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EPA
Johnstown Castle
Wexford
2011-09-29

RE; P0467-02
Woodville Pig Farms Limited
Woodville, Ballymackey, Nenagh, Co Tipperary,

Dear Sir/Madam

Please supply the information listed below preferably in digital as required under EC Directive 2003-4-EC and any implementing regulations and taking Juridical Notice of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998.

1. A copy of the Assessment carried out under article 3 of EIA Directive 85/337/EEC as amended by 97/11/EC and 200330/35/EC.

2.Copy of all documentation showing complete fulfilment of the requirements of Articles 2 to 4 of Directive 85/337, as amended by Directive 2003/35.

Please take Judicial Notice of the following attached judgements of the ECJ and Irish High Court;

ECJ Case C- 09/50
High Court An Taisce -v- Ireland & Ors [2010] IEHC 415 (25 November 2010)

Please provide the information requested within one week as the final date for submissions is 19/09/2011

THIS IS A REQUEST FOR INFORMATION NOT A SUBMISSION.

Yours faithfully

Peter Sweetman

Please find attached
Judgement of the ECJ Case C- 09/50
An Taisce -v- Ireland & Ors [2010] IEHC 415 (25 November 2010)

62009J0050

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.

Neutral Citation Number: [2010] IEHC 415

THE HIGH COURT

JUDICIAL REVIEW

2009 941 JR

BETWEEN

AN TÁISCE – THE NATIONAL TRUST FOR IRELAND

APPLICANT

AND

IRELAND AND THE ATTORNEY GENERAL

AND

AN BORD PLEANÁLA

RESPONDENT

AND

MONAGHAN COUNTY COUNCIL,

JOHN McQUADE QUARRIES LIMITED

AND

PETER SWEETMAN AND ASSOCIATES

NOTICE PARTIES

JUDGMENT of Mr. Justice Charleton delivered on 25th November 2010

1. An Táisce seeks to overturn a decision of An Bord Pleanála dated the 20th July 2009, granting permission to John McQuade Quarries Limited to continue to use a quarry at Lengare, Clontibert, County Monaghan subject to conditions. The permission was granted under s.261 of the Planning and Development Act 2000 ("the Act of 2000") (Quarry reference no. Q04/303) and the decision is PL 18.225398. An Bord Pleanála granted permission predicated on the basis that the quarry had begun to operate prior to the implementation of the Local Government Planning and Development Act 1963 on 1 October 1964 and had not been changed as to the use thereof by intensification.

2. The grounds on which judicial review is sought may be concisely stated as follows:

(1) An Bord Pleanála failed to consider if the quarry was not an authorised development by reference to its usage prior to the implementation of the planning code on the 1st October 1964 and whether same was proportionate;

(2) An Bord Pleanála engaged in an irrational approach to the issue as to whether the quarry had been proportionately used prior to the 1st October 1964;

(3) An Bord Pleanála failed to at all consider the issue of the use of the quarry prior to the 1st October 1964;

(4) An Bord Pleanála failed to give any reason for any decision it may have made to the effect that the quarry had been used in a proportionate manner prior to the 1st October 1964;

(5) An Bord Pleanála failed to give any consideration as to whether there were exceptional circumstances, absent proportionate pre-1st October 1964 use, which would have allowed for the retention of the use of the quarry.

2. Because of the thorough nature of the arguments presented by counsel, for which the Court is grateful, the issues which this case has raised may be disposed of concisely.

Proportionate Use

3. Ordinarily, the use of land prior to 1 October 1964 is outside the scope of planning control, once a building exists since before that day or a use has been established and, proportionate to that use, carried on after that date. Quarries were made an exception to that legal exemption from planning controls in the Act of 2000. Section 261 ensures that all quarries in the State must be registered, subjected to planning scrutiny, and then, if appropriate, subjected to a requirement to abide by planning conditions, to apply for planning permission or to carry out and submit an environmental impact statement. No other industry sector has been subjected to requirements equivalent to those set out in s. 261 of the Act. Quarrying is, of its nature, an activity that must be carried out over many years. Upon the coming into force of the planning code on the 1st October 1964, there were many quarries which had an entitlement to continue with their operation in a proportionate fashion. The Oireachtas made a decision that all such quarries should be registered and, when their operation had been properly analysed by local planning authorities as to the information which must be supplied for this process, quarries might need to be further regulated beyond the restrictions that the commencement of operations prior to 1st October 1964 would have necessarily attracted. In that context, I have referred to the continuance by a business or a quarry,

on a proportionate basis, of operations on the implementation of the first planning code. By this I mean that no quarry would have been entitled to intensify the use of its operations after that date so as that intensification of use amounted to change of use and which had an impact, proven directly or by necessary implication, on planning considerations for the area in which it is situate. A mineral extraction operation must, of its nature, expand either down into the ground or up into a mountain, in the case of mining operations, or outwards from an original area of operation in the case of a quarry or open-cast mine. Quarries which are proposed to be developed with an extraction area of 5 hectares or more are subject to a requirement under the Act of 2000 to submit an environmental impact study when applying for planning permission. That did not apply, up to the Act of 2000, to existing quarries, proportionately carrying on a pre-1 October 1964 use. Further, it is clearly established both in relation to Council Directive 85/337/EEC of 27 June, 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L 175, 5.7.1985 ("the EIA Directive") and Council Directive 92/43/EEC of 21 May, 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. L 206, 22.7.1992 ("the Habitats Directive"), that projects which had already commenced when these directives were transposed into Irish law were not then subject to the restrictions later made possible under s. 261(5) and (7) of the 2000 Act; see Haarlemmerliede en Spaarnwoude and others v. Gedeputeerde Staten Van Noord-Holland (Case C-81/96) [1998] E.C.R. I-3925 Stadt Papenburg v. Bundesrepublik Deutschland (C-226/08) (Unreported, European Court of Justice, 14th January, 2010). .

4. Intensification of use as a breach of an existing pre-1964 lawful use of land is not to be decided solely by reference to criteria set out in Galway County Council v. Lackagh Rock Limited [1985] I.R. 120. Modern methods as a replacement for manual work do not necessarily establish an unlawful intensification of use but neither is that an indication of lawful intensification. That, furthermore, is only one principle. Whether intensification of use is established, as opposed to a proportionate and therefore lawful continuance of pre-planning control use, is a question for analysis based on the relevant case law. Where there has been an intensification of use, it must also be considered if that intensification impacts on the proper planning and sustainable development of an area. The establishment, however, that such intensification has affected the proper planning and development of the area does not necessarily have to be subject to separate submissions to either a planning authority or An Bord Pleanála. As with other areas of proof, this may arise by necessary implication arising out of a comparison of this nature and scale of the operation as compared to the base line against which it is to be judged. Further, a planning application is not a court process. Proofs are absent. The duty that is cast on a planning authority, or on An Bord Pleanála on appeal, is to make an appropriate enquiry. See Weston Limited v. An Bord Pleanála [2010] IEHC 255, (Unreported, High Court, Charleton J., 1st July, 2010).

Section 261(7)

5. Section 261 of the Planning and Development Act 2000 provides as follows:-

"261(1) The owner or operator of a quarry to which this section applies

shall, not later than one year from the coming into operation of this section, provide to the planning authority, in whose functional area the quarry is situated, information relating to the operation of the quarry at the commencement of this section, and on receipt of such information the planning authority shall, in accordance with section 7, enter it in the register.

(2) Without prejudice to the generality of subsection (1), information provided under that subsection shall specify the following

(a) the area of the quarry, including the extracted area delineated on a map,

(b) the material being extracted and processed (if at all),

(c) the date when quarrying operations commenced on the land (where known),

(d) the hours of the day during which the quarry is in operation,

(e) the traffic generated by the operation of the quarry including the type and frequency of vehicles entering and leaving the quarry,

(f) the levels of noise and dust generated by the operations in the quarry,

(g) any material changes in the particulars referred to in paragraphs (a) to (f) during the period commencing on the commencement of this section and the date on which the information is provided,

(h) whether -

(i) planning permission under Part IV of the Act of 1963 was granted in respect of the quarry and if so, the conditions, if any, to which the permission is subject, or

(ii) the operation of the quarry commenced before 1 October 1964,and

(iii) such other matters in relation to the operations of the quarry as may be prescribed.

(3) A planning authority may require a person who has submitted information in accordance with this section to submit such further information as it may specify, within such period as it may specify, relating to the operation of the quarry concerned and, on receipt thereof, the

planning authority shall enter the information in the register.

(4) (a) A planning authority shall, not later than 6 months from the registration of a quarry in accordance with this section, publish notice of the registration in one or more newspapers circulating in the area within which the quarry is situated.

(b) A notice under paragraph (a) shall state -

(i) that the quarry has been registered in accordance with this section,

(ii) where planning permission has been granted in respect of the quarry, that it has been so granted and whether the planning authority is considering restating, modifying or adding to conditions attached to the planning permission in accordance with subsection (6)(a)(ii), or

(iii) where planning permission has not been granted in respect of the quarry, that it has not been so granted and whether the planning authority is considering—

(I) imposing conditions on the operation of the quarry in accordance with subsection (6)(a)(i), or

(II) requiring the making of a planning application and the preparation of an environmental impact statement in respect of the quarry in accordance with subsection (7),

(iv) the place or places and times at which the register may be inspected,

(v) that submissions or observations regarding the operation of the quarry may be made to the planning authority within 4 weeks from the date of publication of the notice.

(c) A notice under this subsection may relate to one or more quarries registered in accordance with this section.

(5) (a) Where a planning authority proposes to—

(i) impose, restate, modify or add to conditions on the operation of the

quarry under this section, or

(ii) require, under subsection (7), a planning application to be made and an environmental impact statement to be submitted in respect of the quarry in accordance with this section, it shall, as soon as may be after the expiration of the period for making observations or submissions pursuant to a notice under subsection (4)(b), serve notice of its proposals on the owner or operator of the quarry.

(b) A notice referred to in paragraph (a), shall state—

(i) the reasons for the proposals, and

(ii) that submissions or observations regarding the proposals may be made by the owner or operator of the quarry to the planning authority within such period as may be specified in the notice, being not less than 6 weeks from the service of the notice.

(c) Submissions or observations made pursuant to a notice under paragraph (b) shall be taken into consideration by a planning authority when performing its functions under subsection (6) or (7).

(6) (a) Not later than 2 years from the registration of a quarry under this section, a planning authority may, in the interests of proper planning and sustainable development, and having regard to the development plan and submissions or observations (if any) made pursuant to a notice under subsection (4) or (5)—

(i) in relation to a quarry which commenced operation before 1 October 1964, impose conditions on the operation of that quarry, or

(ii) in relation to a quarry in respect of which planning permission was granted under Part IV of the Act of 1963 restate, modify or add to conditions imposed on the operation of that quarry,

and the owner and operator of the quarry concerned shall as soon as may be thereafter be notified in writing thereof.

(b) Where, in relation to a grant of planning permission conditions have been restated, modified or added in accordance with paragraph (a), the planning permission shall be deemed, for the purposes of this Act, to have been granted under section 34 , and any condition so restated, modified or added shall have effect as if imposed under section 34.

(c) Notwithstanding paragraph (a), where an integrated pollution control licence has been granted in relation to a quarry, a planning authority or the Board on appeal shall not restate, modify, add to or impose conditions under this subsection relating to—

(i) the control (including the prevention, limitation, elimination, abatement or reduction) of emissions from the quarry, or

(ii) the control of emissions related to or following the cessation of the operation of the quarry.

(7) (a) Where the continued operation of a quarry—

(i) (I) the extracted area of which is greater than 5 hectares, or

(II) that is situated on a European site or any other area prescribed for the purpose of section 10 (2)(c), or land to which an order under section 15, 16 or 17 of the Wildlife Act, 1976 , applies,

and

(ii) that commenced operation before 1 October 1964, would be likely to have significant effects on the environment (having regard to any selection criteria prescribed by the Minister under section 176 (2)(e)), a planning authority shall not impose conditions on the operation of a quarry under subsection (6), but shall, not later than one year after the date of the registration of the quarry, require, by notice in writing, the owner or operator of the quarry to apply for planning permission and to submit an environmental impact statement to the planning authority not later than 6 months from the date of service of the notice, or such other period as may be agreed with the planning authority.

(b) Section 172 (1) shall not apply to development to which an application made pursuant to a requirement under paragraph (a) applies.

(c) A planning authority, or the Board on appeal, shall, in considering an application for planning permission made pursuant to a requirement under paragraph (a), have regard to the existing use of the land as a quarry.

(8) (a) Where, in relation to a quarry for which permission was granted under Part IV of the Act of 1963, a planning authority adds or modifies conditions under this section that are more restrictive than existing conditions imposed in relation to that permission, the owner or operator of

the quarry may claim compensation under section 197 and references in that section to compliance with conditions on the continuance of any use of land consequent upon a notice under section 46 shall be construed as including references to compliance with conditions so added or modified, save that no such claim may be made in respect of any condition relating to a matter specified in paragraph (a), (b) or (c) of section 34 (4), or in respect of a condition relating to the prevention, limitation or control of emissions from the quarry, or the reinstatement of land on which the quarry is situated.

(b) Where, in relation to a quarry to which subsection (7) applies, a planning authority, or the Board on appeal, refuses permission for development under section 34 or grants permission thereunder subject to conditions on the operation of the quarry, the owner or operator of the quarry shall be entitled to claim compensation under section 197 and for that purpose the reference in subsection (1) of that section to a notice under section 46 shall be construed as a reference to a decision under section 34 and the reference in section 197 (2) to section 46 shall be construed as a reference to section 34 save that no such claim may be made in respect of any condition relating to a matter specified in paragraph (a), (b) or (c) of section 34 (4), or in respect of a condition relating to the prevention, limitation or control of emissions from the quarry, or the reinstatement of land on which the quarry is situated.

(9) (a) A person who provides information to a planning authority in accordance with subsection (1) or in compliance with a requirement under subsection (3) may appeal a decision of the planning authority to impose, restate, add to or modify conditions in accordance with subsection (6) to the Board within 4 weeks from the date of receipt of notification by the authority of those conditions.

(b) The Board may at the determination of an appeal under paragraph (a) confirm with or without modifications the decision of the planning authority or annul that decision.

(10) (a) A quarry to which this section applies in respect of which the owner or operator fails to provide information in relation to the operations of the quarry in accordance with subsection (1) or in accordance with a requirement under subsection (3) shall be unauthorised development.

(b) Any quarry in respect of which a notification under subsection (7) applies shall, unless a planning application in respect of the quarry is submitted to the planning authority within the period referred to in that subsection, be unauthorised development.

(11) This section shall apply to—

(a) a quarry in respect of which planning permission under Part IV of the Act of 1963 was granted more than 5 years before the coming into operation of this section, and

(b) any other quarry in operation on or after the coming into operation of this section, being a quarry in respect of which planning permission was not granted under that Part.

(12) The Minister may issue guidelines to planning authorities regarding the performance of their functions under this section and a planning authority shall have regard to any such guidelines.

(13) In this section—

"emission" means—

(a) an emission into the atmosphere of a pollutant within the meaning of the Air Pollution Act, 1987,

(b) a discharge of polluting matter, sewage effluent or trade effluent within the meaning of the Local Government (Water Pollution) Act, 1977, to waters or sewers within the meaning of that Act,

(c) the disposal of waste, or

(d) noise;

"operator" means a person who at all material times is in charge of the carrying on of quarrying activities at a quarry or under whose direction such activities are carried out;

"quarry" has the meaning assigned to it by section 3 of the Mines and Quarries Act, 1965."

6. I do not intend to make any comment on the procedures under the section. They are irrelevant to this case. I have previously commented thereon in O'Reilly v Galway County Council [2010] IEHC 97 (High Court, Charleton J., Unreported 26 March 2010). The procedures under the subsection involve compulsory registration of quarries, consideration by the planning authority, notices and procedures that are designed to allow the public to comment, and authority granted to planning bodies to regulate quarries depending on their type and status. It is clear that a planning authority, or An

Bord Pleanála on appeal, are obliged under s. 261(7) to have regard to the existing use of land in respect of a quarry which consists of a subtracted area of greater than 5 hectares. That consideration applies to the quarry in question here. What is crucial, however, to the proper operation of the subsection is that an unlawful use of land must be disregarded. To otherwise interpret the provision would deprive it of necessary compliance with law. It would be contrary to any rational intention of the Oireachtas that when, on 28th April 2004, this section came into force, those who had been plotting to deal with it over the previous months or year could, without planning permission, open a gigantic quarry, register it and then suggest that the planning authority, or the board on appeal, should "have regard to the existing use of the land as a quarry". In this context, the subsection applies only to operations of a quarry which commenced prior to the 1st October 1964 and which would be likely to have a significant effect on the environment. If a quarry commenced operation on a small scale prior to the 1st October 1964 and was then unlawfully intensified in use, as opposed to continuing its operations in the proportionate way to which I have previously referred, a new planning application for retention of use is appropriate. Section 261(7) is irrelevant in that situation. Where it is relevant, as with the proportionate continuance of use lawfully established prior to 1 October 1964, the requirement to take into account an existing use of land cannot apply in respect of an unlawful activity or an activity that has become unlawful by reason of intensification.

7. Regrettably, it is apparent on the face of the order that a number of significant errors were made in the decision of the Board. Firstly, by board direction dated 10th July 2009 it is provided:-

> "The board considered that the pre-1964 status of the quarry had been established and accepted in the registration of the quarry, which led to the current application and subsequent appeal. The board also noted the presence of mining on this site which dated to the 19th Century."

This is not correct. Mining is not to be equated, in terms of the use of land, with quarrying. Quarrying can have significant adverse effects on the landscape, on the necessity for reinstatement after extraction, on noise and on the emission of pollutants which are markedly more significant as to planning considerations than those which may be referable to mining. Further, the mere registration of a quarry does not establish a pre-1964 use. The statement is a legal error. Nor was there anything before the Board which established that there had been no intensification of use since that time.

8. It is settled as a matter of law that the registration of a quarry under s. 261 does not alter its status. If the use of a quarry was unlawful before registration, that status remains afterwards. It is incumbent on the planning authority to consider, in any application under s. 261(7), whether a lawful use has been established. No burden of proof exists as to an objector in that respect. The planning process is not to be turned into a kind of adversarial system. It is an enquiry into the appropriateness or otherwise of a proposed development. Legal status, where relevant to that process, can be established by reference to the enquiry which the Board or the planning authority

undertakes. If An Bord Pleanála is not satisfied with the information which it has at its disposal it can cause further enquiries to be made.

9. Even the imposition of conditions, consequent upon registration under s. 261(5), of the Act does not alter the status of a quarry. As regard is to be had under s. 261(7) of the existing lawful use of the land, it would be wrong for the planning authority or the Board to take the lawful use of the land as having been established or implied by registration. In Pierson and Others v. Keegan Quarries Limited [2009] IEHC 550 (Unreported, High Court, Irvine J., 8th December, 2009), at para. 40. Irvine J. offered the following view, with which I agree:-

> "I do not accept that a decision made by a planning authority to register a quarry subject to the imposition of conditions under s. 261 of the 2000 Act has the legal effect contended for by the respondent. If the quarry constituted unauthorised development at the start of the s. 261 process, its registration subject to conditions does not, in my view, alter its status. Neither does that decision have any legal effect on the right of a party with the appropriate locus standi, such as the applicants in the present case, to challenge that development as being unauthorised under s. 160 of the 2000 Act."

10. To that observation I should add that s. 157(4) of the Act provides that no warning letter or enforcement notice is to issue, and no proceedings are to be commenced for an offence, in respect of any development where there is no permission after seven years from the date of commencement of the development. Proceedings may be commenced, however, at any time, in respect of any condition concerning the use of land to which permission is subject. This provision does not operate so as to bypass s. 261(7). An ability to enforce planning controls in relation to development does not equate to lawful use under section. 261(7).

Irrational Approach

11. It is further argued that there has been an irrational approach by the Board to the issue as to pre-1964 use. A decision on this ground is not necessary. Some observations are. In that regard, the inspector noted that an issue was raised by An Táisce as to the lawful use of the site. Specifically, the thorough report of Suzanne Kehely of An Bord Pleanála Inspectorate, dated 22nd May 2008, raises this issue in the following passage:-

> "An Táisce, however, makes the case that a large portion of the site is unauthorised. In the submission received on 20th November 2007 the maps and photographs show the pattern of quarry development advancing from the confinement of a couple of fields with a frontage of about 180 metres to encroachment into adjoining fields. The maps also outline ownership and land transfer dates. The case is made, quite convincingly in my opinion, that effectively the pre-64 quarry relates to only a portion of the subject's site, therefore the extension of the quarry is unauthorised. This supported by the

> Planning Authority's declaration that the quarry works are not exempted development. This would appear to be based on the same maps and information submitted to the board. Consequently it is argued by the appellant that the unauthorised status of the existing quarry extension invalidates the public notices and the [environmental impact statement] by inadequate description and erroneous base data."

12. The information before on An Bord Pleanála indicated a degree of pre-1964 use. That use, however, was limited to some blasting where the removal of stones by horse and cart and brief anecdotal evidence that does not appear to support a quarry which, on its current level of operation as declared at registration, involves over forty lorry roads of minerals and over ten tractor and trailer loads of minerals being removed on each working day. The maps and photographs provided by An Táisce should have been dealt with on the basis of the modern legal analysis of change of use through intensification. This did not happen beyond the consideration by the inspector. Whereas it may be argued that an ore body is what is intended to remove when a mine begins, and that the application of modern methods does not necessary constitute an intensification of use, nonetheless a marked increase in extraction and the purchase of additional lands are very important factors to be taken into account before the lawful use of land as a quarry can legitimately be said to be established and so taken into consideration by An Bord Pleanála under s.216(7); see Waterford County Council v. John A. Wood Limited [1999] 1 I.R. 556 on the issue of quarrying and development from an original site of extraction.

Reasons

13. Under s.34 (10) of the Planning and Development Act 2000, a Planning Authority or An Bord Pleanála on appeal, must give reasons for its decisions. Specifically, the subsection states that where a planning authority, or the Board on appeal, decides to grant or refuse permission on a basis of not accepting a recommendation in a local authority planner's, or an appeal an inspector's, report, the main reasons for not accepting that recommendation should be stated. Further, the obligation to give reasons is statutorily defined as a requirement to "state the main reasons and considerations on which the decision is based". Where conditions are imposed then it is required that "the decision shall state the main reasons for the imposition of any such conditions..."

14. Established authority clearly provides that An Bord Pleanála, or a planning authority, is enabled to give reasons by reference to the acceptance of a relevant report. This incorporates the relevant reasons and constitutes a fulfilment of the statutory obligation outlined.

15. In the decision in question, those reasons are manifestly absent. There is no consideration of the issue as to pre-1964 use. The matter was properly raised. A small error in terminology is argued to excuse this requirement. It does not excuse it.

Exceptional Circumstances

16. Were an intensification of use to have occurred subsequent to the implementation into Irish law of the relevant Directives, then it is doubtful as to whether retention permission could be sought. A number of possible options might be available to someone seeking planning permission at the site of the quarry, including applying for extraction on a green field area under their control or shutting the quarry and applying again. I make no comments in relation to any of this. It is established by The Commission of the European Communities v. Ireland (Case 215/06) [2008] E.C.R. 4911 that a member State fails to fulfil its obligations under that directive, as amended, where after the event retention permissions are given, even where there are no exceptional circumstances proved.

17. This issue was not considered by An Bord Pleanála. A legislative amendment makes an application under a different route possible. Again, since this is not before the court, I refrain from comment.

Result

18. In the result the planning permission issued by An Bord Pleanála is quashed.