annex refers to any change or extension of projects listed in Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.

109. In addition, the relevant selection criteria in Annex III to Directive 85/337 as amended, which are applicable to the projects listed in Annex II and are referred to in Article 4(3) of that directive, include the risk of accidents having regard inter alia to the technologies used. Noteworthy among those criteria is the environmental sensitivity of the geographical area, which must be considered having regard, inter alia, to 'the absorption capacity of the natural environment', paying particular attention to mountain and forest areas.

110. Since the installation of 25 new turbines, the construction of new service roadways and the change in the type of wind turbines initially authorised, which was intended to increase the production of electricity, are projects which are referred to in Annex II to Directive 85/337 as amended and which were likely, having regard to the specific features of the site noted in paragraph 102 of this judgment and the criteria referred to in the preceding paragraph of this judgment, to have significant effects on the environment, they should, before being authorised, have been subject to a requirement for development consent and to an assessment of their effects on the environment, in conformity with the conditions laid down in Articles 5 to 10 of Directive 85/337 as amended.

111. Consequently, by failing to take all measures necessary to ensure that the grant of the amending consents and the consent relating to the third phase of construction of the wind farm was preceded by such an assessment, and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under Directive 85/337 as amended.

112. It follows from the foregoing that, by failing to take all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental

effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

Costs

113. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Ireland and the latter has been unsuccessful, Ireland must be ordered to pay the costs.

Operative part

On those grounds, the Court (Second Chamber) hereby:

1. Declares that, by failing to adopt all measures necessary to ensure that:

– projects which are within the scope of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment either before or after amendment by Council Directive 97/11/EC of 3 March 1997 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and

– the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11,

Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive;

2. Orders Ireland to pay the costs.

62009C0050j C v Ireland EIA

Title and reference

Judgment of the Court (First Chamber) of 3 March 2011.

European Commission v Ireland.

Failure of a Member State to fulfil obligations - Directive 85/337/EEC - Obligation of the competent environmental authority to carry out an assessment of the effects of certain projects on the environment - More than one competent authority - Need to ensure an assessment of the interaction between factors likely to be directly or indirectly affected - Application of the directive to demolition works.

Case C-50/09.

Parties

In Case C-50/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 February 2009,

European Commission, represented by P. Oliver, C. Clyne and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, assisted by G. Simons SC and D. McGrath BL, with an address for service in Luxembourg,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, M. Ilešič and M. Berger (Rapporteur), Judges,

Advocate General: J. Mazák,

Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2010,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

Grounds

1. By its action, the Commission of the European Communities requested the Court to declare that:

– by failing to transpose Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17; 'Directive 85/337');

– by failing to ensure that, where Irish planning authorities and the Environmental Protection Agency ('the Agency') both have decision-making powers on a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of that directive; and

– by excluding demolition works from the scope of its legislation transposing that directive,

Ireland has failed to fulfil its obligations under that directive.

Legal context

European Union legislation

2. Article 1(2) and (3) of Directive 85/337 provide:

'(2) For the purposes of this Directive:

"project" means:

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

...

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

(3) The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this Directive.'

3. Under Article 2(1) to (2a) of Directive 85/337:

'(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 an assessment with regard to their effects. These 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.

(2a) Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Council Directive 96/61/EC of 24 September 1996 on integrated pollution prevention and control ...'

4. Article 3 of Directive 85/337 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora,

– soil, water, air, climate and the landscape,

– material assets and the cultural heritage,

– the interaction between the factors mentioned in the first, second and third indents.'

5. Article 4(1) and (2) of Directive 85/337 are worded as follows:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).'

6. Articles 5 to 7 of Directive 85/337 concern the information which must be gathered and the consultations which must be undertaken for the purposes of the assessment procedure. Article 5 deals with the information which the developer must supply, Article 6 deals with the obligation to consult, on the one hand, authorities with specific environmental responsibilities and the public, on the other, and Article 7 covers the obligation, in the case of a cross-border project, to inform the other Member State concerned. Article 8 of the directive states that the results of those consultations and the information gathered must be taken into consideration in the development consent procedure.

7. Articles 9 to 11 of Directive 85/337, relating to the decision taken at the conclusion of the consent procedure, cover, respectively, informing the public and the Member States concerned, respect for commercial and industrial confidentiality, the right of members of the public to bring proceedings before a court and the exchange of information between Member States and the Commission.

8. Under Article 12(1) of Directive 85/337, in its original version, the Member States were obliged to comply with that directive's provisions by 3 July 1988 at the latest. With regard to the amendments made to it by Directives 97/11 and 2003/35, the Member States were obliged to bring them into force at the latest by 14 March 1999 and 25 June 2005 respectively.

National legislation

The Planning and Development Act 2000

9. The Planning and Development Act 2000, as amended by the Strategic Infrastructure Act 2006 ('the PDA'), lays down the legal framework for issuing development consent for most of the project categories listed in Annexes I and II to Directive 85/337. For some projects, development consent under the PDA, which is termed 'planning permission' and granted, as a rule, by a local authority, is the only form of consent required for a project to proceed. In such cases, the PDA provides that the decisions taken by local authorities may be appealed against to An Bord Pleanála (The Planning Appeals Board; 'the Board').

10. Part X of the PDA, comprising sections 172 to 177, is devoted to environmental impact assessments. Section 176 provides for ministerial regulations to identify projects requiring such an assessment. Section 172 provides that, for projects covered by regulations made under section 176, applications for planning permission are to be accompanied by an environmental impact statement. Under section 173, where a planning authority receives an application for planning permission accompanied by an environmental impact statement, that authority and, on appeal, the Board must have regard to that statement. Section 177 provides that the information to be included in such a statement is to be prescribed by ministerial regulation.

11. Detailed measures for the implementation of the PDA are set out in the Planning and Development Regulations 2001, as amended by the Planning and Development Regulations 2008 ('the PDR'), which were adopted pursuant to, among others, sections 176 and 177 of the PDA.

12. Part 2 of the PDR concerns projects which are exempt from an environmental impact assessment. Article 6 thereof refers in that regard to Part 1 of Schedule 2 to the PDR, which, in Category 50, refers to 'the demolition of a building or other structure'. Articles 9 and 10 of the PDR lay down the conditions under which a project as a rule exempted must none the less be made subject to a consent procedure.

13. Part 10 of the PDR is devoted to environmental impact assessments. Article 93 thereof, in combination with Schedule 5 thereto, defines the categories of projects for which such an assessment is required. Article 94 of the PDR, which lists the information that should be found in an environmental impact statement, is worded as follows:

'An environmental impact statement shall contain:

(a) the information specified in paragraph 1 of Schedule 6,

(b) the information specified in paragraph 2 of Schedule 6 to the extent that

(i) such information is relevant to a given stage of the consent procedure and to the specific characteristics of the development or type of development concerned and of the environmental features likely to be affected, and

(ii) the person or persons preparing the statement may reasonably be required to compile such information having regard, among other things, to current knowledge and methods of assessment, and,

(c) a summary in non-technical language of the information required under paragraphs (a) and (b).'

14. Schedule 6 to the PDR specifies the information to be contained in an environmental impact statement. Paragraph 2(b) of Schedule 6 stipulates that it must contain:

'A description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular:

– human beings, fauna and flora,

– soil, water, air, climatic factors and the landscape,

– material assets, including the architectural and archaeological heritage, and the cultural heritage,

– the inter-relationship between the above factors.'

15. Under Article 108 of the PDR, the competent planning authority is obliged to establish whether the information contained in an environmental impact statement complies with the requirements laid down in the PDR.

The Environmental Protection Agency Act 1992

16. The Environmental Protection Agency Act 1992 ('the EPAA') introduced, among other things, a new system of integrated pollution control under which many industrial activities require a licence granted by the Agency. Where the activity is new and/or involves new construction, it must also obtain planning permission as provided for by the PDA.

17. Section 98 of the EPAA, which precluded planning authorities from taking into consideration aspects connected with pollution risks in considering an application for planning permission, was amended by section 256 of the PDA to the effect that, whilst it precluded planning authorities from including any pollution control conditions in planning permissions for activities also requiring a licence from the Agency, they could nevertheless, where appropriate, refuse to grant planning permission on environmental grounds. Section 98 of the EPAA, as amended, provides that planning authorities may ask the Agency for an opinion, in particular on an environmental impact statement. However, the Agency is not required to respond to such a request.

18. Under the Environmental Protection Agency (Licensing) Regulations 1994 ('the EPAR'), the Agency may notify a planning authority of a licence application. There is, however, no obligation on the planning authority to respond to such a notification.

The National Monuments Act 1930

19. The National Monuments Act 1930 ('the NMA') governs the protection of Ireland's most culturally significant archaeological remains, which are classed as 'national monuments'. It was amended by the National Monuments (Amendment) Act 2004, to relax the constraints imposed under earlier legislation concerning proposals to alter or remove national monuments.

20. Section 14 of the NMA confers on the Irish Minister for the Environment, Heritage and Local Government ('the Minister') discretion to consent to the destruction of a national monument. Where a national monument is discovered during the carrying out of a road development which has been subject to an environmental impact assessment, section 14A of the NMA provides that it is, in principle, prohibited to carry out any works on the monument pending directions by the Minister. Those directions can relate to 'the doing to the monument of [various] matters', including its demolition. There is no provision for any assessment to be made, for the adoption of such directions, of the effects on the environment. However, section 14B of the NMA provides that the Minister's

directions must be notified to the Board. If those directions envisage an alteration to the approved road development, the Board must consider whether or not that alteration is likely to have significant adverse effects on the environment. If it is of that opinion, it must require the submission of an environmental impact statement.

Pre-litigation procedure

21. Following the examination of a complaint regarding Ireland's transposition of Directive 85/337, the Commission took the view that Ireland had failed to ensure its full and correct transposition and, by letter of 19 November 1998, gave Ireland formal notice, to submit its observations, in accordance with the procedure for failure to fulfil Treaty obligations. A further letter of formal notice was sent to Ireland on 9 February 2001.

22. After examining the observations received in response to those letters, the Commission, on 6 August 2001, sent the Irish authorities a reasoned opinion in which it claimed that Ireland had not correctly transposed Articles 2 to 6, 8 and 9 of Directive 85/337. In reply, Ireland stated that the legislative amendments necessary to bring about the transposition were being adopted and requested that the proceedings be stayed.

23. Following further complaints, the Commission, on 2 May 2006, sent an additional letter of formal notice to Ireland.

24. As the Commission was not satisfied with the replies received, on 29 June 2007 it addressed an additional reasoned opinion to Ireland in which it claimed that Ireland had not correctly transposed Directive 85/337, in particular Articles 2 to 4 thereof, and called upon it to comply with that reasoned opinion within a period of two months from the date of its receipt. In reply, Ireland maintained its position that the Irish legislation in force now constitutes adequate transposition of that directive.

25. The Commission then brought the present action.

The action

The first complaint, alleging failure to transpose Article 3 of Directive 85/337

Arguments of the parties

26. According to the Commission, Article 3 of Directive 85/337 is of pivotal importance, since it sets out what constitutes an environmental impact assessment and must therefore be transposed explicitly. The provisions relied upon by Ireland as adequate transposition of Article 3 of the directive are insufficient.

27. Thus, section 173 of the PDA, which requires planning authorities to have regard to the information contained in an environmental impact statement submitted by a developer, relates to the obligation, under Article 8 of Directive 85/337, to take into consideration the information gathered pursuant to Articles 5 to 7 thereof. By contrast, section 173 does not correspond to the wider obligation, imposed by Article 3 of Directive 85/337 on the competent authority, to ensure that there is carried out an environmental impact assessment which identifies, describes and assesses all the matters referred to in that article.

28. As for Articles 94, 108 and 111 of, and Schedule 6 to, the PDR, the Commission observes that they are confined, first, to setting out the matters on which the developer must supply information in its environmental impact statement and, second, to specifying the obligation on the competent authorities to establish that the information is complete. The obligations laid down by those provisions are different from that, imposed by Article 3 of Directive 85/337 on the competent authority, of carrying out a full environmental impact assessment

29. With regard to the relevance of the Irish courts' case-law on the application of the provisions of national law at issue, the Commission points out that while those courts may interpret ambiguous provisions so as to ensure their compatibility with a directive; they cannot plug legal gaps in the national legislation. Moreover, the extracts from the decisions cited by Ireland concern, in the Commission's submission, not the interpretation of that legislation but the interpretation of Directive 85/337 itself.

30. Ireland disputes the significance which the Commission attaches to Article 3 of that directive. It submits that that provision, drafted in general terms, is confined to stating that an environmental impact assessment must be made in accordance with Articles 4 to 11 of the directive. By transposing Articles 4 to 11 into national law, a Member State thereby, in Ireland's submission, ensures the transposition of Article 3.

31. Ireland maintains that Article 3 of Directive 85/337 is fully transposed by sections 172(1) and 173 of the PDA and Articles 94 and 108 of, and Schedule 6 to, the PDR. It points out that the Supreme Court (Ireland) has confirmed, in two separate judgments of 2003 and 2007, namely O'Connell v Environmental Protection Agency and Martin v An Bord Pleanála , that Irish law requires planning authorities and the Agency to assess the factors referred to in Article 3 and the interaction between them. Those judgments, which, Ireland submits, should be taken into account when assessing the scope of the national provisions at issue, do not fill a legal gap but are confined to holding that the applicable national legislation imposes an obligation on the competent authorities to carry out an environmental impact assessment of a development in the light of the criteria laid down in Article 3 of Directive 85/337.

32. In the alternative, Ireland refers to the concept of 'proper planning and sustainable development' referred to in section 34 of the PDA. It is, in Ireland's submission, the principal criterion which must be taken into consideration by any planning authority when deciding on an application for planning permission. That concept is in addition to all the criteria referred to in section 34 of the PDA, as well as in other provisions of that Act, including section 173, the application of which it reinforces.

33. Finally, Ireland submits that the Commission does not respect the discretion which a Member State enjoys under Article 249 EC as to the form and methods for transposing a directive. By requiring the literal transposition of Article 3 of Directive 85/337, the Commission is disregarding the body of legislation and case-law built up in Ireland over 45 years surrounding the concepts of 'proper planning' and 'sustainable development'.

Findings of the Court

34. At the outset, it is to be noted that the Commission and Ireland give a different reading to Article 3 of Directive 85/337 and a different analysis of its relationship with Articles 4 to 11 thereof. The Commission maintains that Article 3 lays down obligations which go beyond those required by Articles 4 to 11, whereas Ireland submits that it is merely a provision drafted in general terms and that the details of the process of environmental impact assessment are specified in Articles 4 to 11.

35. In that regard, whilst Article 3 of Directive 85/337 provides that the environmental impact assessment is to take place 'in accordance with Articles 4 to 11' thereof, the obligations referred to by those articles differ from that under Article 3 itself.

36. Article 3 of Directive 85/337 makes the competent environmental authority responsible for carrying out an environmental impact assessment which must include a description of a project's direct and indirect effects on the factors set out in the first three indents of that article and the interaction between those factors (judgment of 16 March 2006 in Case C-332/04 Commission v Spain , paragraph 33). As stated in Article 2(1) of the directive, that assessment is to be carried out before the consent applied for to proceed with a project is given.

37. In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case.

38. That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive.

39. Admittedly, Article 8 of Directive 85/337 provides that the results of the consultations and the information gathered pursuant to Articles 5 to 7 must be taken into consideration in the development consent procedure.

40. However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 Commission v United Kingdom [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors.

41. It follows therefore both from the wording of the provisions at issue of Directive 85/337 and from its general scheme that Article 3 is a fundamental provision. The transposition of Articles 4 to 11 alone cannot be regarded as automatically transposing Article 3.

42. It is in the light of those considerations that the Court must consider whether the national provisions upon which Ireland relies constitute proper transposition of Article 3 of Directive 85/337.

43. It can be seen from the wording of section 172 of the PDA and of Article 94 of, and Schedule 6 to, the PDR that those provisions relate to the developer's obligation to supply an environmental impact statement, which corresponds, as the Commission correctly claims, to the obligation imposed upon the developer by Article 5 of Directive 85/337. Article 108 of the PDR imposes no obligation on the planning authority other than that of establishing the completeness of that information.

44. As regards section 173 of the PDA, according to which the planning authority, where it receives an application for planning permission accompanied by an environmental impact statement, must take that statement into account as well as any additional information provided to it, it is clear from the very wording of that article that it is confined to laying down an obligation similar to that provided for in Article 8 of Directive 85/337, namely that of taking the results of the consultations and the information gathered for the purposes of the consent procedure into consideration. That obligation does not correspond to the broader one, imposed by Article 3 of Directive 85/337 on the competent environmental authority, to carry out itself an environmental impact assessment in the light of the factors set out in that provision.

45. In those circumstances, it must be held that the national provisions invoked by Ireland cannot attain the result pursued by Article 3 of Directive 85/337.

46. Whilst it is true that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, in

particular, Case C-427/07 Commission v Ireland [2009] ECR I-6277, paragraph 54 and the case-law cited), the fact remains that, according to equally settled case-law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, in particular, Commission v Ireland , paragraph 55 and the case-law cited).

47. In that regard, the judgment of the Supreme Court in O'Connell v Environmental Protection Agency gives, admittedly, in the passage upon which Ireland relies, an interpretation of the provisions of domestic law consistent with Directive 85/337. However, according to the Court's settled case-law, such a consistent interpretation of the provisions of domestic law cannot in itself achieve the clarity and precision needed to meet the requirement of legal certainty (see, in particular, Case C-508/04 Commission v Austria [2007] ECR I-3787, paragraph 79 and the case-law cited). The passage in the judgment of the same court in Martin v An Bord Pleanála , to which Ireland also refers, concerns the question of whether all the factors referred to in Article 3 of Directive 85/337 are mentioned in the consent procedures put in place by the Irish legislation. By contrast, it has no bearing on the question, which is decisive for the purposes of determining the first complaint, of what the examination of those factors by the competent national authorities should comprise.

48. As regards the concepts of 'proper planning' and 'sustainable development' to which Ireland also refers, it must be held that, even if those concepts encompass the criteria referred to in Article 3 of Directive 85/337, it is not established that they require that those criteria be taken into account in all cases for which an environmental impact assessment is required.

49. It follows that neither the national case-law nor the concepts of 'proper planning' and 'sustainable development' can be invoked to remedy the failure to transpose into the Irish legal order Article 3 of Directive 85/337.

50. The Commission's first complaint in support of its action must therefore be held to be well founded.

The second complaint, alleging failure to ensure full compliance with Articles 2 to 4 of Directive 85/337 where several authorities are involved in the decision-making process

Arguments of the parties

51. For the Commission, it is of the essence that the environmental impact assessment be carried out as part of a holistic process. In Ireland, following the Agency's creation, certain projects requiring such an assessment are subject to two separate decision-making processes: one process involves decision-making on land-use aspects by planning authorities, while the other involves decision-making by the Agency on pollution aspects. The Commission accepts that planning permission and an Agency licence may be regarded, as has been held in Irish case-law (Martin v An Bord Pleanála), as together constituting 'development consent' within the meaning of Article 1(2) of Directive 85/337 and it does not object to such consent being given in two successive stages. However, the Commission criticises the fact that the Irish legislation fails to impose any obligation on planning authorities and the Agency to coordinate their activities. In the Commission's submission, that situation is contrary to Articles 2 to 4 of Directive 85/337.

52. As regards Article 2 of Directive 85/337, the Commission notes that it requires an environmental impact assessment to be undertaken for a project covered by Article 4 'before consent is given'. The Commission submits that there is a possibility under the Irish legislation that part of the decision-making process will take place in disregard of that requirement. First, the Irish legislation does not require that an application for planning permission be lodged with the planning authorities before a licence application is submitted to the Agency, which is not empowered to undertake an environmental impact assessment. Second, the planning authorities are not obliged to take into account, in their assessment, the impact of pollution, which might not be assessed at all.

53. Referring to the Court's case-law (see, in particular, judgment of 20 November 2008 in Case C-66/06 Commission v Ireland , paragraph 59), the Commission states that it is not obliged to wait until the application of the transposing legislation produces harmful effects or to establish that it does so, where the wording of the legislation itself is insufficient or defective.

54. As regards Article 3 of Directive 85/337, the Commission submits that where there is more than one competent body, the procedures followed by each of them must, when taken together, ensure that the assessment required by Article 3 is fully carried out. The strict demarcation of the separate roles of the planning authorities on the one hand and the Agency on the other, as laid down by the Irish legislation, fails to take formally into account the concept of 'environment' in the decision-making. None of the bodies involved in the consent process is responsible for assessing and taking into consideration the interaction between the factors referred to in the first to third indents of Article 3, which fall respectively within the separate spheres of the powers of each of those authorities.

55. In that regard, the Commission, referring to section 98 of the EPAA, as amended, and to the EPAR, observes that there is no formal link, in the form of an obligation, for the competent authorities, to consult each other between the process of planning permission followed by the planning authority and the licensing process followed by the Agency.

56. In order to illustrate its analysis, the Commission refers to the projects relating to the installation of an incinerator at Duleek, in County Meath, and to the wood-processing factory at Leap, in County Offaly.

57. Referring to Case C-98/04 Commission v United Kingdom [2006] ECR I-4003, Ireland contests the admissibility of the Commission's second complaint in support of its action, on the ground that, in Ireland's submission, the Commission has failed to indicate precisely the reason why Ireland's designation of two competent authorities infringes the requirements of Directive 85/337. Ireland submits that the failure has interfered with the preparation of its defence.

58. On the substance, Ireland contends that the consequence of involving a number of different competent authorities in the decision-making process, which is permitted by Articles 1(3) and 2(2) of Directive 85/337, is that their involvement and their obligations will be different and will occur at different stages prior to 'development consent' being given. Relying on Martin v An Bord Pleanála , Ireland contends that nowhere in that directive is it in any sense suggested that a single competent body must carry out a 'global assessment' of the impact on the environment.

59. Ireland denies that there is a strict demarcation between the powers of the two decision-making bodies and submits that there is, rather, overlap between them. The concept of 'proper planning and sustainable development', to which the PDA refers, is a very broad one, which includes, in particular, environmental pollution. Planning authorities are required to assess environmental pollution in the context of a decision relating to planning permission. They are moreover empowered under various provisions to refuse planning permission on environmental grounds.

60. Replying to the Commission's argument that it is possible for a licence application to be made to the Agency before an application for planning permission has been made to the planning authority, and thus before an environmental impact assessment has been carried out, Ireland contends that under Irish law 'development consent' requires both planning permission from the competent planning authority and a licence from the Agency. In those circumstances, there is no practical benefit in the developer applying for a licence from the Agency without making a contemporaneous application to the planning authority; such separate applications do not therefore occur in practice.

61. In addition, Ireland argues that, contrary to the Commission's assertion that the Agency cannot undertake an environmental impact assessment, there is in several instances an obligation, particularly for waste recovery or waste disposal licence applications and for applications for integrated pollution control and prevention licences, to submit an environmental impact statement to the Agency independently of any earlier application for planning permission lodged with a planning

authority. In addition, in such cases the Agency is expressly empowered to request further information from an applicant and may therefore request information which is substantially similar to that contained in an environmental impact statement.

62. Ireland submits that an obligation on the planning authority and the Agency to consult in every case would be inappropriate. It would be more appropriate to allow such consultation whilst affording a discretion to the relevant decision-makers as to whether, in each particular case, to undertake such consultation.

63. Finally, the judgment in Case C-66/06 Commission v Ireland , to which the Commission refers in order to avoid having to adduce proof of its allegations, is not relevant to the present case. In Ireland's submission, the alleged infringement, in that case, concerned the manner in which Directive 85/337 had been transposed into Irish domestic law, whereas the present case concerns the application of the legislation transposing that directive. Whilst a comprehensive scheme has been put in place by the Irish legislation on the environmental impact assessment, the Commission claims that that legislation may not always be applied properly in practice. In that regard, the onus of proof lies with the Commission, which has failed to discharge it. The references to the projects at Duleek and Leap offer no support whatsoever for the Commission's allegations.

Findings of the Court

– Admissibility of the second complaint

64. It is settled case-law that, in the context of an action brought on the basis of Article 226 EC, the reasoned opinion and the action must set out the Commission's complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the scope of the infringement of European Union law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged (see, in particular, Commission v United Kingdom , paragraph 18, and Case C-66/06 Commission v Ireland , paragraph 31).

65. In this case, it is apparent from the documents in the court file that, in the pre-litigation procedure, both paragraphs 3.2.2 to 3.2.5 of the reasoned opinion of 6 August 2001 and paragraphs 2.17 and 2.18 of the additional reasoned opinion of 29 June 2007 set forth the reason for which the strict demarcation between the separate roles assigned to the planning authorities, on the one hand, and the Agency, on the other, does not satisfy, in the Commission's submission, the requirements of Directive 85/337. It is there explained that such sharing of powers is incompatible with the fact that the concept of 'environment', as it must be taken into account in the decision-making process laid down by that directive, involves taking into consideration the interaction between the factors falling within the separate spheres of responsibility of each of those decision-making authorities.

66. That complaint is set out in identical or similar terms in paragraphs 55 et seq. of the application in this action which, in addition, contains, in its paragraphs 9 to 20, a summary of the relevant provisions of the Irish legislation.

67. It follows from those findings that the Commission's allegations in the course of the pre-litigation procedure and the proceedings before the Court were sufficiently clear to enable Ireland properly to defend itself.

68. Accordingly, Ireland's plea of inadmissibility in respect of the Commission's second complaint must be rejected.

– Substance

69. At the outset, it is to be noted that, by its second complaint, the Commission is criticising the transposition by the Irish legislation at issue of Articles 2 to 4 of Directive 85/337, on the ground that

the procedures put in place by that legislation do not ensure full compliance with those articles where several national authorities take part in the decision-making process.

70. Consequently, Ireland's line of argument that the Commission has not adequately established the factual basis for its action must immediately be rejected. As the Commission claimed, since its action for failure to fulfil obligations is concerned with the way in which Directive 85/337 has been transposed, and not with the actual result of the application of the national legislation relating to that transposition, it must be determined whether that legislation itself harbours the insufficiencies or defects in the transposition of the directive which the Commission alleges, without any need to establish the actual effects of the national legislation effecting that transposition with regard to specific projects (see Case C-66/06 Commission v Ireland , paragraph 59).

71. Article 1(2) of Directive 85/337 defines the term 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Article 1(3) states that the competent authorities are to be that or those which the Member States designate as responsible for performing the duties arising from that directive.

72. For the purposes of the freedom thus left to them to determine the competent authorities for giving development consent, for the purposes of that directive, the Member States may decide to entrust that task to several entities, as the Commission has moreover expressly accepted.

73. Article 2(2) of Directive 85/337 adds that the environmental impact statement may be integrated into the existing procedures for consent to projects or failing that, into other procedures or into procedures to be established to comply with the aims of that directive.

74. That provision means that the liberty left to the Member States extends to the determination of the rules of procedure and requirements for the grant of the development consent in question.

75. However, that freedom may be exercised only within the limits imposed by that directive and provided that the choices made by the Member States ensure full compliance with its aims.

76. Article 2(1) of Directive 85/337 thus states that the environmental impact assessment must take place 'before the giving of consent'. That entails that the examination of a project's direct and indirect effects on the factors referred to in Article 3 of that directive and on the interaction between those factors be fully carried out before consent is given.

77. In those circumstances, while nothing precludes Ireland's choice to entrust the attainment of that directive's aims to two different authorities, namely 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 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.

78. In that regard, the Commission maintains that it has identified, in the Irish legislation, a gap arising from the combination of two factors. The first is the lack of any right on the part of the Agency, where it receives an application for a licence for a project as regards pollution aspects, to require an environmental impact assessment. The second is the possibility that the Agency might receive an application and decide on questions of pollution before an application is made to the planning authority, which alone can require the developer to make an environmental impact statement.

79. In its defence, Ireland, which does not deny that, generally, the Agency is not empowered to require a developer to produce such a statement, contends that there is no practical benefit for a developer in seeking a licence from the Agency without simultaneously making an application for planning permission to the planning authority, since he needs a consent from both those authorities. However, Ireland has neither established, nor even alleged, that it is legally impossible for a

developer to obtain a decision from the Agency where he has not applied to the planning authority for permission.

80. Admittedly, the EPAR give the Agency the right to notify a licence application to the planning authority. However, it is common ground between the parties that it is not an obligation and, moreover, an authority which has received such notification is not bound to reply to it.

81. It is therefore not inconceivable that the Agency, as the authority responsible for licensing a project as regards pollution aspects, may make its decision without an environmental impact assessment being carried out in accordance with Articles 2 to 4 of Directive 85/337.

82. Ireland contends that, in certain cases, relating particularly to licences for the recovery or disposal of waste and integrated pollution control and prevention licences, the Agency is empowered to require an environmental impact statement, which it must take into account. However, such specific rules cannot fill the gap in the Irish legislation identified in the preceding paragraph.

83. Ireland submits also that planning authorities are empowered, since the amendment of the EPAA by section 256 of the PDA, to refuse, where appropriate, planning permission on environmental grounds and that the concepts of 'proper planning' and 'sustainable development' confer on those authorities, generally, such power.

84. Such an extension of the planning authority's powers may, as Ireland argues, create in certain cases an overlap of the respective powers of the authorities responsible for environmental matters. None the less, it must be held that such an overlap cannot fill the gap pointed out in paragraph 81 of the present judgment, which leaves open the possibility that the Agency will alone decide, without an environmental impact assessment complying with Articles 2 to 4 of Directive 85/337, on a project as regards pollution aspects.

85. In those circumstances, it must be held that the Commission's second complaint in support of its action for failure to fulfil obligations is well founded.

The third complaint, alleging failure to apply Directive 85/337 to demolition works

Arguments of the parties

86. In the Commission's submission, demolition works may constitute a 'project' within the meaning of Article 1(2) of Directive 85/337, since they fall within the concept of 'other interventions in the natural surroundings and landscape'. However, in the PDR, Ireland purported to exempt nearly all demolition works from the obligation to carry out an environmental impact assessment. After the end of the two-month period laid down in the additional reasoned opinion of 29 June 2007, Ireland admittedly notified the Commission of new legislation, which amended the PDR by significantly narrowing the scope of the exemption for demolition works. However, that legislation cannot, the Commission submits, be taken into account in the present infringement action.

87. The Commission claims that Ireland's interpretation that demolition works fall outside the scope of the directive is reflected in the NMA, and refers in that regard to sections 14, 14A and 14B of that Act which relate to the demolition of a national monument.

88. By way of illustration of how, in contravention of Directive 85/337, the exclusion of demolition works allowed, by virtue of section 14A of the NMA, a national monument to be demolished without an environmental impact assessment being undertaken, the Commission cites the ministerial decision of 13 June 2007 ordering the destruction of a national monument in order to permit the M3 motorway project to proceed.

89. As a preliminary point, Ireland objects that the Commission's third complaint is, in so far as it concerns section 14 of the NMA, inadmissible, since that provision was not mentioned in the additional reasoned opinion of 29 June 2007.

90. In Ireland's submission, demolition works do not fall within the scope of Directive 85/337, since they are not mentioned in Annex I or II thereto. In addition, Ireland submits that section 10 of the PDA and Article 9 of the PDR, when read together, make clear that the exemption from the obligation to obtain planning permission in respect of demolition works can apply only if the project is unlikely to have significant effects on the environment.

91. As regards the obligation to carry out further assessments, Ireland argues that the essence of Directive 85/337 is that the environmental impact assessment be carried out at the earliest possible stage, before the development starts. The only occasion when it is ever necessary to carry out a fresh assessment is, in accordance with the first indent of point 13 in Annex II to the directive, where the development project has been changed or extended.

92. With regard to the scope of ministerial directions issued under section 14A of the NMA, Ireland states that that provision applies only in the context of a road development previously approved by the Board, on the basis of an environmental impact assessment. Only the Board may authorise an alteration to a road development and it must in such a case assess whether that alteration is likely to have adverse environmental consequences. In those circumstances, the Minister's power to issue ministerial directions cannot be equated with the giving of consent for the motorway project. Those directions are issued only, if at all, following the commencement of the development works and the discovery of a new national monument and are designed only to regulate how the newly discovered national monument is to be dealt with. Also, Ireland denies that a ministerial decision was taken ordering the destruction of a national monument in order to allow the M3 motorway project to proceed.

Findings of the Court

– Admissibility of the third complaint

93. According to the Court's settled case-law, the subject-matter of proceedings brought under Article 226 EC is delimited by the administrative pre-litigation procedure governed by that article and the application must be founded on the same grounds and pleas as those stated in the reasoned opinion (see, in particular, Case C-340/02 Commission v France [2004] ECR I-9845, paragraph 26 and the case-law cited).

94. In this case, it is clear from the wording of the additional reasoned opinion of 29 June 2007 that the Commission, in paragraphs 2.34 to 2.38 thereof, complained that Ireland had excluded demolition works from the scope of the national legislation transposing Directive 85/337. In paragraphs 2.39 and 2.40 of the same opinion, the Commission stated that Ireland's interpretation of that directive was reflected not only in the PDA, but also in other more specific legislative provisions, such as the NMA, and it took as an example the carrying-out of the M3 motorway project.

95. It follows that, while the Commission did not expressly refer to section 14 of the NMA in that reasoned opinion, it none the less referred clearly to the decision-making mechanism laid down by that section as part of its analysis of the deficiencies which, in its submission, that Act entails.

96. In those circumstances, Ireland's plea of inadmissibility against the Commission's third complaint must be rejected.

– Substance

97. As regards the question whether demolition works come within the scope of Directive 85/337, as the Commission maintains in its pleadings, or whether, as Ireland contends, they are excluded, it is

appropriate to note, at the outset, that the definition of the word 'project' in Article 1(2) of that directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition. Such works can, indeed, be described as 'other interventions in the natural surroundings and landscape'.

98. That interpretation is supported by the fact that, if demolition works were excluded from the scope of that directive, the references to 'the cultural heritage' in Article 3 thereof, to 'landscapes of historical, cultural or archaeological significance' in point 2(h) of Annex III to that directive and to 'the architectural and archaeological heritage' in point 3 of Annex IV thereto would have no purpose.

99. It is true that, under Article 4 of Directive 85/337, for a project to require an environmental impact assessment, it must come within one of the categories in Annexes I and II to that directive. However, as Ireland contends, they make no express reference to demolition works except, irrelevantly for the purposes of the present action, the dismantling of nuclear power stations and other nuclear reactors, referred to in point 2 of Annex I.

100. However, it must be borne in mind that those annexes refer rather to sectoral categories of projects, without describing the precise nature of the works provided for. As an illustration it may be noted, as did the Commission, that 'urban development projects' referred to in point 10(b) of Annex II often involve the demolition of existing structures.

101. It follows that demolition works come within the scope of Directive 85/337 and, in that respect, may constitute a 'project' within the meaning of Article 1(2) thereof.

102. According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion (see, in particular, Case C-427/07 Commission v Ireland , paragraph 64 and the case-law cited).

103. Ireland does not deny that, under the national legislation in force at the date of the additional reasoned opinion, demolition works were not subject, as a general rule, to an environmental impact assessment but, on the contrary, were entitled to an exemption in principle.

104. It is clear from the rules laid down in sections 14 to 14B of the NMA as regards the demolition of a national monument that, as the Commission claims, they take no account of the possibility that such demolition works might constitute, in themselves, a 'project' within the meaning of Articles 1 and 4 of Directive 85/337 and, in that respect, require a prior environmental impact assessment. However, since the insufficiency of that directive's transposition into the Irish legal order has been established, there is no need to consider what that legislation's actual effects are in the light of the carrying-out of specific projects, such as that of the M3 motorway.

105. As regards the legislative changes subsequent to the action for failure to fulfil obligations being brought, they cannot be taken into consideration by the Court (see, in particular, Case C-427/07 Commission v Ireland , paragraph 65 and the case-law cited).

106. In those circumstances, the Commission's third complaint in support of its action must be held to be well founded.

107. Accordingly, it must be declared that:

– by failing to transpose Article 3 of Directive 85/337;

– by failing to ensure that, where planning authorities and the Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of that directive; and

– by excluding demolition works from the scope of its legislation transposing that directive,

Ireland has failed to fulfil its obligations under that directive.

Costs

108. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful the latter must be ordered to pay the costs.

Operative part

On those grounds, the Court (First Chamber) hereby:

1. Declares that:

– by failing to transpose Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003;

– by failing to ensure that, where Irish planning authorities and the Environmental Protection Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of Directive 85/337, as amended by Directive 2003/35; and

– by excluding demolition works from the scope of its legislation transposing Directive 85/337, as amended by Directive 2003/35,

Ireland has failed to fulfil its obligations under that directive;

2. Orders Ireland to pay the costs.

Comhshaol, Pobal agus Rialtas Áitiúil
Environment, Community and Local Government

Guidelines for Planning Authorities and An Bord Pleanála

Guidelines for Planning Authorities and An Bord Pleanála on carrying out

Environmental Impact Assessment

Department of the Environment, Community and Local Government

March 2013

Ministerial Foreword

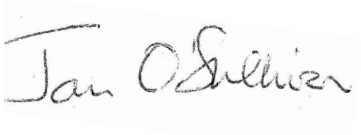
Environmental impact assessment (EIA) is a critical tool in managing and clarifying the complex interrelationships between development and the environment. It is, in essence, a process that provides for an examination of the environmental consequences of development actions in a systematic, holistic and multidisciplinary way. As such it is a critical aid to decision making. However it is not decision making in itself.

Sustainability and the better management of development in harmony with the environment should be a fundamental aspiration of any development consent system. It is an aspiration that I hold for the Irish planning system. EIA – an instrument for sustainable development – provides all stakeholders in the Irish planning system with a vehicle through which we can all seek to make continuous improvement.

Since the first iteration of the EIA Directive in 1985 there have been changes to the legislation itself and to the practice of carrying out EIA both in Ireland and throughout the European Community.

The policy and operational context for all stakeholders – competent authorities, project sponsors/developers, local communities and third parties has become significantly more complex in that time as a result. Changes in legislation on the EIA requirement contained in the 2010 Act, and subsequent amendments thereto, need to be clarified so that all parties involved understand the obligation on competent authorities.

The purpose of these Guidelines is therefore to provide practical guidance to planning authorities and An Bord Pleanála on procedural issues and the EIA process arising from the requirement to carry out an environmental impact assessment in relevant cases. It is envisaged that the guidelines will result in greater consistency in the procedures adopted by competent authorities. The Guidelines should also assist developers, EIA practitioners, NGOs and other participants in the planning process.



Jan O'Sullivan, T.D.,
Minister of State, Department of the Environment, Community and Local Government, with special responsibility for Housing and Planning

1. Introduction

1.1 Environmental Impact Assessment (EIA) is a very significant instrument in the implementation of EU environmental policy. The EIA Directive, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment as amended by Council Directive 97/11/EC of 3 March 1997, Directive 2003/35/EC of 26 May 2003 and Directive 2009/31/EC of 23 April 2009, now codified in Directive 2011/92/EU of 13 December 2011, is designed to ensure that projects likely to have significant effects on the environment are subject to a comprehensive assessment of environmental effects prior to development consent being given. The full text of the codified Directive is contained in Appendix. 1.

1.2 Assessing the effects of a proposed development on the environment is an integral part of considering whether the development is in the interests of the proper planning and sustainable development of any area. Such effects must accordingly be taken into account in determining any application for consent under the provisions of the Planning and Development Act, 2000, as amended. Competent authorities should also have regard to the objectives and purposes of the EIA Directive as set out in the preamble thereto when deciding on the merits of a relevant proposed development. Assessing environmental effects facilitates a more informed decision and should result in the avoidance or reduction of adverse environmental effects.

1.3 The EIA Directive was first transposed into Irish law by the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349 of 1989) which amended the Local Government (Planning and Development) Act, 1963 (and other legislation) to provide for environmental impact assessment. These Regulations, together with the Local Government (Planning and Development) Regulations, 1990, (S.I. No. 25 of 1990), which made more detailed provision in relation to planning consents, came into effect on 1 February 1990.

1.4 EIA provisions in relation to planning consents are currently contained in the Planning and Development Act, 2000, as amended, (Part X) and in Part 10 of the Planning and Development Regulations, 2001, as amended. A revised Planning and Development Act, 2000, incorporating all amendments to date, is available on the website of the Law Reform Commission. The Planning and Development Act, 2000, as amended, is referred to throughout these Guidelines as “the Planning Act”.

1.5 Part X of the Planning Act was significantly amended by

- the Planning and Development (Amendment) Act 2010 (number 30 of 2010) – amendment commenced 19/08/2010 (by S.I. No. 405 of 2010),

2. Status, Scope, Purpose and Objectives of the Guidelines

2.1 These Guidelines are issued to planning authorities and the Board under section 28 of the Planning Act and both are required under the section to have regard to the Guidelines in the performance of their functions under the Act.

2.2 The purpose of the Guidelines is to provide practical guidance to planning authorities and the Board on legal and procedural issues arising from the requirement to carry out an EIA in relevant cases. The Guidelines relate essentially to the responsibilities on planning authorities and the Board as contained in the current section 172 of the Planning Act. It is envisaged that the Guidelines will result in greater consistency in the procedures adopted by competent authorities.

2.3 The Guidelines deal with the specific requirement on planning authorities and the Board to carry out EIA in relevant cases as now contained in section 172 of the Planning Act. Section 171A is referred to for the purpose of defining what is meant by EIA for the purpose of the Guidelines.

2.4 The Guidelines deal with the matter of competent authorities carrying out an EIA. They do not cover all issues relating to the EIA Directive. Separate guidance on screening for EIA is contained in the Department's *Environmental Impact Assessment (EIA) Guidance for Consent Authorities regarding Sub-threshold Development* (August 2003). Guidance on the information to be contained in environmental impact statements is given in the document entitled *Guidelines on the Information to be contained in Environmental Impact Statements* published by the Environmental Protection Agency (EPA) in March 2002. (Article 94 of the Planning and Development Regulations, 2001 specifies the information to be contained in an EIS). Additional advice is contained in the *Advice Notes on Current Practice (in the preparation of Environmental Impact Statements)* published by the EPA in September 2003.

2.5 The guidance and advice contained in the publications referred to in 2.4 are generally still relevant. Planning authorities and the Board should therefore continue to have regard to these publications. It is envisaged that the two EPA publications referred to above (prepared under section 72 of the Environmental Protection Agency Act, 1992) will be updated in the short to medium term. The revision and updating of the documents in question will result in updating of advice on the information to be contained in environmental impact statements to assist developers and competent authorities in fulfilling their obligations under the EIA Directive.

2.6 It should be noted in applying these Guidelines that they relate to the assessment carried out by the planning authority or the Board on an application for consent rather than to the more holistic and iterative meaning given to the phrase environmental impact assessment in the EPA Guidelines referred to above. (The EPA document notes that the environmental impact assessment procedure commences at the project design stage).

2.7 The core objectives of these Guidelines are:

- to facilitate better understanding by competent authorities of the requirements of the EIA process;
- to ensure that the requirements of the EIA Directive and planning legislation are complied with prior to the issue of development consent for relevant projects; and
- to ensure consistency of EIA processes adopted by competent authorities.

3. Outline of and guide to section 172 and section 171A

3.1 Section 172(1) requires that an EIA must be carried out by the planning authority or the Board, as the case may be, in respect of an application for consent for:

(a) proposed development of a class specified in Schedule 5 of the Planning and Development Regulations, 2001 which exceeds a quantity, area or other limit specified in that schedule or

(b) proposed development of a class specified in Schedule 5 which does not exceed the specified quantity, area or limit but which the planning authority or the Board determines is likely to have significant effects on the environment.

3.2 The developments and consents to which section 172 applies are set out in subsection (1A). The relevant developments are

- development requiring planning permission under Part III of the Act;
- development in a Strategic Development Zone under Part IX;
- certain development by local authorities under Part X and by state authorities and statutory undertakers under Part XI;
- development on the foreshore under Part XV;
- development requiring consent under section 43 of the Transport (Railway Infrastructure) Act, 2001;
- development requiring consent under section 51 of the Roads Act 1993.
- development the subject of an application for substitute consent under Part XA.

3.3 Section 172(1B) requires an applicant for consent for proposed development of a class specified in Schedule 5 of the Planning and Development Regulations, 2001 which exceeds a quantity, area, or other limit specified in that Schedule to submit an EIS to the planning authority or to the Board as the case may be. Consent should accordingly never be granted for a proposed development falling into that category in circumstances where an EIS has not been submitted as required. The options open to the competent authority in such circumstances are a refusal of consent, a refusal to deal with the application, a request for the submission of an EIS, or a declaration that the application is invalid. The appropriate option depends on the nature of the particular application for consent. In the case of a planning application to a planning authority, article 99 of the Planning and Development Regulations, 2001, as amended, provides that in such a case the application shall be invalid and the planning authority is required under article 26(5) to inform the applicant of this and that the application cannot be

considered by the planning authority. Article 109, however, allows the Board to require the submission of an EIS in a situation where an appeal relates to such a development and an EIS was not submitted to the planning authority.

3.4 Section 172(1C) specifies that where an application for consent for proposed development of a class specified in Schedule 5 of the Planning and Development Regulations, 2001, which does not exceed a quantity, area or other limit specified in that schedule, is not accompanied by an environmental impact statement, but where the planning authority or the Board determine that the proposed development would be likely to have significant effects on the environment, the authority or the Board, as the case may be, must require the applicant to submit an EIS. In the event of the applicant not submitting the required statement in the specified period, or any further specified period as may be allowed by the authority or the Board, the application for consent shall be deemed to be withdrawn. It is desirable in the interests of openness and transparency that the applicant and any persons who have made submissions/observations should be informed that the application has been deemed to be withdrawn in these circumstances. This should be done immediately after the expiration of the specified period unless an application to extend that period has been made prior to that date. If an application to extend the period is refused, the parties should be informed immediately after the expiry of the specified period or the date of refusal – whichever is the later.

3.5 Section 172(1D) requires the planning authority or the Board to consider whether any EIS submitted identifies and describes adequately the direct and indirect effects on the environment of the proposed development. Where it considers that the EIS does not do so, the planning authority or the Board must require the applicant to furnish such further information as it considers necessary to remedy such defect.

3.6 Section 172(1E) provides that the competent authority must require the applicant to furnish any further information considered necessary to enable it to carry out an EIA.

3.7 Section 172(1F) provides that where information required under section 172(1D) or section 172(1E) is not submitted within the period specified, or any further period that the competent authority may specify, the application shall be deemed to be withdrawn. It should be noted that this allows the competent authority to specify a further period for the submission of the information. The specification of any further period should be done on the basis of an application to extend the period made prior to the first specified period elapsing.

3.8 Section 172(1G) sets out a number of items which the competent authority must consider in carrying out an EIA. The items listed include the EIS, any further information submitted by the applicant, submissions or observations made in relation to environmental effects and the views of any other member state submitted under section 174 or Regulations made under that section.

3.9 Section 172(1H) provides that in carrying out an EIA a competent authority may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers. It should be noted that the reference to consultants, experts, etc. is not confined to consultants or experts employed by the competent authority. This allows for the adoption in whole or in part of the assessment contained in the EIS submitted, or in other consultant/expert reports submitted in relation to the application.

3.10 Section 172(1I) allows the competent authority to attach conditions to any grant of permission in order to avoid, reduce and, if possible, offset the major adverse effects of the proposed development on the environment. It should be noted, however, that section 99F of the Environmental Protection Agency Act, 1992, as amended, section 54 of the Waste Management Act, 1996, as amended, prohibit the attachment of conditions to any grant of permission or consent for development which are for the purpose of controlling emissions from an activity for which a licence from the EPA under the Environmental Protection Agency Act, 1992, as amended, or the Waste Management Act, 1996, as amended, is required. However, important new provisions in relation to the interface between planning authorities/the Board and the EPA in respect of projects which require both planning permission with EIA and a licence from the Agency were introduced in September 2012. These new measures are set out below at 5.22.

3.11 Section 172(1J) specifies various information which must be made available to the applicant and to the public by the competent authority when it has made a decision whether or not to grant consent. The bulk of the information referred to is already made available to the public and the applicant under various provisions in the Planning Act and Regulations including the main reasons and considerations for the decision and any conditions attached to the decision, a copy of all documents relating to the application including any report or study, information on procedures available to review the substantive and procedural legality of the decision and the views of any other member state submitted under section 174 of the Planning Act. It is now also a requirement that the information made available must **include an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A**, and, where relevant, **a description of the main measures to avoid, reduce and if possible offset the major adverse effects**. The latter requirement may, in some cases, involve an elaboration on or addition to the conditions imposed, the reasons for the conditions, or the reasons and considerations on which the decision is based.

3.12 A new section, section 171A, was inserted into the Planning Act by section 53 of the Planning and Development (Amendment) Act 2010. This section came into effect on 19 August 2010 and was amended on 31 October 2012 (S.I. No. 419 of 2012).

3.13 Section 171A contains a definition of "environmental impact assessment" for the purposes of Part X of the Act. Environmental impact assessment is stated to be an assessment "carried out by a planning authority or the Board", i.e. the competent authority must itself carry out an assessment.

3.14 Section 171A sets out in detail, using wording similar to the EIA Directive, what the assessment must comprise. The assessment must include an examination, analysis and evaluation and it must identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the EIA Directive, the direct and indirect effects of a proposed development on the following:

(a) human beings, flora and fauna,
(b) soil, water, air, climate and the landscape
(c) material assets and the cultural heritage, and
(d) the interaction between the factors mentioned in paragraphs (a), (b) and (c).

3.15 Section 171A(2) states that a word or expression used in Part X and also in the EIA Directive has the same meaning in Part X as in the Directive unless the context requires otherwise.

4. Procedural Issues

4.1 The EIA Directive requires that EIA be carried out in an open and transparent manner with the public and bodies with specific environmental responsibility being given an opportunity to comment and participate in the process of assessment (Article 6 of the Directive). The public concerned and persons with sufficient interest must also be given an opportunity to challenge the substantive and procedural legality of the final decision. (Article 11 of the Directive).

4.2 In order to comply with the requirements of section 171A and section 172 and the requirements of Articles 6 and 11 of the EIA Directive, it is essential that an assessment of the environmental effects of relevant projects is carried out by the competent authority and that the assessment is clearly documented with a "paper trail" being available for public scrutiny and to facilitate and defend any legal challenge. To facilitate ease of communication etc., the "paper trail" should also be in electronic format.

4.3 In the case of applications being considered by a planning authority, internal planning authority reports (water services, environment, roads, etc.) on the proposed development should contain comments on the relevant information and assessment contained in the EIS e.g. reports from the water services/ environment section should comment on relevant issues relating to water quality. The main report on the planning application which would generally be prepared by the planner in the planning section/department (the planner's report) should co-ordinate the reports from various sections within the planning authority and should contain a section clearly identified as an "Environmental Impact Assessment" – this section of the planner's report will hereafter be referred to as "the EIA Report". That is, "the EIA Report" is a section or chapter of the planner's report, which section or chapter should be headed "Environmental Impact Assessment". (Chapter 6 of the Development Management Guidelines for planning authorities (June 2007) contains detailed advice in relation to planners' reports). In the case of an application being dealt with by the Board, an EIA Report should similarly be contained in the Inspector's Report unless a separate report is prepared on the EIA.

4.4 The EIA Directive and the Planning Act require that an assessment be carried out by the competent authority, i.e. the planning authority or the Board. It is, accordingly, necessary that the decision-maker in the planning authority (i.e. the manager or person to whom the decision-making power has been delegated) or in the Board, as appropriate, carries out an assessment. Therefore the decision-maker must indicate in a written statement that he or she has read the EIA Report referred to above and/or any other report, which the decision-maker relies on in carrying out the assessment and either has accepted the conclusions of the planner/Board's Inspector, in whole or in part or has not accepted such conclusions. Where the decision-maker does not accept some or all of the

conclusions drawn by the planner/Inspector in the EIA Report, he or she must in the written statement give reasons as to why he or she does not accept the conclusions in question. This written statement should be independent of the decision of the decision-maker as to whether to grant or refuse permission for the development. An example of a decision-maker's written statement, which may be appropriately adapted, is set out in Appendix 5.

5. Environmental Impact Assessment Process

5.1 Section 171A requires that the EIA includes an examination, analysis and evaluation and that it must identify, describe and assess in an appropriate manner the direct and indirect effects of the development on the various factors listed in the section, which reflect those referred to in Article 3 of the EIA Directive. It must also address any interactions between the various factors listed.

5.2 The requirement on a competent authority to carry out an EIA as defined in section 171A is a separate and different requirement from that imposed on the developer/applicant to submit an EIS. The EIA to be carried out by the competent authority is focused on the effects of the proposed development on various environmental factors. The information to be supplied by the developer focuses more on information, data and a description of the proposed development and on the aspects of the environment likely to be affected. The applicant/developer is, however, also required to submit a description of the likely significant effects of the proposed project on the environment. The applicant/developer must also submit an outline of the main alternatives studied, a non-technical summary of the information provided, and an indication of any difficulties encountered in compiling the required information.

5.3 The assessment required of the competent authority is specifically of the development proposed. The study of alternatives carried out by the applicant may, however, give useful guidance to the competent authority on its decision on the application and while it does not form part of the assessment as defined in section 171A, the EIA Report should comment on and assess the robustness of the applicant's conclusions on the environmental effects of the alternatives outlined. (It is noted in the High Court decision in the case of *Volkmar Klohn v An Bord Pleanála (2004 No. 544 JR*) that the development consent procedure does not require the competent authority to carry out an EIA of the possible alternatives). The EIS must contain a study of any alternative referred to by the competent authority when giving an opinion on the information to be contained in an EIS.

5.4 The assessment to be carried out by the competent authority involves an examination of the substance of information gathered as well as a consideration of the necessity/expediency of supplementing it, if appropriate, with additional data. The competent authority must undertake an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effect of the project on the factors listed in section 171A and of interactions. The overall assessment, including the examination and analysis, will have been done in part during the processing of the application and the EIA Report section of the planner's/Inspector's report should summarise the conclusions of the overall process.

5.5 Planning authorities will have a significant amount of information and data available in relation to environmental conditions within their functional areas. They will also have a significant amount of relevant local information which may be useful in evaluating the accuracy and veracity of information/data submitted by the applicant and others. The information available to planning authorities and the expertise of their own technical staff should be used to complete a full investigation and analysis of the likely significant environmental effects of a proposed development. This information should already be incorporated and factored into a well-prepared EIS.

5.6 In the event of weaknesses or deficiencies in the data/information submitted being identified, the applicant should be requested to submit the necessary information, e.g. adequate water or air quality monitoring may not have been carried out or the water or air quality testing carried out may not be that recommended for the particular purpose. Any deficiencies in the data/information should be identified as early as possible in the process in order to avoid undue delay. Section 172(1D) refers to situations where the EIS submitted is considered to be deficient and section 172(1E) refers to situations where the competent authority requires further information in order to carry out an EIA.

5.7 The EIA Report should contain commentary on the adequacy of the EIS submitted by the applicant, augmented where relevant by any additional information, data or assessment submitted subsequent to the lodgement of the application in the context of the requirements of the Planning Act/Planning Regulations. In any case where a written opinion has been given of the information to be contained in the EIS, the EIA Report should indicate the extent to which this has been complied with and should also contain a conclusion on the adequacy of the information provided.

5.8 The EIA should **identify** the likely significant direct and indirect effects of the proposed development on the environment. In any well prepared EIS these effects should have already been clearly identified. Observations submitted may also contribute to the identification of effects. The effects, as identified, should be referred to in the EIA Report.

5.9 The likely effects are dependent on the nature of the project proposed and the environmental conditions pertaining. The environmental sensitivity of the location may be of particular significance. The EPA publication Advice Notes on Current Practice (in the preparation of Environmental Impact Statements) published in September 2003 gives useful guidance on the typical environmental effects likely to occur from the various project types listed.

5.10 The EIA Report should **describe** the likely significant effects identified, including a description of any interaction between the factors listed in section 171A. The effects on the environment should be described without reference to any detailed mitigating measures which may be required and imposed as conditions in order to reduce or avoid such effects.

5.11 The likely significant effects on the environment in the context of the factors listed in section 171A should be assessed and such assessment included in the EIA Report. The assessment should have regard to any mitigating measures which might be proposed in order to avoid, reduce or if possible offset any major adverse effects. The impact of residual effects should be assessed. The assessment to be carried out should include an evaluation and commentary on the significance of the likely effects of the development on the environment which have been identified and described.

5.12 Where mitigation measures are proposed to be included in any permission/ consent, conditions requiring such measures should comply with the criteria for conditions in planning permissions as referred to in the Development Management Guidelines for Planning Authorities (June 2007). This may require strengthening/editing of mitigating measures contained in the EIS submitted on behalf on the applicant. Any significant environmental impacts likely to arise from the mitigation measures should be assessed and referred to in the report, e.g. noise mitigation measures may have adverse visual impacts. Conditions should not be used to obtain information required to assess the significant effects of the development.

5.13 The EIA to be carried out should include an assessment of beneficial effects on the environment in addition to adverse effects, e.g. an effluent treatment plant may have significant beneficial effects in terms of water quality but may also have some adverse effects such as traffic, noise or odour generation.

5.14 The EIA should be carried out and reported on in an objective, scientific and impartial manner. It should be robust and where possible it should be based on standard descriptive methods and replicable prediction techniques. **All** significant impacts should be referred to and the **timescale** of such impacts should be identified, e.g. short, medium, long term, temporary, permanent, continuous, or intermittent. The **magnitude** of impacts should also be evaluated, e.g. the impact on water or air quality in terms of internationally/nationally adopted/ recommended standards, the geographical extent of noise pollution likely to arise, or the number of people likely to be affected. The probability of impacts occurring and the consequences of such impacts should be referred to.

5.15 The significance of effects on the environment is determined by a combination of objective/scientific and subjective/social concerns. Objective/scientific criteria are not always available in relation to some of the factors which may be affected, e.g. effects on landscape or cultural heritage. In assessing the significance of effects on factors where scientific criteria are not available, it is desirable that the effects are considered and assessed in an objective professional manner informed by societal value systems rather than the personal subjective view of the person carrying out the assessment. A societal value system response can be gauged for example, by whether or not the item or factor affected is listed as being of particular importance in the development plan for the area or in any inventory of sites, areas or items of importance. Planning authorities and the Board will also be aware of the suite of guidelines issued in relation to various aspects of development management such as *Framework and Principles for the Protection of Archaeological Heritage* and *Architectural Heritage Protection Guidelines for Planning Authorities*. Adherence to such guidelines will result in a more objective approach to the required assessment and evaluation.

5.16 The effects on the environment to be assessed are the full effects of the proposed development rather than merely the effects of the works to be carried out. Direct, indirect and cumulative effects should be evaluated. The assessment should also take account of the different stages of the development including construction, operation and decommissioning where relevant.

5.17 Planning authorities and the Board have significant expertise and skills available within their existing staff. They have considerable experience in carrying out environmental impact and similar assessments. Normally therefore the requirement to carry out an EIA will not give rise to a requirement for the use of additional consultancy services by the planning authorities and the Board. In the event of specific projects giving rise to a need for particular specialist expertise, this should be obtained in the normal manner.

5.18 In carrying out its evaluation and assessment it is reasonable for the competent authority to have regard to the qualifications and expertise of the persons involved in preparing the EIS and in making submissions in relation to the environmental effects of the development. However, conclusions of the assessment carried out by the consultants who prepared the EIS may not be accepted without analysis. In the event of the competent authority's own expertise conflicting with that in the EIS, or there being conflicting expert views or opinions contained in the submissions, it will be necessary for the competent authority to resolve the issue and form its own view on the likely significant effects. This may, on occasion, require the engagement of appropriate specialist consultancy services. The official with responsibility for assessing the significant effects of the development on the environment, on behalf of the competent

authority, may also consider it necessary to obtain additional reports and assessments from other departments. This may be necessary in order to give proper consideration to submissions made and/or to reconcile conflicting expert views or opinions on specific topics.

5.19 In identifying, describing and assessing the likely significant effects of a development on the environment, the EIA Report may refer to the EIS and any additional information submitted by the applicant and to submissions made in the course of considering the application. It is not necessary or desirable to repeat in detail the contents of the EIS or other documentation submitted.

5.20 The EIA Report should clearly indicate that the EIS and all submissions/ observations received which are relevant to impacts on the environment have been considered and taken into account in the EIA. Submissions considered would of course include any submissions made in relation to transboundary effects in accordance with the Planning Regulations giving effect to Article 7 of the EIA Directive. (Section 172(1G) of the Planning Act is relevant in respect of the documentation etc. which the competent authority must consider in its assessment).

5.21 Some application types, where both planning permission/consent and a licence/ authorisation from the EPA under the provisions of the Environmental Protection Agency Act, 1992, the Waste Management Act, 1996 or the Waste Water Discharge (Authorisation) Regulations 2007 are required, give rise to particular considerations in terms of EIA. In cases where there is a legal restriction on the planning authority or the Board on imposing conditions for controlling emissions from the licensable activity or controlling the waste water discharge where authorisation from the EPA is required under the 2007 Regulations, detailed consultations between the relevant planning authority/the Board and the EPA will be required prior to any planning permission/consent being granted. The purpose of such consultation is to ensure that a comprehensive, holistic assessment of likely effects on the environment is carried out prior to the determination of the application by the planning authority or the Board and the determination of the licence application by the EPA.

5.22 The European Union (Environmental Impact Assessment) (Integrated Pollution Prevention and Control) Regulations 2012 and the European Union (Environmental Impact Assessment) (Waste) Regulations 2012 (S.I. Nos. 282 and 283 of 2012), which came into operation on 30 September 2012, place an onus on the EPA to carry out an EIA as respects the matters that come within the functions of the Agency prior to determining relevant applications for licences. The Regulations in question require the Agency to consult with the relevant planning authority or the Board as appropriate in such cases and require the

relevant authority to furnish observations to the Agency within 4 weeks of such being requested (new sections 173A and 173B of the Planning Act). The Regulations also provide for the competent authorities and the Agency entering into consultations in relation to any environmental impacts of the proposed development comprising or for the purposes of the activity to which the licence application relates. A licence may not be granted for any such activity prior to consent being granted by the competent authority of the Planning Act. Planning authorities and the Board should co-operate with the Agency to ensure the efficient and effective operation of these Regulations. A detailed guidance Circular Letter on the provisions of the new Regulations, Circular Letter PHFPD 06/12, issued on 27 August 2012 and process maps in relation to the process of consultation/interaction between the planning authorities/the Board and the EPA have now been prepared, in consultation with planning authorities and the Board. The Circular and the process maps are attached at Appendix 6.

5.23 An EIA must identify, describe and assess the effects of a proposed development on various factors, including flora and fauna. This can, on occasion, result in an overlap with requirements contained in Part XAB of the Planning Act (which replaced and updated the transposition of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora contained in the 1997 European Communities (Natural Habitats) Regulations). The provisions of Part XAB set out the new legislative regime for implementing the requirements of the Habitats Directive in so far as consents under the Planning Act are concerned. Where EIA under Part X, and appropriate assessment under Part XAB, are both required, separate assessments should be carried out by the competent authority prior to any decision to grant permission/consent. The different assessments should be clearly identified in the relevant reports. Unlike the EIA process, the conclusions of an appropriate assessment may be determinate as to whether or not planning permission/consent can be granted.

Appendix 1

Appendix 1

Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance

Official Journal L 026 , 28/01/2012 P. 0001 - 0021

Directive 2011/92/EU of the European Parliament and of the Council

of 13 December 2011

on the assessment of the effects of certain public and private projects on the environment

(codification)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [3] has been substantially amended several times [4]. In the interests of clarity and rationality the said Directive should be codified.

(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.

(3) The principles of the assessment of environmental effects should be harmonised, in particular with reference to the projects which should be subject to assessment, the main obligations of the developers and the content of the assessment. The Member States may lay down stricter rules to protect the environment.

(4) In addition, it is necessary to achieve one of the objectives of the Union in the sphere of the protection of the environment and the quality of life.

(5) The environmental legislation of the Union includes provisions enabling public authorities and other bodies to take decisions which may have a significant effect on the environment as well as on personal health and well-being.

(6) General principles for the assessment of environmental effects should be laid down with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.

(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.

(9) Projects of other types may not have significant effects on the environment in every case and those projects should be assessed where the Member States consider that they are likely to have significant effects on the environment.

(10) (Member States may set thresholds or criteria for the purpose of determining which of such projects should be subject to assessment on the basis of the significance of their environmental effects. Member States should not be required to examine projects below those thresholds or outside those criteria on a case-by-case basis.

(11) When setting such thresholds or criteria or examining projects on a case-by-case basis, for the purpose of determining which projects should be subject to assessment on the basis of their significant environmental effects, Member States should take account of the relevant selection criteria set out in this Directive. In accordance with the subsidiarity principle, the Member States are in the best position to apply those criteria in specific instances.

(12) For projects which are subject to assessment, a certain minimal amount of information should be supplied, concerning the project and its effects.

(13) It is appropriate to lay down a procedure in order to enable the developer to obtain an opinion from the competent authorities on the content and extent of the information to be elaborated and supplied for the assessment. Member States, in the framework of this procedure, may require the developer to provide, inter alia, alternatives for the projects for which it intends to submit an application.

(14) The effects of a project on the environment should be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure

maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

(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.

(16) Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

(17) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public.

(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.

(19) Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

(20) Article 6 of the Aarhus Convention provides for public participation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which may have a significant effect on the environment.

(21) Article 9(2) and (4) of the Aarhus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of that Convention.

(22) However, this Directive should not be applied to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.

(23) Furthermore, it may be appropriate in exceptional cases to exempt a specific project from the assessment procedures laid down by this Directive, subject to appropriate information being supplied to the Commission and to the public concerned.

(24) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in

Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(25) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex V, Part B,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive, the following definitions shall apply:

   (a) "project" means:

   - the execution of construction works or of other installations or schemes,
   - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

   (b) "developer" means the applicant for authorisation for a private project or the public authority which initiates a project;

   (c) "development consent" means the decision of the competent authority or authorities which entitles the developer to proceed with the project;

   (d) "public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

   (e) "public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

   (f) "competent authority or authorities" means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive.

3. Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on those purposes.

4. This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.

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 [5].
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.

Article 3

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:

(a) human beings, fauna and flora;

(b) soil, water, air, climate and the landscape;

(c) material assets and the cultural heritage;

(d) the interaction between the factors referred to in points (a), (b) and (c).

Article 4

1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

   (a) a case-by-case examination;

   or

   (b) thresholds or criteria set by the Member State.

   Member States may decide to apply both procedures referred to in points (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.

Article 5

1. In the case of projects which, pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Articles 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

   (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

   (b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment.

2. Member States shall take the necessary measures to ensure that, if the developer so requests before submitting an application for development consent, the competent authority shall give an opinion on the information to be supplied by the developer in accordance with paragraph 1. The competent authority shall consult the developer and authorities referred to in Article 6(1) before it gives its opinion. The fact that the authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the developer to submit further information.

   Member States may require the competent authorities to give such an opinion, irrespective of whether the developer so requests.

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

   (a) a description of the project comprising information on the site, design and size of the project;

(b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;

(c) the data required to identify and assess the main effects which the project is likely to have on the environment;

(d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;

(e) a non-technical summary of the information referred to in points (a) to (d).

4. Member States shall, if necessary, ensure that any authorities holding relevant information, with particular reference to Article 3, make this information available to the developer.

Article 6

1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To that end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. The public shall be informed, whether by public notices or by other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places at which, and the means by which, the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [6], information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

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

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.

4. The Member States concerned shall enter into consultations regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable time-frame for the duration of the consultation period.

5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.

Article 8

The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure.

Article 9

1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

   (a) the content of the decision and any conditions attached thereto;

   (b) having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process;

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

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.

Article 10

The provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national laws, regulations and administrative provisions and accepted legal practices with regard to commercial and industrial confidentiality, including intellectual property, and the safeguarding of the public interest.

Where Article 7 applies, the transmission of information to another Member State and the receipt of information by another Member State shall be subject to the limitations in force in the Member State in which the project is proposed.

Article 11

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

   (a) having a sufficient interest, or alternatively;

   (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

   have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

   Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

Article 12

1. The Member States and the Commission shall exchange information on the experience gained in applying this Directive.
2. In particular, Member States shall inform the Commission of any criteria and/or thresholds adopted for the selection of the projects in question, in accordance with Article 4(2).
3. On the basis of that exchange of information, the Commission shall if necessary submit additional proposals to the European Parliament and to the Council, with a view to ensuring that this Directive is applied in a sufficiently coordinated manner.

Article 13

Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

Article 14

Directive 85/337/EEC, as amended by the Directives listed in Annex V, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex V, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex VI.

Article 15

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 16

This Directive is addressed to the Member States.

Done at Strasbourg, 13 December 2011.

For the European Parliament

The President

J. Buzek

For the Council

The President

M. Szpunar

[1] OJ C 248, 25.8.2011, p. 154.

[2] Position of the European Parliament of 13 September 2011 (not yet published in the Official Journal) and decision of the Council of 15 November 2011.

[3] OJ L 175, 5.7.1985, p. 40.

[4] See Annex VI, Part A.

[5] OJ L 24, 29.1.2008, p. 8.

[6] OJ L 41, 14.2.2003, p. 26.

ANNEX I

PROJECTS REFERRED TO IN ARTICLE 4(1)

1. Crude-oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.

2. (a) Thermal power stations and other combustion installations with a heat output of 300 megawatts or more;

   (b) Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors [1] (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).

3. (a) Installations for the reprocessing of irradiated nuclear fuel;

   (b) Installations designed:

      (i) for the production or enrichment of nuclear fuel;

      (ii) for the processing of irradiated nuclear fuel or high-level radioactive waste;

      (iii) for the final disposal of irradiated nuclear fuel;

      (iv) solely for the final disposal of radioactive waste;

      (v) solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

4. (a) Integrated works for the initial smelting of cast iron and steel;

   (b) Installations for the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes.

5. Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos: for asbestos-cement products, with an annual production of more than 20000 tonnes of finished products, for friction material, with an annual production of more than 50 tonnes of finished products, and for other uses of asbestos, utilisation of more than 200 tonnes per year.

6. Integrated chemical installations, i.e. those installations for the manufacture on an industrial scale of substances using chemical conversion processes, in which several units are juxtaposed and are functionally linked to one another and which are:

   (a) for the production of basic organic chemicals;

   (b) for the production of basic inorganic chemicals;

   (c) for the production of phosphorous-, nitrogen- or potassium-based fertilisers (simple or compound fertilisers);

   (d) for the production of basic plant health products and of biocides;

   (e) for the production of basic pharmaceutical products using a chemical or biological process;

(f) for the production of explosives.

7. (a) Construction of lines for long-distance railway traffic and of airports [2] with a basic runway length of 2100 m or more;

(a) Construction of motorways and express roads [3];

(b) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road or realigned and/or widened section of road would be 10 km or more in a continuous length.

8. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1350 tonnes;

(a) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1350 tonnes.

9. Waste disposal installations for the incineration, chemical treatment as defined in Annex I to Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste [4] under heading D9, or landfill of hazardous waste, as defined in point 2 of Article 3 of that Directive.

10. Waste disposal installations for the incineration or chemical treatment as defined in Annex I to Directive 2008/98/EC under heading D9 of non-hazardous waste with a capacity exceeding 100 tonnes per day.

11. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

12. (a) Works for the transfer of water resources between river basins where that transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(b) In all other cases, works for the transfer of water resources between river basins where the multi-annual average flow of the basin of abstraction exceeds 2000 million cubic metres/year and where the amount of water transferred exceeds 5 % of that flow.

In both cases transfers of piped drinking water are excluded.

13. Waste water treatment plants with a capacity exceeding 150000 population equivalent as defined in point 6 of Article 2 of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment [5].

14. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500000 cubic metres/day in the case of gas.

15. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

16. Pipelines with a diameter of more than 800 mm and a length of more than 40 km:

(a) for the transport of gas, oil, chemicals;

(b) for the transport of carbon dioxide (CO2) streams for the purposes of geological storage, including associated booster stations.

17. Installations for the intensive rearing of poultry or pigs with more than:

(a) 85000 places for broilers, 60000 places for hens;

(b) 3000 places for production pigs (over 30 kg); or

(c) 900 places for sows.

18. Industrial plants for the production of:

(a) pulp from timber or similar fibrous materials;

(b) paper and board with a production capacity exceeding 200 tonnes per day.

19. Quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

20. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

21. Installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200000 tonnes or more.

22. Storage sites pursuant to Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide [6].

23. Installations for the capture of CO2 streams for the purposes of geological storage pursuant to Directive 2009/31/EC from installations covered by this Annex, or where the total yearly capture of CO2 is 1,5 megatonnes or more.

24. Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.

[1] 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.

[2] For the purposes of this Directive, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organisation (Annex 14).

[3] For the purposes of this Directive, "express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

[4] OJ L 312, 22.11.2008, p. 3.

[5] OJ L 135, 30.5.1991, p. 40.

[6] OJ L 140, 5.6.2009, p. 114.

ANNEX II

PROJECTS REFERRED TO IN ARTICLE 4(2)

1. AGRICULTURE, SILVICULTURE AND AQUACULTURE
   (a) Projects for the restructuring of rural land holdings;
   (b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;
   (c) Water management projects for agriculture, including irrigation and land drainage projects;
   (d) Initial afforestation and deforestation for the purposes of conversion to another type of land use;
   (e) Intensive livestock installations (projects not included in Annex I);
   (f) Intensive fish farming;
   (g) Reclamation of land from the sea.
2. EXTRACTIVE INDUSTRY
   (a) Quarries, open-cast mining and peat extraction (projects not included in Annex I);
   (b) Underground mining;
   (c) Extraction of minerals by marine or fluvial dredging;
   (d) Deep drillings, in particular:
      (i) geothermal drilling;
      (ii) drilling for the storage of nuclear waste material;
      (iii) drilling for water supplies;

      with the exception of drillings for investigating the stability of the soil;
   (e) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale.
3. ENERGY INDUSTRY
   (a) Industrial installations for the production of electricity, steam and hot water (projects not included in Annex I);
   (b) Industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables (projects not included in Annex I);
   (c) Surface storage of natural gas;
   (d) Underground storage of combustible gases;
   (e) Surface storage of fossil fuels;
   (f) Industrial briquetting of coal and lignite;
   (g) Installations for the processing and storage of radioactive waste (unless included in Annex I);
   (h) Installations for hydroelectric energy production;
   (i) Installations for the harnessing of wind power for energy production (wind farms);

(j) Installations for the capture of CO2 streams for the purposes of geological storage pursuant to Directive 2009/31/EC from installations not covered by Annex I to this Directive.

4. PRODUCTION AND PROCESSING OF METALS

(a) Installations for the production of pig iron or steel (primary or secondary fusion) including continuous casting;

(b) Installations for the processing of ferrous metals:

(i) hot-rolling mills;

(ii) smitheries with hammers;

(iii) application of protective fused metal coats;

(c) Ferrous metal foundries;

(d) Installations for the smelting, including the alloyage, of non-ferrous metals, excluding precious metals, including recovered products (refining, foundry casting, etc.);

(e) Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process;

(f) Manufacture and assembly of motor vehicles and manufacture of motor-vehicle engines;

(g) Shipyards;

(h) Installations for the construction and repair of aircraft;

(i) Manufacture of railway equipment;

(j) Swaging by explosives;

(k) Installations for the roasting and sintering of metallic ores.

5. MINERAL INDUSTRY

(a) Coke ovens (dry coal distillation);

(b) Installations for the manufacture of cement;

(c) Installations for the production of asbestos and the manufacture of asbestos products (projects not included in Annex I);

(d) Installations for the manufacture of glass including glass fibre;

(e) Installations for smelting mineral substances including the production of mineral fibres;

(f) Manufacture of ceramic products by burning, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain.

6. CHEMICAL INDUSTRY (PROJECTS NOT INCLUDED IN ANNEX I)

(a) Treatment of intermediate products and production of chemicals;

(b) Production of pesticides and pharmaceutical products, paint and varnishes, elastomers and peroxides;

(c) Storage facilities for petroleum, petrochemical and chemical products.

7. FOOD INDUSTRY

(a) Manufacture of vegetable and animal oils and fats;

(b) Packing and canning of animal and vegetable products;

(c) Manufacture of dairy products;

(d) Brewing and malting;

(e) Confectionery and syrup manufacture;

(f) Installations for the slaughter of animals;

(g) Industrial starch manufacturing installations;

(h) Fish-meal and fish-oil factories;

(i) Sugar factories.

8. TEXTILE, LEATHER, WOOD AND PAPER INDUSTRIES

(a) Industrial plants for the production of paper and board (projects not included in Annex I);

(b) Plants for the pre-treatment (operations such as washing, bleaching, mercerisation) or dyeing of fibres or textiles;

(c) Plants for the tanning of hides and skins;

(d) Cellulose-processing and production installations.

9. RUBBER INDUSTRY

Manufacture and treatment of elastomer-based products.

10. NFRASTRUCTURE PROJECTS

(a) Industrial estate development projects;

(b) Urban development projects, including the construction of shopping centres and car parks;

(c) Construction of railways and intermodal transhipment facilities, and of intermodal terminals (projects not included in Annex I);

(d) Construction of airfields (projects not included in Annex I);

(e) Construction of roads, harbours and port installations, including fishing harbours (projects not included in Annex I);

(f) Inland-waterway construction not included in Annex I, canalisation and flood-relief works;

(g) Dams and other installations designed to hold water or store it on a long-term basis (projects not included in Annex I);

(h) Tramways, elevated and underground railways, suspended lines or similar lines of a particular type, used exclusively or mainly for passenger transport;

(i) Oil and gas pipeline installations and pipelines for the transport of CO2 streams for the purposes of geological storage (projects not included in Annex I);

(j) Installations of long-distance aqueducts;

(k) Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, moles, jetties and other sea defence works, excluding the maintenance and reconstruction of such works;

(l) Groundwater abstraction and artificial groundwater recharge schemes not included in Annex I;

(m) Works for the transfer of water resources between river basins not included in Annex I.

11. OTHER PROJECTS

(a) Permanent racing and test tracks for motorised vehicles;

(b) Installations for the disposal of waste (projects not included in Annex I);

(c) Waste-water treatment plants (projects not included in Annex I);

(d) Sludge-deposition sites;

(e) Storage of scrap iron, including scrap vehicles;

(f) Test benches for engines, turbines or reactors;

(g) Installations for the manufacture of artificial mineral fibres;

(h) Installations for the recovery or destruction of explosive substances;

(i) Knackers' yards.

12. TOURISM AND LEISURE

(a) Ski runs, ski lifts and cable cars and associated developments;

(b) Marinas;

(c) Holiday villages and hotel complexes outside urban areas and associated developments;

(d) Permanent campsites and caravan sites;

(e) Theme parks.

13. (a) Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I);

(b) Projects in Annex I, undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years.

ANNEX III

SELECTION CRITERIA REFERRED TO IN ARTICLE 4(3)

1. CHARACTERISTICS OF PROJECTS

The characteristics of projects must be considered having regard, in particular, to:

(a) the size of the project;

(b) the cumulation with other projects;

(c) the use of natural resources;

(d) the production of waste;

(e) pollution and nuisances;

(f) the risk of accidents, having regard in particular to substances or technologies used.

2. LOCATION OF PROJECTS

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

(a) the existing land use;

(b) the relative abundance, quality and regenerative capacity of natural resources in the area;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas:

(i) wetlands;

(ii) coastal zones;

(iii) mountain and forest areas;

(iv) nature reserves and parks;

(v) areas classified or protected under Member States' legislation; special protection areas designated by Member States pursuant to Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [1] and to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [2];

(vi) areas in which the environmental quality standards laid down in Union legislation have already been exceeded;

(vii) densely populated areas;

(viii) landscapes of historical, cultural or archaeological significance.

3. CHARACTERISTICS OF THE POTENTIAL IMPACT

The potential significant effects of projects must be considered in relation to criteria set out in points 1 and 2, and having regard in particular to:

(a) the extent of the impact (geographical area and size of the affected population);

(b) the transfrontier nature of the impact;

(c) the magnitude and complexity of the impact;
(d) the probability of the impact;
(e) the duration, frequency and reversibility of the impact.

[1] OJ L 20, 26.1.2010, p. 7.
[2] OJ L 206, 22.7.1992, p. 7.

ANNEX IV

INFORMATION REFERRED TO IN ARTICLE 5(1)

1. A description of the project, including in particular:
   (a) a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases;
   (b) a description of the main characteristics of the production processes, for instance, the 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 project.
2. An outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects.
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 [1] 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.
5. The description by the developer of the forecasting methods used to assess the effects on the environment referred to in point 4.
6. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.
7. A non-technical summary of the information provided under headings 1 to 6.
8. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information.

[1] This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.

ANNEX V

PART A

Repealed Directive with list of its successive amendments

(referred to in Article 14)

Council Directive 85/337/EEC (OJ L 175, 5.7.1985, p. 40)	
Council Directive 97/11/EC (OJ L 73, 14.3.1997, p. 5)	
Directive 2003/35/EC of the European Parliament and of the Council (OJ L 156, 25.6.2003, p. 17)	Article 3 only
Directive 2009/31/EC of the European Parliament and of the Council (OJ L 140, 5.6.2009, p. 114)	Article 31 only

PART B

List of time limits for transposition into national law

(referred to in Article 14)

Directive	Time limit for transposition
85/337/EEC	3 July 1988
97/11/EC	14 March 1999
2003/35/EC	25 June 2005
2009/31/EC	25 June 2011

ANNEX VI

Correlation table

Directive 85/337/EEC	This Directive
Article 1(1)	Article 1(1)
Article 1(2), first subparagraph	Article 1(2), introductory wording
Article 1(2), second subparagraph, introductory wording	Article 1(2)(a), introductory wording
Article 1(2), second subparagraph, first indent	Article 1(2), point (a), first indent
Article 1(2), second subparagraph, second indent	Article 1(2), point (a), second indent
Article 1(2), third subparagraph	Article 1(2), point (b)
Article 1(2), fourth subparagraph	Article 1(2), point (c)
Article 1(2), fifth subparagraph	Article 1(2), point (d)
Article 1(2), sixth subparagraph	Article 1(2), point (e)
Article 1(3)	Article 1(2), point (f)
Article 1(4)	Article 1(3)
Article 1(5)	Article 1(4)
Article 2(1)	Article 2(1)
Article 2(2)	Article 2(2)
Article 2(2a)	Article 2(3)
Article 2(3)	Article 2(4)
Article 3, introductory wording	Article 3, introductory wording
Article 3, first indent	Article 3, point (a)
Article 3, second indent	Article 3, point (b)
Article 3, third indent	Article 3, point (c)
Article 3, fourth indent	Article 3, point (d)
Article 4	Article 4
Article 5(1)	Article 5(1)
Article 5(2)	Article 5(2)
Article 5(3), introductory wording	Article 5(3), introductory wording
Article 5(3), first indent	Article 5(3), point (a)
Article 5(3), second indent	Article 5(3), point (b)
Article 5(3), third indent	Article 5(3), point (c)
Article 5(3), fourth indent	Article 5(3), point (d)
Article 5(3), fifth indent	Article 5(3), point (e)
Article 5(4)	Article 5(4)
Article 6	Article 6
Article 7(1), introductory wording	Article 7(1), first subparagraph, introductory wording

Article 7(1), point (a)	Article 7(1), first subparagraph, point (a)
Article 7(1), point (b)	Article 7(1), first subparagraph, point (b)
Article 7(1), final wording	Article 7(1), second subparagraph
Article 7(2)-7(5)	Article 7(2)-7(5)
Article 8	Article 8
Article 9(1), introductory wording	Article 9, introductory wording
Article 9(1), first indent	Article 9(1), point (a)
Article 9(1), second indent	Article 9(1), point (b)
Article 9(1), third indent	Article 9(1), point (c)
Article 9(2)	Article 9(2)
Article 10	Article 10
Article 10a, first paragraph	Article 11(1)
Article 10a, second paragraph	Article 11(2)
Article 10a, third paragraph	Article 11(3)
Article 10a, fourth and fifth paragraphs	Article 11(4), first and second subparagraphs
Article 10a, sixth paragraph	Article 11(5)
Article 11(1)	Article 12(1)
Article 11(2)	Article 12(2)
Article 11(3)	—
Article 11(4)	Article 12(3)
Article 12(1)	—
Article 12(2)	Article 13
—	Article 14
—	Article 15
Article 14	Article 16
Annex I, point 1	Annex I, point 1
Annex I, point 2, first indent	Annex I, point 2(a)
Annex I, point 2, second indent	Annex I, point 2(b)
Annex I, point 3(a)	Annex I, point 3(a)
Annex I, point 3(b), introductory wording	Annex I, point 3(b), introductory wording
Annex I, point 3(b), first indent	Annex I, point 3(b)(i)
Annex I, point 3(b), second indent	Annex I, point 3(b)(ii)
Annex I, point 3(b), third indent	Annex I, point 3(b)(iii)
Annex I, point 3(b), fourth indent	Annex I, point 3(b)(iv)
Annex I, point 3(b), fifth indent	Annex I, point 3(b)(v)
Annex I, point 4, first indent	Annex I, point 4(a)
Annex I, point 4, second indent	Annex I, point 4(b)
Annex I, point 5	Annex I, point 5

Annex I, point 6, introductory wording | Annex I, point 6, introductory wording |

Annex I, point 6(i) | Annex I, point 6(a) |

Annex I, point 6(ii) | Annex I, point 6(b) |

Annex I, point 6(iii) | Annex I, point 6(c) |

Annex I, point 6(iv) | Annex I, point 6(d) |

Annex I, point 6(v) | Annex I, point 6(e) |

Annex I, point 6(vi) | Annex I, point 6(f) |

Annex I, points 7-15 | Annex I, points 7-15 |

Annex I, point 16, introductory wording | Annex I, point 16, introductory wording |

Annex I, point 16, first indent | Annex I, point 16(a) |

Annex I, point 16, second indent | Annex I, point 16(b) |

Annex I, points 17-21 | Annex I, points 17-21 |

Annex I, point 22 | Annex I, point 24 |

Annex I, point 23 | Annex I, point 22 |

Annex I, point 24 | Annex I, point 23 |

Annex II, point 1 | Annex II, point 1 |

Annex II, point 2(a), (b) and (c) | Annex II, point 2(a), (b) and (c) |

Annex II, point 2(d), introductory wording | Annex II, point 2(d), introductory wording |

Annex II, point 2(d), first indent | Annex II, point 2(d)(i) |

Annex II, point 2(d), second indent | Annex II, point 2(d)(ii) |

Annex II, point 2(d), third indent | Annex II, point 2(d)(iii) |

Annex II, point 2(d), final wording | Annex II, point 2(d), final wording |

Annex II, point 2(e) | Annex II, point 2(e) |

Annex II, points 3-12 | Annex II, points 3-12 |

Annex II, point 13, first indent | Annex II, point 13(a) |

Annex II, point 13, second indent | Annex II, point 13(b) |

Annex III, point 1, introductory wording | Annex III, point 1, introductory wording |

Annex III, point 1, first indent | Annex III, point 1(a) |

Annex III, point 1, second indent | Annex III, point 1(b) |

Annex III, point 1, third indent | Annex III, point 1(c) |

Annex III, point 1, fourth indent | Annex III, point 1(d) |

Annex III, point 1, fifth indent | Annex III, point 1(e) |

Annex III, point 1, sixth indent | Annex III, point 1(f) |

Annex III, point 2, introductory wording | Annex III, point 2, introductory wording |

Annex III, point 2, first indent | Annex III, point 2(a) |

Annex III, point 2, second indent | Annex III, point 2(b) |

Annex III, point 2, third indent, introductory wording | Annex III, point 2(c), introductory wording |

Annex III, point 2, third indent, point (a) | Annex III, point 2(c)(i) |

Annex III, point 2, third indent, point (b) | Annex III, point 2(c)(ii) |

Annex III, point 2, third indent, point (c) | Annex III, point 2(c)(iii) |

Annex III, point 2, third indent, point (d) | Annex III, point 2(c)(iv) |

Annex III, point 2, third indent, point (e) | Annex III, point 2(c)(v) |

Annex III, point 2, third indent, point (f) | Annex III, point 2(c)(vi) |

Annex III, point 2, third indent, point (g) | Annex III, point 2(c)(vii) |

Annex III, point 2, third indent, point (h) | Annex III, point 2(c)(viii) |

Annex III, point 3, introductory wording | Annex III, point 3, introductory wording |

Annex III, point 3, first indent | Annex III, point 3(a) |

Annex III, point 3, second indent | Annex III, point 3(b) |

Annex III, point 3, third indent | Annex III, point 3(c) |

Annex III, point 3, fourth indent | Annex III, point 3(d) |

Annex III, point 3, fifth indent | Annex III, point 3(e) |

Annex IV, point 1, introductory wording | Annex IV, point 1, introductory wording |

Annex IV, point 1, first indent | Annex IV, point 1(a) |

Annex IV, point 1, second indent | Annex IV, point 1(b) |

Annex IV, point 1, third indent | Annex IV, point 1(c) |

Annex IV, points 2 and 3 | Annex IV, points 2 and 3 |

Annex IV, point 4, introductory wording | Annex IV, point 4, first subparagraph, introductory wording |

Annex IV, point 4, first indent | Annex IV, point 4, first subparagraph, point (a) |

Annex IV, point 4, second indent | Annex IV, point 4, first subparagraph, point (b) |

Annex IV, point 4, third indent | Annex IV, point 4, first subparagraph, point (c) |

Annex IV, point 4, final wording | Annex IV, point 5 |

Annex IV, point 5 | Annex IV, point 6 |

Annex IV, point 6 | Annex IV, point 7 |

Annex IV, point 7 | Annex IV, point 8 |

— | Annex V |

— | Annex VI |

Appendix 2

Appendix 2

Section 172 of the Planning and Development Act 2000, as amended

"Section 172.—

(1) An environmental impact assessment shall be carried out by a planning authority or the Board, as the case may be, in respect of an application for consent for—

(a) proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which exceeds a quantity, area or other limit specified in that Schedule, and

(b) proposed development] of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which does not exceed a quantity, area or other limit specified in that Schedule but which the planning authority or the Board determines would be likely to have significant effects on the environment.

(1A) In subsection (1)—

(a) 'proposed development' means—

(i) a proposal to carry out one of the following:

(I) development to which Part III applies;

(II) development that may be carried out under Part IX;

(III) development that may be carried out by a local authority under Part X or development that may be carried out under Part XI;

(IV) development on the foreshore under Part XV;

(V) development under section 43 of the Act of 2001;

(VI) development under section 51 of the Roads Act 1993; and

(ii) notwithstanding that development has been carried out, development in relation to which an application for substitute consent is required under Part XA;

(b) 'consent for proposed development' means, as appropriate—

(i) grant of permission;

(ii) a decision of the Board to grant permission on application or on appeal;

(iii) consent to development under Part IX;

(iv) consent to development that may be carried out by a local authority under Part X or development that may be carried out under Part XI;

(v) consent to development on the foreshore under Part XV;

(vi) consent to development under section 43 of the Act of 2001;

(vii) consent to development under section 51 of the Roads Act 1993; or

(viii) substitute consent under Part XA.

(1B) An applicant for consent to carry out a proposed development referred to in subsection (1)(a) shall furnish an environmental impact statement to the planning authority or the Board, as the case may be, in accordance with the permission regulations.

(1C) Where the planning authority or the Board receives an application for consent for proposed development referred to in paragraph (b) of subsection (1) in relation to which the authority or the Board has made a determination referred to in that paragraph, and the application is not accompanied by an environmental impact statement, the planning authority or Board, as the case may be, shall require the applicant to submit an environmental impact statement and where the environmental impact statement is not submitted within the period specified, or any further period as may be specified by the planning authority or the Board, the application for consent for the proposed development shall be deemed to be withdrawn.

(1D) The planning authority or the Board, as the case may be, shall consider whether an environmental impact statement submitted under this section identifies and describes adequately the direct and indirect effects on the environment of the proposed development and, where it considers that the environmental impact statement does not identify or adequately describe such effects, the planning authority or the Board shall require the applicant for consent to furnish, within a specified period, such further information as the planning authority or the Board considers necessary to remedy such defect.

(1E) In addition to any requirement arising under subsection (1D), the planning authority or the Board, as the case may be, shall require an

applicant for consent to furnish, within a specified period, any further information that the planning authority or the Board considers necessary to enable it to carry out an environmental impact assessment under this section.

(1F) Where information required by the planning authority or the Board under subsection (1D) or subsection (1E) is not furnished by the applicant for consent within the period specified, or any further period as may be specified by the planning authority or the Board, the application for consent for the proposed development shall be deemed to be withdrawn.

(1G) In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, shall consider—

(a) the environmental impact statement;

(b) any further information furnished to the planning authority or the Board pursuant to subsections (1D) or (1E);

(c) any submissions or observations validly made in relation to the environmental effects of the proposed development;

(d) the views, if any, provided by any other Member State under section 174 or Regulations made under that section.

(1H) In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.

(1I) Where the planning authority or the Board, as the case may be, decides to grant consent for the proposed development, it may attach such conditions to the grant as it considers necessary, to avoid, reduce and, if possible, offset the major adverse effects on the environment (if any) of the proposed development.

(1J) When the planning authority or the Board, as the case may be, has decided whether to grant or to refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following information available to the applicant for consent and the public:

(a) the content of the decision and any conditions attached thereto;

(b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;

(c) having examined any submission or observation validly made,

(i) the main reasons and considerations on which the decision is based, and

(ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by a member of the public;

(d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;

(e) any report referred to in subsection (1H);

(f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and

(g) the views, if any, furnished by other Member States of the European Union pursuant to section 174.

(2) In addition to the matters set out in section 33(2), the Minister may make permission regulations in relation to the submission of planning applications which are to be accompanied by environmental impact statements.

(3) (a) At the request of an applicant or of a person intending to apply for permission, the Board may, having afforded the planning authority concerned an opportunity to furnish observations on the request, and where the Board is satisfied that exceptional circumstances so warrant, grant in respect of a proposed development an exemption from a requirement of or under regulations under this section to prepare an environmental impact statement, except that no exemption may be granted in respect of a proposed development if another Member State of the European Communities or other state party to the Trans boundary Convention, having been informed about the proposed development and its likely effects on the environment in that State, has indicated that it intends to furnish views on those effects.

(b) The Board shall, in granting an exemption under paragraph (a), —

(i) consider whether the effects, if any, of the proposed development on the environment should be assessed in some other form, and

(ii) make available to members of the public the information relating to the exemption decision referred to under paragraph (a), the reasons for granting such exemption and the

information obtained under any other form of assessment referred to in subparagraph (i),

and the Board may apply such requirements regarding these matters in relation to the application for permission as it considers necessary or appropriate.

(c) The Board shall, as soon as may be, notify the planning authority concerned of the Board's decision on any request made under paragraph (a), and of any requirements applied under paragraph (b).

(d) Notice of any exemption granted under paragraph (a), of the reasons for granting the exemption, and of any requirements applied under paragraph (b) shall, as soon as may be—

(i) be published in Iris Oifigiúil and in at least one daily newspaper published in the State,

(ii) be given, together with a copy of the information, if any, made available to the members of the public in accordance with paragraph (b), to the Commission of the European Communities.

(4) (a) A person who makes a request to the Board for an exemption under subsection (3) shall, as soon as may be, inform the planning authority concerned of the making of the request and the date on which it was made.

(b) Notwithstanding subsection (8) of section 34, the period for making a decision referred to in that subsection shall not, in a case in which a request is made to the Board under subsection (3) of this section, include the period beginning on the day of the making of the request and ending on the day of receipt by the planning authority concerned of notice of the Board's decision on the request.

(5) In addition to the matters provided for under Part VI, Chapter III, the Minister may prescribe additional requirements in relation to the submission of appeals to the Board which are to be accompanied by environmental impact statements."

Appendix 3

Appendix 3

Section 171A of the Planning and Development Act 2000

"Section 171A.—

(1) In this Part—

'environmental impact assessment' means an assessment, which includes an examination, analysis and evaluation, carried out by a planning authority or the Board, as the case may be, in accordance with this Part and regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:

(a) human beings, flora and fauna,

(b) soil, water, air, climate and the landscape,

(c) material assets and the cultural heritage, and

(d) the interaction between the factors mentioned in paragraphs (a), (b) and (c).

(2) Subject to this Part, a word or expression that is used in the Part and that is also used in the Environmental Impact Assessment Directive has, unless the context otherwise requires, the same meaning in this Part as it has in the Environmental Impact Assessment Directive."

Appendix 4

Appendix 4

Glossary of Terms

Competent authority means the body i.e. planning authority or An Bord Pleanála to which an application for proposed development, as defined in subsection 172 (1A)(a) of the Planning and Development Act, 2000, as amended, is submitted.

Consent means the relevant permission, approval or other authorisation which may be given by the competent authority for development under the various headings listed in subsection 172(1A)(b) of the Planning and Development Act, 2000, as amended.

Decision-maker means the legal entity or person legally entitled to grant or refuse consent as defined above.

EIA means an environmental impact assessment carried out by the competent authority unless the context implies otherwise.

EIS means an Environmental impact Statement as defined in the Planning and Development Act, 2000, as amended, i.e. a statement of the effects, if any, which proposed development, if carried out, would have on the environment and shall include the information specified in Annex IX of Council Directive No. 2011/92/EU. The legislation requires that such a statement must be submitted by the developer in relevant cases.

EPA means the Environmental Protection Agency.

Appendix 5

Appendix 5

Template of decision-maker's written statement on EIA

It is noted that the environmental impact assessment carried out by the (Senior Planner) (Inspector) and reported on in the report dated _____ has been carried out giving full consideration to the environmental impact statement submitted with the application, the additional information submitted on _____ pursuant to a request under subsection 172 (1D or 1E) of the Planning and Development Act, 2000, as amended, all submissions and observations validly made in relation to the environmental effects of the development (and the views provided by the Planning Service of Northern Ireland – under section 174 of the Planning and Development Act 2000, as amended).

It is considered that the report dated _____(generally) contains a fair and reasonable assessment of the likely significant effects of the development on the environment. The assessment as reported is adopted as the assessment of (name of planning authority or the Board), (with the exception of the conclusion that the development would have a significant long term adverse effect due to its visual impact on the landscape. Having regard to the character of the landscape in the area, which is indicated to be of low landscape value with low sensitivity in the landscape character assessment contained in the current development plan, to the fact that there are other structures of similar scale and height located in the general area and to the landscaping proposals submitted, it is considered that any negative impact on the landscape would be only moderate in the short term and slight to negligible in the long term).

Appendix 6

Appendix 6

Circular Letter: PHFPD 06/12

27 August 2012

To: Directors of Planning

Borough and Town Clerks

An Bord Pleanála

EU (Environmental Impact Assessment) (Integrated Pollution Prevention and Control) Regulations 2012 (S.I. No. 282 of 2012) and EU (Environmental Impact Assessment) (Waste) Regulations 2012 (S.I. No. 283 of 2012)

Context

The Court of Justice of the European Union (CJEU) delivered its judgement in case C50/09 relating to Ireland's implementation of the Environmental Impact Assessment (EIA) Directive (2011/92/EU) on 3 March 2011. Irish legislation was found, *inter alia*, not to be fully in conformity with the EIA Directive with respect to projects involving both a land use consent (planning) and pollution control consent (licence). Specifically, the Court found that in a case where a project requiring EIA required both planning permission and a licence from the Agency, the fact that Irish legislation did not prevent the Agency from making a licensing decision before the planning permission application was decided,

and therefore before the EIA was completed, meant that part of the overall consent for the project (i.e. the licence) was being decided without an EIA being first carried out, contrary to Articles 2 and 4 of the EIA Directive.

In order to comply with the Court ruling it was necessary to make amendments to the Environmental Protection Agency Act, 1992 (the EPA Act), the Waste Management Act, 1996 (the Waste Management Act) and the Planning and Development Act, 2000 (the Planning Act) to, among other things, close the gap highlighted in paragraph 81 of the C50/09 judgement which states that *"it is not inconceivable that the Agency, as the authority responsible for licensing a project as regards pollution aspects, may make its decision without an environmental impact assessment being carried out in accordance with Article 2 to 4 of Directive 85/337".*

The above Regulations, which make the amendments referred to in the previous paragraph, have been signed by the Minister and will come into operation on 30 September 2012. Copies of the Regulations are attached.

Overview of Regulations

The European Union (Environmental Impact Assessment) (Integrated Pollution Prevention and Control) Regulations 2012 (S.I. No. 282 of 2012) amend the EPA Act and the Planning Act: the Planning Act is amended by the insertion of a new section 173A (see Regulation 8). The European Union (Environmental Impact Assessment) (Waste) Regulations 2012 (S.I. No. 283 of 2012) amend the Waste Management Act and the Planning Act: the

Planning Act is amended by the insertion of a new section 173B (see Regulation 10).

The principal amendments made are those to the EPA Act and the Waste Management Act.

Under the amended provisions the Agency may not in the future decide on an application for an Integrated Pollution Prevention and Control (IPPC) licence or a waste licence without ensuring that an EIA has been carried out if required by the EIA Directive. The Agency's responsibility in relation to EIA is confined to the matters coming within the remit of the Agency (i.e. the pollution control aspects): the Agency is required to ensure that an EIA has been carried out in relation to these issues. The Agency may satisfy this requirement in whole or in part by means of consultation with, or the submission of observations to, the planning authority or the Board as part of the development consent process (see new subsection 87(1G) of the EPA Act and new subsection 42(1G) of the Waste Management Act). The Agency will also be statutorily required in future to respond to planning authorities/the Board when notified about any proposed development requiring EIA which is associated with an activity requiring a licence, and to have any appropriate input into the EIA being carried out by the planning authority/Board.

In future, the Agency will not accept a licence application unless it is accompanied by:

- confirmation in writing from the planning authority/Board that an application for permission is currently under consideration together with a copy of the related EIS, if one is required, or confirmation in writing from the planning authority/Board that an EIA is not required, or
- a copy of the development consent together with the related EIS, if one was required, or confirmation in writing from the planning authority/Board that an EIA was not required.

This means that in a case where EIA is required, the Agency will not in future consider such a licence application unless the development consent process, including EIA, has been concluded or at least the application for the consent lodged with the planning authority/Board. Where consideration of the development consent application is ongoing at the time the licence application is submitted, the Agency may not make its decision until the development consent process, including EIA, has been completed.

The Agency has also been given the power to call for an EIS in the (unlikely) case of a project requiring EIA under the Directive which does not require any development consent.

The Agency's responsibility in relation to EIA and activities requiring an IPPC licence are set out in the new subsection (2A) inserted into section 83 of the EPA Act, and the new arrangements for processing an IPPC licence

application, in a case where EIA is required, are set out in the new subsections (1A) to (1H) inserted into section 87 of that Act.

The Agency's responsibility in relation to EIA and activities requiring a waste licence are set out in the new subsection (2A) inserted into section 40 of the Waste Management Act, and the new arrangements for processing a waste licence application, in a case where EIA is required, are set out in the new subsections (1A) to (1H) inserted into section 42 of that Act.

The amendments to the Planning Act – the new section 173A (re IPPC licences) and section 173B (re waste licences) – are relatively minor and consequential to the above, principally providing that:

- Where the planning authority or the Board are considering an application for permission for development comprising or for the purposes of an activity requiring a licence and are asked by the applicant to give written confirmation of that matter, they must do so as soon as possible (section 173A(2) and section 173B(2)).

- In giving this confirmation, in a case where the development does not require EIA the planning authority/Board must also include confirmation that the proposed development does not require EIA under the Planning Act (section 173A(3) and section 173B(3)).

- When consulted by the Agency in relation to a licence application, in a case where permission, as part of which EIA was carried out, for the associated development has been given prior to the making of the licence application, and asked to confirm that the activity in question is permitted by the permission given and to forward all documentation in relation to the EIA[1] and any observations it has on the licence application, the planning authority or the Board must respond within the period specified by the Agency, which will be 4 weeks (section 173A(4) and section 173B(4)).

- In making a determination as to whether an application for permission for sub-threshold development which the planning authority or the Board consider is development comprising of or for the purposes of an activity requiring a licence, requires EIA (on the grounds that it could have significant effects on the environment) the planning authority/Board must request the views of the Agency, and must consider any such views received in making its determination (section 173A(5) and section 173B(5)).

The paragraphs under the third heading below set out in more detail how the process of consent for a project requiring both a development consent under the Planning Act and an IPPC or a waste licence will operate after the new Regulations come into operation. The relevant consents under the Planning Act are:

[1] Not including the EIS, which will already been forwarded to the Agency by the licence applicant.

- an application for permission for development under Part III,
- an application for approval under section 175,
- an application for approval under section 177AE,
- an application for approval under section 181A,
- an application for approval under section 182A,
- an application for approval under section 182C,
- an application for approval under section 226,
- an application for substitute consent under section 177E.

The term “permission” is used in the Regulations, and below, in respect of these various consents.

Processing of licence applications and planning consents for projects requiring EIA

1. After the commencement of the new Regulations, in order to ensure that the licence application is made subsequent to either an application for, or the giving of, permission for the associated development, the Agency will only be able to consider an application for an IPPC licence or a waste licence where it is accompanied by:

   (a) a written confirmation from a planning authority or the Board that an application for permission for the associated development is currently under consideration or

   (b) a copy of the permission given for the associated development.

(New subsections 87(1B) and (1C) of the EPA Act and new subsections 42(1B) and (1C) of the Waste Management Act).

2. An application for a licence must **also** be accompanied by either:

   (a) a copy of the EIS if one was required to be submitted as part of the application for permission or

   (b) a screening decision from the planning authority/Board determining that EIA is not or was not required under the Planning Act.

(New subsections 87(1B) and (1C) of the EPA Act and new subsections 42(1B) and (1C) of the Waste Management Act).

3. In order that applicants for a licence can meet the requirement under (1)(a) above, the new subsection 173A(2) and the new subsection 173B(2) of the Planning Act provide that where a planning authority or the Board is considering an application for permission for development relating to an activity requiring a licence, and is requested by the applicant to confirm in writing that such development is the subject of the application for permission, the planning authority or the Board shall give such confirmation as soon as possible.

4. In order that applicants for a licence can meet the requirement under (2)(b) above (i.e. a case where EIA is not required) the new subsection

173A(3) and the new subsection 173B(3) of the Planning Act provide that when confirming that an application for permission is under consideration, in a case where EIA of the development is not required under the Planning Act, the planning authority or the Board must also confirm that fact (i.e. EIA not required).

5. The Agency will ensure that before a decision is made on a licence application or a revised licence, in a case where the activity relates to development of a type listed in Schedule 5 of the Planning and Development Regulations, the licence application is made subject to an EIA as respects the matters that come within the functions of the Agency: the new subsection 83(2A) of the EPA Act and the new subsection 40(2A) of the Waste Management Act refer.

6. Where an EIS is received along with a licence application, the Agency will, in a case where an application for permission is under consideration when the licence application is made (new subsection 87(1D) of the EPA Act and new subsection 42(1D) of the Waste Management Act) notify the planning authority or the Board as appropriate within 2 weeks, and will ask that any observations that the planning authority/Board has on the licence application be furnished to the Agency within 4 weeks of the date of notification. Requests by the Agency for observations should be as specific as possible. All documents in relation to the licence application will be available on the Agency's website. The planning authority/Board should respond to Agency within this 4 week period. The Agency is

required to consider any observations received from the planning authority/Board and to enter into any consultations with the planning authority/Board that it, or the planning authority/Board, considers appropriate. The Agency may not decide on the licence application until a decision has been made by the planning authority/Board, as appropriate, and the period for any appeal has expired.

7. Where an EIS is received along with a licence application in a case where permission for the associated development has been given prior to the making of the licence application, the Agency will (new subsection 87(1E) of the EPA Act and subsection 42(IE) of the Waste Management Act), notify the planning authority or the Board as appropriate within 2 weeks, asking it to respond within 4 weeks -

(a) stating whether the activity for which a licence is now being sought is permitted by the permission given,

(b) furnishing all documents relating to the EIA carried out, and

(c) furnishing any views it has in relation to the licence application.

Under the new subsections 173A(4) and 173B(4) of the Planning Act, the planning authority/Board are required to comply with the request of the Agency within the 4 week period referred to. As stated above, all documents in relation to the licence application will be available on the Agency's website. Again, the Agency is required to consider any observations received from the planning authority/Board and to enter into

any consultations with the planning authority/Board that it, or the planning authority/Board, considers are appropriate.

8. As is currently the position, the Agency will make its provisional licensing decision available to certain statutory consultees (including planning authorities): these will now include the Board (section 87(2) of the EPA Act and section 42(2) of the Waste Management Act as amended) and will, following that consultation, conclude the licensing process. Section 83(4) and section 41(2A) respectively of the EPA Act and the Waste Management Act have been amended to provide that where it grants a licence, the Agency will attach such conditions to the licence as it considers necessary to avoid, reduce and is possible, offset the major adverse effects (if any) on the environment. When the Agency makes its decision on a licence application, the Agency informs the applicant and the public and makes specified information available to the applicant and the public: amended provisions in this regard are contained in the new subsection 87(9A) of the EPA Act and the new subsection 42(11A) of the Waste Management Act.

9. A new subsection (3A) has been inserted into section 87 of the EPA Act to provide that the Agency may, in consultation with the planning authority/Board, extend the period of 8 weeks provided in section 87(3) in which to issue its proposed determination of an IPPC licence application if -

(a) it is necessary to complete the consultations with the planning authority/Board as now provided for in subsections (1D), (1E), (1F) or (1H) of section 87, or

(b) to enable the Agency to comply with the new requirement in section 87(1D)(d) that the Agency may not make its proposed determination of an IPPC licence application until the development consent process, including EIA, has been completed.

The same time-constraints provided in section 87(3) of the EPA Act do not arise in the context of the Waste Management Act, accordingly similar amendments were not required to the Waste Management Act.

10. Where a planning authority or the Board are dealing with an application for permission for development of a type listed in Schedule 5 of the Planning and Development Regulations, the planning authority or the Board are required, unless the likelihood of significant effects on the environment can be excluded, to make a determination as to whether the proposed development would have significant effects on the environment such that EIA is required. The new subsection 173A(5) and the new subsection 173B(5) provide that where the planning authority or the Board consider that the development for which permission is being applied will require an IPPC licence or a waste licence, respectively, it must request observations from the Agency to assist it in making its determination as to whether EIA is required and must take any such observations into

account when making its determination. Such requests for observations should be as specific as possible

11. The Agency is now required, under the new subsection 87(1G)(b) of the EPA Act in respect of an IPPC licence and the new subsection 42(1G)(b) of the Waste Management Act in respect of a waste licence application, to respond to a request by the planning authority or the Board for observations to assist the planning authority or the Board in making its EIA determination and those subsections also provide that the Agency will accept the determination of the planning authority or the Board so made.

12. The current position (prior to the new Regulations) is, of course, that the planning authority/Board is required to notify the Agency in relation to any application for permission for development comprising of or for the purposes of an activity requiring an IPPC licence or a waste licence and to inform the Agency that it may make submissions/observations. The new subsection (1F) of section 87 of the EPA Act and the new subsection (1F) of section 42 of the Waste Management Act require the Agency (provided it is satisfied that the development comprises or is for the purposes of an activity) to forward to the planning authority/Board such observations as it has on the application for permission, including the EIS, and to enter into such consultations with the planning authority or the Board in relation to the environmental impacts of the proposed development as the Agency, or the planning authority/Board considers necessary to complete the EIA.

13. As is the current position, the planning authority or the Board must take submissions received from the Agency into account in making its decision as to whether to give the permission concerned.

The EPA and CCMA (through the LUTS Committee) will develop together in the coming weeks detailed working arrangements to facilitate the implementation of these Regulations and will make these arrangements publically available.

Any queries in relation to this Circular Letter should be addressed to Ms. Joan Murphy, Environment Policy and Awareness, tel: (053) 911 7342, email: joan.murphy@environ.ie or Mr. Conor O' Sullivan, Planning and Housing (Finance and Policy Development), tel: (01) 888 2810, email: conor_o'sullivan@environ.ie.

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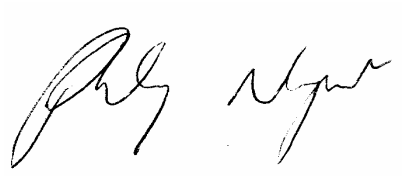


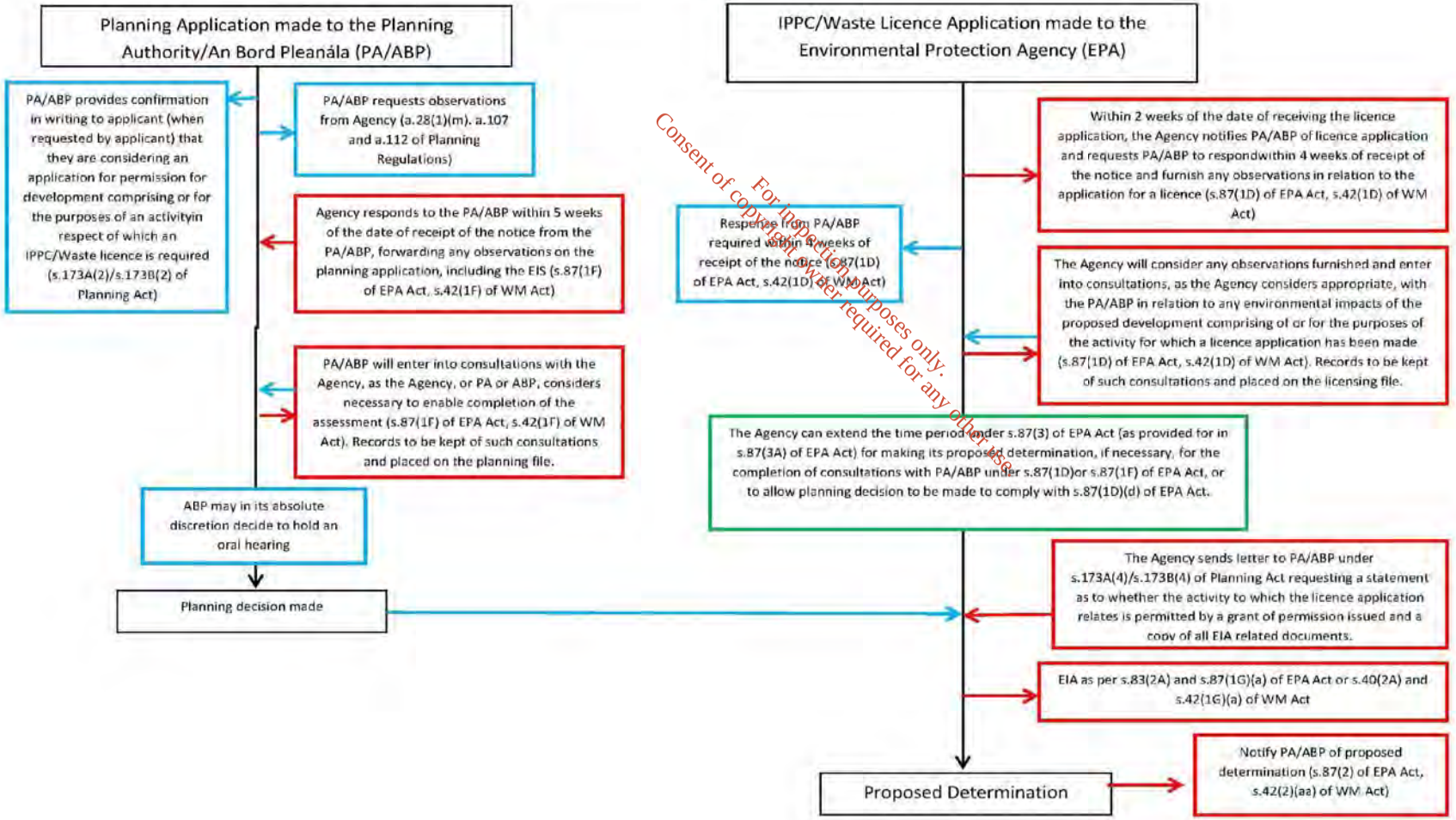
Philip Nugent

Principal Officer

Planning and Housing (Finance and Policy Development)

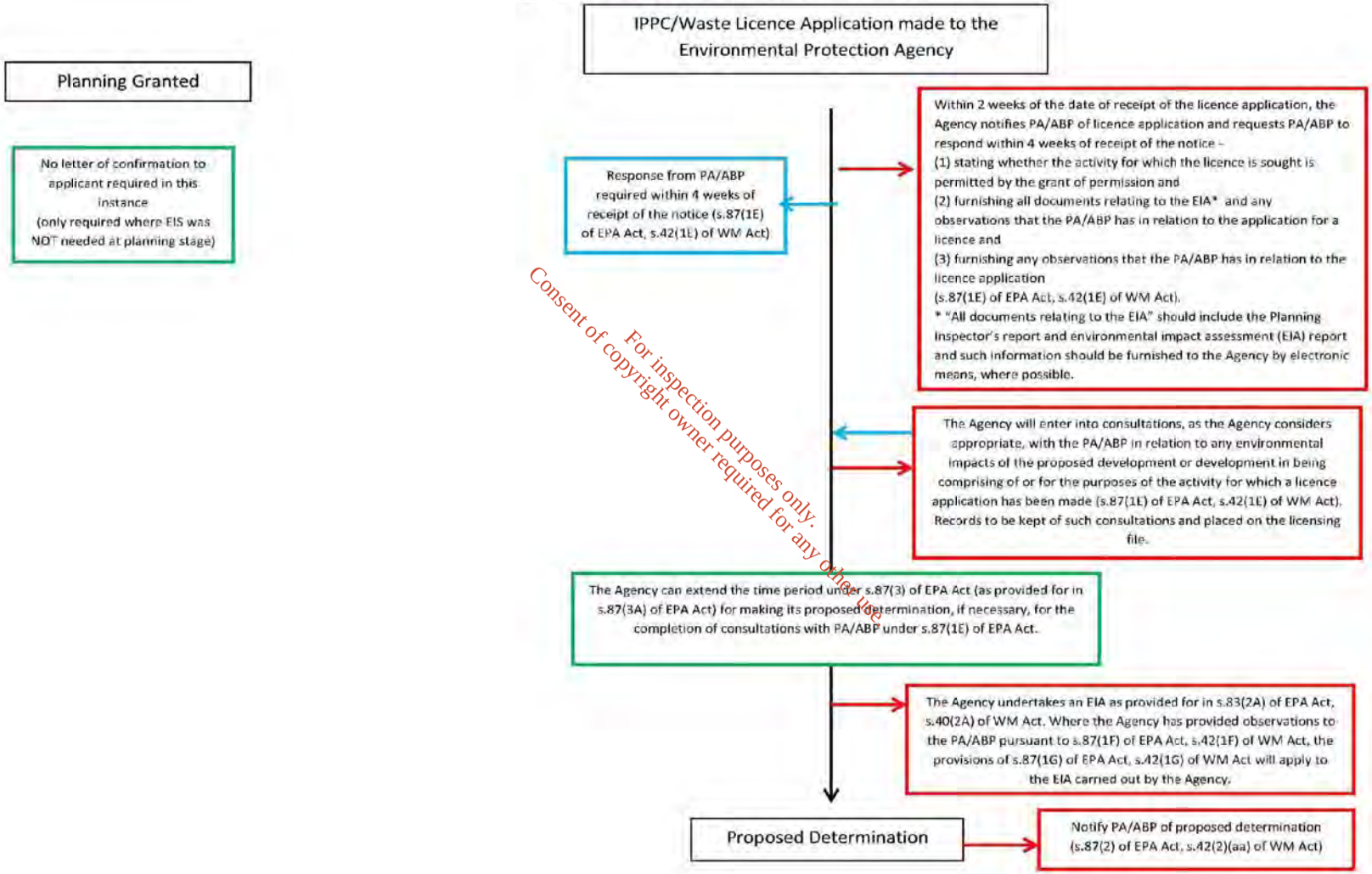
New Activity, Planning UNDER CONSIDERATION, EIA required

Sections 87(1B), (1D), (1F) and (1G) of EPA Act; Sections 42(1B), (1D), (1F) and (1G) of Waste Management Act



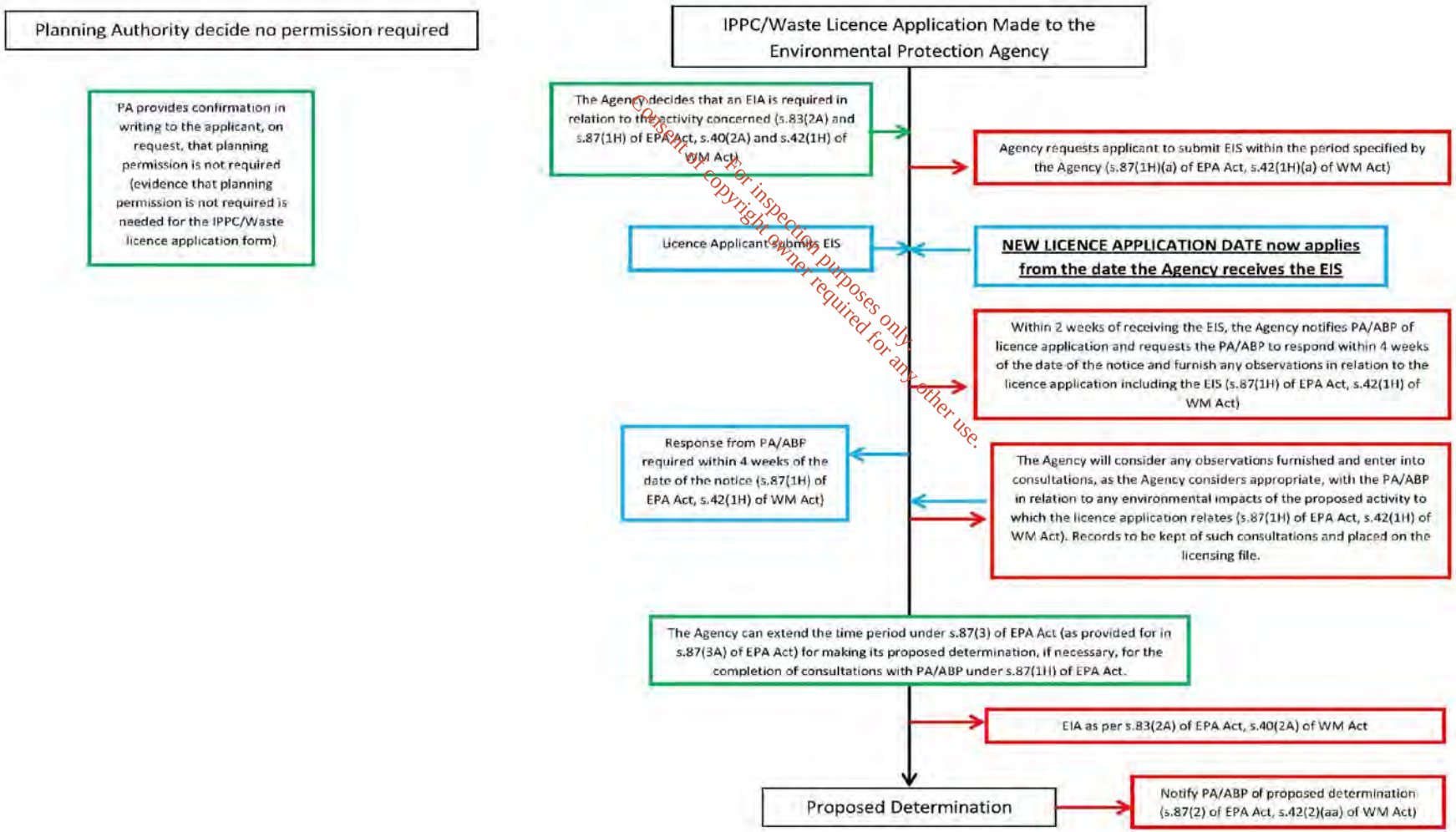
New Activity, Planning GRANTED, EIA required

Sections 87(1B) and (1E) of EPA Act; Sections 42(1B) and (1E) of Waste Management Act



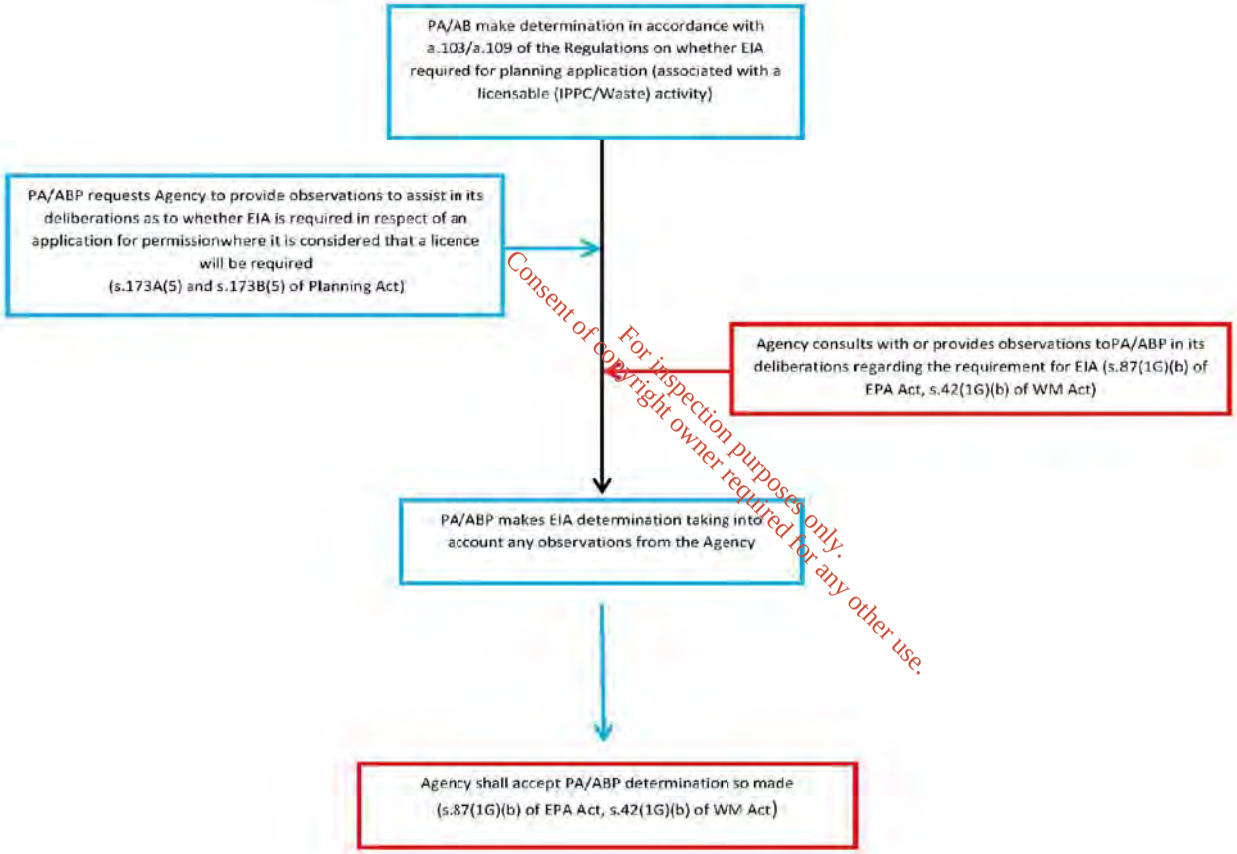
Licence needed, PLANNING NOT NEEDED, Agency decides EIA required

Section 87(1H) of EPA Act; Section 42(1H) of Waste Management Act

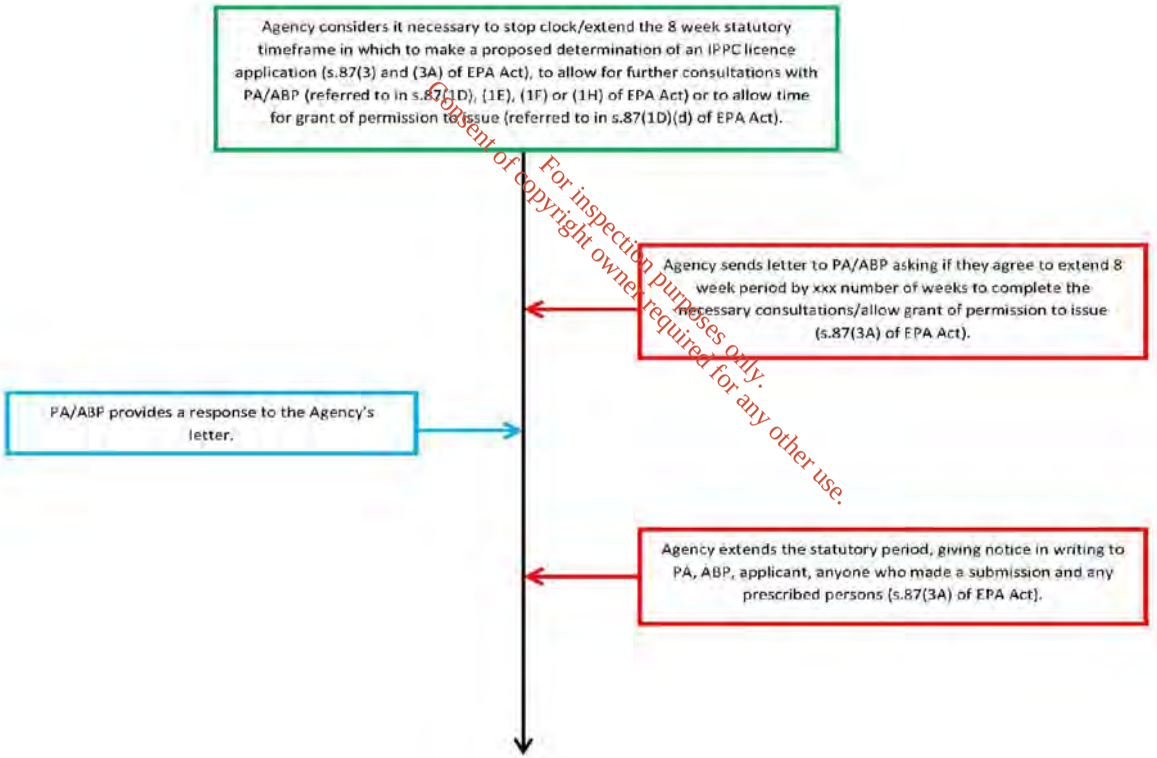


EIAScreening(for proposed development comprising or for the purposes of an activity requiring an IPPC/Waste licence)

Section 87(1G)(b) of EPA Act; Section 42(1G)(b) of Waste Management Act; Sections 173A(5)/173B(5) of Planning Act



Stopping Clock for Consultation
(Integrated Pollution Prevention and Control (IPPC) only)
Section 87(3A) of EPA Act



Note: an equivalent time-limit of 8 weeks as provided for under s.87(2) ands.87(3) of EPA Act for issuing a proposed determination in respect of an IPPC licence application does not arise under the Waste Management Act.