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EPA
Johnstown Castle
Wexford

2013-05-07

RE:

P0915-01	Ballyfaskin Enterprises Limited	Ballyfauskeen, Ballylanders, County Limerick.

Dear Sir/Madam

We wish to appeal the above decision on behalf of Peter Sweetman and The Swans & The Snails Ltd. c/o Monica Muller Rossport South Ballina Co. Mayo for the following reasons;

1. No screening as required under the Habitats Directive and as clarified in the Judgement of the CJEU in case C - 256/1 points;

> *32. In appraising the scope of the expression 'adversely affect the integrity of the site' in its overall context, it should be made clear that, as the Advocate General has noted in point 43 of her Opinion, the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species (see, to this effect, Case C-404/09 Commission v Spain [2011] ECR I-0000, paragraph 142), whilst Article 6(4) merely derogates from the second sentence of Article 6(3).*
>
> *43. Paragraphs 2, 3 and 4 of Article 6 serve a different purpose. Paragraph 2 imposes an overarching obligation to avoid deterioration or disturbance. Paragraphs 3 and 4 then set out the procedures to be followed in respect of a plan or project which is not directly connected with or necessary to the management of the site (and which is thus not covered by paragraph 1) but which is likely to have a significant effect thereon. Collectively, therefore, these three paragraphs seek to pre-empt damage being done to the site or (in exceptional cases where damage has, for imperative reasons, to be tolerated) to minimise that damage. They should therefore be construed as a whole.*
>
> *44. So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case*

C-404/09 Commission v Spain, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.

46. I would pause here to note that, although the words 'likely to have [an] effect' used in the English-language version of the text (18) may immediately bring to mind the need to establish a degree of probability – that is to say that they may appear to require an immediate, and quite possibly detailed, determination of the impact that the plan or project in question might have on the site – the expression used in other language versions is weaker. Thus, for example, in the French version, the expression is 'susceptible d'affecter', the German version uses the phrase 'beeinträchtigen könnte', the Dutch refers to a plan or project which 'gevolgen kan heben', while the Spanish uses the expression 'pueda afectar'. Each of those versions suggests that the test is set at a lower level and that the question is simply whether the plan or project concerned is capable of having an effect. It is in that sense that the English 'likely to' should be understood.

The inspector found;

A screening for Appropriate Assessment was undertaken to assess, in view of best scientific knowledge and the conservation objectives of the site, if the expandedactivity (600 sow unit), individually or in combination with other plans or projects, is likely to have a significant effect on the European Sites.
*The screening assessment undertaken demonstrates that the activity is not likely to have significant effects, in terms of maintaining favourable conservation status of the qualifying interests, on the Galtee Mountains SAC having regard to its conservation objectives, due to the distance between the activity and the SAC and the fact that appropriate site management will ensure the activity's impact on the surrounding area is low. A screening of the activity in relation to the potential impact on the Lower River Suir SAC rules out the likelihood of significant impact on the European Site in view of its conservation objectives. Clean surface water from the site ultimately discharges to the River Aherlow, which becomes part of the Lower River Suir SAC. The stretch of the River Aherlow nearest the installation, and into which the surface water from the site eventually discharges, has a Q value of 4. The surface water from the installation should be uncontaminated and therefore will have no impact on surface water quality off site. Furthermore, the potential impact on the European Sites from landspreading associated with the activity is not considered likely to have a significant impact on the SACS due to the requirement for all landspreading to be undertaken in accordance with the Nitrates Regulations (S.I. **No.** 610 of 2010).*
The screening assessment undertaken demonstrates that the activity is not likely to have significant effects, in terms of maintaining favourable conservation status of the qualifying interests, on the European Sites having regard to its conservation objectives due to the nature and scale of the activity and manure management requirements prescribed in the Nitrates Regulations and in the RD. On the basis of screening undertaken, it is considered that an Appropriate Assessment is not necessary.

This does not fulfil the requirements of the Directive which is "could the development have an effect" Without the publishing of the full details of the disposal of slurry it is not possible to assess the decision.

2. No Environmental Impact Assessment has been carried out;

The requirements for an Environmental Impact Assessment are set out in Section 171A of the Planning Acts, this is clarified in section 4 of the Guidelines;

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" shoul 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.d 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

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.

This has not been carried out by either Cork County Council or the Environmental Protection Agency.

3. The decision of the Environmental Protection Agency does not comply with the Judgement in Case C 50/09 of the CJEU in particular the finding;

– 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

The inspector states;

> *An EIA as regards the functions of the planning authorities was carried out by the planning authority when granting planning permission for the development (Planning File Ref.* ***12/306.*** *This EIA addressed the significant likely effects of the 12 development. The Planning Authority did not provide any additional observations to the Agency under Section 87 of the EPA Acts.*

A glance at the planner's report in 12/306 clearly shows that this is not the facts.

Yours faithfully

Peter Sweetman
and on behalf of
The Swans & The Snails Ltd.

PLEASE COROSPOND BY EMAIL **ONLY**

JUDGMENT OF THE COURT (Third Chamber)

11 April 2013 (*)

(Environment – Directive 92/43/EEC – Article 6 – Conservation of natural habitats – Special areas of conservation – Assessment of the implications for a protected site of a plan or project – Criteria to be applied when assessing the likelihood that such a plan or project will adversely affect the integrity of the site concerned – Lough Corrib site – N6 Galway City Outer Bypass road scheme)

In Case C-258/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 13 May 2011, received at the Court on 26 May 2011, in the proceedings

Peter Sweetman,

Ireland,

Attorney General,

Minister for the Environment, Heritage and Local Government

v

An Bord Pleanála,

notice parties:

Galway County Council,

Galway City Council,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as the President of the Third Chamber, K. Lenaerts, G. Arestis (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2012,

after considering the observations submitted on behalf of:

– Mr Sweetman, by B. Harrington, Solicitor, and R. Lyons SC,

– Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government, by D. O'Hagan and G. Simons, acting as Agents, and M. Gray BL,

– An Bord Pleanála, by A. Doyle and O. Doyle, Solicitors, and N. Butler SC,

– Galway County Council and Galway City Council, by V. Raine and A. Casey, acting as Agents, E. Keane SC and B. Kennedy BL,

– the Greek Government, by G. Karipsiades, acting as Agent,

– the United Kingdom Government, by H. Walker, acting as Agent, and K. Smith, Barrister,

– the European Commission, by S. Petrova and K. Mifsud-Bonnici, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive').

2 The request has been made in proceedings between (i) Mr Sweetman, Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government and (ii) An Bord Pleanála (the Irish Planning Board), supported by Galway County Council and Galway City Council, concerning An Bord Pleanála's decision to grant development consent for the N6 Galway City Outer Bypass road scheme.

Legal context

European Union law

3 The third recital in the preamble to the Habitats Directive states:

'… the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; … the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities'.

4 Article 1(d), (e), (k) and (l) of the Habitats Directive provide:

'For the purpose of this Directive:

…

(d) *priority natural habitat types* means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservative status of a natural habitat will be taken as "favourable" when:

– its natural range and areas it covers within that range are stable or increasing, and

– the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

– the conservation status of its typical species is favourable as defined in (i);

...

(k) *site of Community importance* ["SCI"] means a site which, in the biogeographical region or regions to which is belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

...

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated'.

5 Article 2 of the Habitats Directive is worded as follows:

'1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

6 Article 3(1) of the Habitats Directive states:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network … shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to [Council] Directive 79/409/EEC [of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1)].'

7 Article 6(2) to (4) of the Habitats Directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having

ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

8 Annex I to the Habitats Directive, entitled 'Natural habitat types of Community interest whose conservation requires the designation of special areas of conservation', designates '[l]imestone pavements' as a priority habitat type, under code 8240.

Irish law

9 The European Communities (Natural Habitats) Regulations, 1997, in the version applicable at the material time ('the 1997 Regulations'), implement the obligations of the Habitats Directive in Irish law.

10 Regulation 30 of the 1997 Regulations, which transposed the requirements of Article 6 of the Habitats Directive, provides:

'(1) Where a proposed road development in respect of which an application for the approval of the [competent authority] has been made in accordance with section 51 of the Roads Act, 1993, is neither directly connected with nor necessary to the management of a European site but likely to have a significant effect thereon either individually or in combination with other developments, the [competent authority] shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

(2) An environmental impact assessment as required under subsection (2) of section 51 of the Roads Act, 1993, in respect of a proposed road development referred to in paragraph (1) shall be an appropriate assessment for the purposes of this Regulation.

(3) [The competent authority] shall, having regard to the conclusions of the assessment undertaken under paragraph (1), agree to the proposed road development only after having ascertained that it will not adversely affect the integrity of the European site concerned.

(4) In considering whether the proposed road development will adversely affect the integrity of the European site concerned, the [competent authority] shall have regard to the manner in which the proposed development is being carried out or to any conditions or restrictions subject to which the approval is given.

(5) [The competent authority] may, notwithstanding a negative assessment and where [it] is satisfied that there are no alternative solutions, decide to agree to the proposed road development where the proposed road development has to be carried out for imperative reasons of overriding public interest.

(6) (a) Subject to paragraph (b) imperative reasons of overriding public interest shall include reasons of a social or economic nature;

(b) If the site concerned hosts a priority natural habitat type or a priority species, the only considerations of overriding public interest shall be –

(i) those relating to human health or public safety,

(ii) beneficial consequences of primary importance for the environment, or

(iii) further to an opinion from the Commission to other imperative reasons of overriding public interest.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 By decision of 20 November 2008, An Bord Pleanála decided to grant development consent for the N6 Galway City Outer Bypass road scheme. Part of the proposed road was planned to cross the Lough Corrib SCI. Following an enlargement of the extent of the SCI, it hosts a total of 14 habitats referred to in Annex I to the Habitats Directive, of which six are priority habitat types, including karstic limestone pavement, the specific protected habitat forming the subject-matter of the main proceedings.

12 The road scheme involves the permanent loss within the Lough Corrib SCI of approximately 1.47 hectares of that limestone pavement. Those 1.47 hectares will be lost from an area which was described by An Bord Pleanála's inspector as constituting a 'distinct sub-area and an area having the particular characteristic of possessing substantial areas of a priority habitat', and which contains a total of 85 hectares of limestone pavement. That surface of 85 hectares itself forms part of a total of 270 hectares of such limestone pavement – which constitutes a priority habitat type referred to in Annex I to the Habitats Directive – in the entire SCI.

13 At the time when An Bord Pleanála's decision was taken, that area had already been included as a potential SCI on a list of sites transmitted by Ireland to the Commission. The extended Lough Corrib site was formally classified as an SCI by a Commission decision of 12 December 2008. According to the referring court, although the extended Lough Corrib site was not formally classified by the Commission as an SCI before that date, An Bord Pleanála was required under national law to apply legal protections equivalent to those under Article 6(2) to (4) of the Habitats Directive to that site from December 2006.

14 In its decision of 20 November 2008, An Bord Pleanála stated, inter alia, that 'it is considered that the part of the road development being approved would be an appropriate solution to the identified traffic needs of the city and surrounding area … and, while having a localised severe impact on the Lough Corrib candidate Special Area of Conservation, would not adversely affect the integrity of this candidate special Area of Conservation. The development, hereby approved, would not, therefore, have unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area.'

15 Mr Sweetman applied to the High Court for leave to issue judicial review proceedings against, in particular, An Bord Pleanála's decision of 20 November 2008. He submitted that An Bord Pleanála had erred in its interpretation of Article 6 of the Habitats Directive in concluding, in particular, that the effect of the road scheme on the Lough Corrib protected site would not constitute an 'adverse effect on the integrity of the site'.

16 By decision of 9 October 2009, the High Court dismissed the application for leave to issue judicial review proceedings and upheld An Bord Pleanála's decision. On 6 November 2009 Mr Sweetman was granted leave to appeal to the Supreme Court against the decision of 9 October 2009.

17 The Supreme Court observes that it has doubts as to when and in what circumstances, where an appropriate assessment of a plan or project is carried out pursuant to Article 6(3) of the Habitats Directive, such a plan or project is likely to have 'an adverse effect on the integrity of the site'. In that regard, the Supreme Court states that the judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405 has not fully dispelled its doubts.

18 It is in those circumstances that the Supreme Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. What are the criteria in law to be applied by a competent authority to an assessment of the likelihood of a plan or project the subject of Article 6(3) of the Habitats Directive, having "an adverse effect on the integrity of the site"?

2. Does the application of the precautionary principle have as its consequence that such a plan or project cannot be authorised if it would result in the permanent non-renewable loss of the whole or any part of the habitat in question?

3. What is the relationship, if any, between Article 6(4) and the making of the decision under Article 6(3) that the plan or project will not adversely affect the integrity of the site?'

Consideration of the questions referred

Jurisdiction of the Court

19 Galway County Council and Galway City Council plead, in essence, that the Court lacks jurisdiction to answer the questions referred for a preliminary ruling given that Article 6(3) of the Habitats Directive is not applicable to the main proceedings because An Bord Pleanála's decision approving the N6 Galway City Outer Bypass road scheme was adopted before the Commission decision to classify as an SCI the Lough Corrib site extension which is affected by the scheme.

20 It is indeed apparent from the order for reference that, on the date of An Bord Pleanála's decision, 20 November 2008, the extension of the Lough Corrib site had been notified within Ireland, under Regulation 4 of the 1997 Regulations, but had not yet been designated as an SCI in the list of sites adopted by the Commission. Such a decision was adopted by the Commission on 12 December 2008, that is to say, three weeks after An Bord Pleanála's decision.

21 In the main proceedings, as the referring court itself states, Regulation 30 of the 1997 Regulations largely replicates the wording of Article 6 of the Habitats Directive. It follows, furthermore, from the title of the 1997 Regulations that the Irish legislature intended by their adoption to transpose that directive into domestic law. Finally, as the referring court observes, by according a notified site protection equivalent to that under Article 6(2) to (4) of the Habitats Directive before its designation as an SCI in the list adopted by the Commission, Ireland considered itself to have complied with its obligation to take appropriate protective measures pending designation of a site as an SCI.

22 On that last point, it should be recalled that the Court has already held that, whilst the protective measures prescribed in Article 6(2) to (4) of the Habitats Directive are required only as regards sites which are placed on the list of sites selected as SCIs drawn up by the Commission, this does not mean that the Member States do not have to protect sites as soon as they propose them, under Article 4(1) of the directive, as sites eligible for identification as SCIs on the national list transmitted to the Commission (see Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraphs 25 and 26, and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, paragraphs 36 and 37).

23 Therefore, as soon as a site is proposed by a Member State, pursuant to Article 4(1) of the Habitats Directive, on the national list transmitted to the Commission as a site eligible for identification as an SCI, and at least until the Commission adopts a decision in that regard, that Member State is, by virtue of the Habitats Directive, required to take protective measures of such a kind as to safeguard the ecological interest referred to (see, to this effect, *Dragaggi and Others*, paragraph 29, and *Bund Naturschutz in Bayern and Others*, paragraph 38). The situation of such a site thus cannot be categorised as a situation not falling within the scope of European Union law.

24 It accordingly follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred for a preliminary ruling by the Supreme Court.

Substance

25 By its questions, which it is appropriate to deal with together, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that in a situation such as that in the main proceedings a plan or project not directly connected with or necessary to the management of a site adversely affects the integrity of that site. For the purposes of such an interpretation, the referring court raises the question of the possible effect of the precautionary principle and the question of the relationship between Article 6(3) and Article 6(4) of the Habitats Directive.

26 It is apparent from the order for reference that the implementation of the N6 Galway City Outer Bypass road scheme would result in the permanent and irreparable loss of part of the Lough Corrib SCI's limestone pavement, which is a priority natural habitat type specially protected by the Habitats Directive. Following assessment of the impact of the road scheme on the Lough Corrib SCI, An Bord Pleanála established that it would have a locally significant negative impact on the SCI, but decided that such an impact did not adversely affect the integrity of that site.

27 According to Mr Sweetman, Ireland, the Attorney General, the Minister for the Environment, Heritage and Local Government and the Commission, a negative impact of that kind on the site caused by that road scheme necessarily entails an adverse effect on the site's integrity. By contrast, An Bord Pleanála, Galway County Council and Galway City Council and the United Kingdom Government submit that the finding of damage to that site is not necessarily incompatible with there being no adverse effects on its integrity.

28 Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 34, and Case C-182/10 *Solvay and Others* [2012] ECR I-0000, paragraph 66).

29 That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 41 and 43).

30 Where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light of, in particular, the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 49).

31 The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4).

32 In appraising the scope of the expression 'adversely affect the integrity of the site' in its overall context, it should be made clear that, as the Advocate General has noted in point 43 of her Opinion, the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species (see, to this effect, Case C-404/09*Commission* v *Spain* [2011] ECR I-0000, paragraph 142), whilst Article 6(4) merely derogates from the second sentence of Article 6(3).

33 The Court has already held that Article 6(2) of the Habitats Directive makes it possible to comply with the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration as well as disturbance which could have significant effects in the light of the directive's objectives (Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 49 and the case-law cited).

34 Article 6(4) of the Habitats Directive provides that if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see Case C-304/05 *Commission* v*Italy* [2007] ECR I-7495, paragraph 81, and *Solvay and Others*, paragraph 72).

35 As an exception to the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) can apply only after the implications of a plan or project have been analysed in accordance with Article 6(3) (see *Solvay and Others*, paragraphs 73 and 74).

36 It follows that Article 6(2) to (4) of the Habitats Directive impose upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of the directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation.

37 In this regard, according to Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is taken as 'favourable' when, in particular, its natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.

38 In this context, the Court has already held that the Habitats Directive has the aim that the Member States take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types (see Case C-308/08 *Commission* v *Spain* [2010] ECR I-4281, paragraph 21, and Case C-404/09 *Commission* v *Spain*, paragraph 163).

39 Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.

40 Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 *Commission* v *Spain*, paragraph 99, and *Solvay and Others*, paragraph 67).

41 It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that

in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 58).

42 Such an appraisal applies all the more in the main proceedings, since the natural habitat affected by the proposed road scheme is among the priority natural habitat types, which Article 1(d) of the Habitats Directive defines as 'natural habitat types in danger of disappearance' for whose conservation the European Union has 'particular responsibility'.

43 The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned (see, as regards the disappearance of priority species, Case C-308/08 *Commission* v *Spain*, paragraph 21, and Case C-404/09 *Commission* v *Spain*, paragraph 163).

44 So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 *Commission* v *Spain*, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.

45 In the main proceedings, the Lough Corrib SCI was designated as a site hosting a priority habitat type because, in particular, of the presence in that site of limestone pavement, a natural resource which, once destroyed, cannot be replaced. Having regard to the criteria referred to above, the conservation objective thus corresponds to maintenance at a favourable conservation status of that site's constitutive characteristics, namely the presence of limestone pavement.

46 Consequently, if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.

47 In those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive. Nevertheless, in such a situation, the competent national authority could, where appropriate, grant authorisation under Article 6(4) of the directive, provided that the conditions set out therein are satisfied (see, to this effect,*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 60).

48 It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs

incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

[Signatures]

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* Language of the case: English.

OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 22 November 2012 (1)

Case C-258/11

Peter Sweetman
Ireland
Attorney General
Minister for the Environment, Heritage and Local Government
v
An Bord Pleanala

(Reference for a preliminary ruling from the Supreme Court (Ireland))

(Environment – Special conservation areas – Assessment of the impact of a plan or project on a protected site – Adverse effect on the integrity of the site)

Introduction

1. This reference for a preliminary ruling concerns the interpretation of Article 6 of the Habitats Directive. (2) The particular issue before the Court involves the proper interpretation of paragraph 3 of that article, which relates to plans or projects not directly connected with or necessary to the management of a habitat site. That provision applies where such a plan or project is 'likely to have a significant effect' on the site. If so, there must be an appropriate assessment of the implications for the site. It is only where, following that assessment, the competent national authorities have ascertained that the plan or project will not 'adversely affect the integrity of the site' that they may agree to it. The national court seeks guidance on the meaning of the last of these phrases.

Legal framework

European Union ('EU') legislation

2. Article 1 of the Directive contains the following definitions:

'(a) "conservation" means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

…

(d) “priority natural habitat types” means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

(e) “conservation status of a natural habitat” means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as “favourable” when:

– its natural range and areas it covers within that range are stable or increasing, and

– the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

– the conservation status of its typical species is favourable as defined in (i);

…

(i) “conservation status” of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The conservation status will be taken as “favourable” when:

– population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

– the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

– there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

(j) “site” means a geographically defined area whose extent is clearly delineated;

(k) “site of Community importance” means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

…

(l) “special area of conservation” means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the

necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated.'

3. Article 2 provides:

'(1) The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

(2) Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

(3) Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

4. Article 3(1) states:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

…'

5. Article 4 lays down the procedure for the designation of habitat sites under the Directive. Essentially, this involves the preparation of a list of appropriate sites by each Member State, which is then transmitted to the Commission (Article 4(1)). On the basis of the information provided, the Commission is then, in agreement with each Member State, to prepare a draft list of sites of Community importance ('SCIs'), the purpose of which is to identify those hosting one or more priority natural habitat types or priority species. The list of selected sites is then to be adopted formally by the Commission (Article 4(2)). Once a site has been adopted as an SCI in accordance with the procedure laid down in paragraph 2, the Member State is to designate it as a special area of conservation ('SAC') within a period not exceeding six years (Article 4(4)). However, as soon as a site is placed on the list of sites adopted by the Commission as SCIs, it is to be subject to the obligations laid down in Article 6(2), (3) and (4) (Article 4(5)).

6. Article 6 provides:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well

as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

7. Annex 1 to the Directive includes the following entry:

– '8240 * Limestone pavements'.

National law

8. Road developments in Ireland are subject to the provisions of the Roads Act 1993 (as amended). Sections 50 and 51 of that Act, together with the European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999, prescribe a development procedure for those projects. That procedure requires the carrying out of an environmental impact assessment for the purposes of Directive 85/337. (3)

9. In addition, if a road development is likely to have a significant effect on certain sites of ecological importance, it will be subject to the European Communities (Natural Habitats) Regulations 1997 (as amended) ('the Regulations'), which transpose the Directive into national law.

10. Regulation 2 of the Regulations defines a 'European site' so as to include sites which Ireland proposes to submit to the Commission for adoption as an SCI. Regulation 4 lays down a procedure for notifying sites within Ireland. Such sites are subsequently included in the list transmitted to the European Commission pursuant to Article 4(1) of the Directive.

11. Regulation 30 of the Regulations ('Regulation 30') provides:

'1. Where a proposed road development in respect of which an application for the approval of the Minister for the Environment has been made in accordance with

section 51 of the Roads Act, 1993, is neither directly connected with nor necessary to the management of a European site but likely to have a significant effect thereon either individually or in combination with other developments, the Minister for the Environment shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

…

3. The Minister for the Environment shall, having regard to the conclusions of the assessment undertaken under paragraph (1), agree to the proposed road development only after having ascertained that it will not adversely affect the integrity of the European site concerned.

…

5. The Minister for the Environment may, notwithstanding a negative assessment and where that Minister is satisfied that there are no alternative solutions, decide to agree to the proposed road development where the proposed road development has to be carried out for imperative reasons of overriding public interest.

6.(a) Subject to paragraph (b) imperative reasons of overriding public interest shall include reasons of a social or economic nature;

(b) If the site concerned hosts a priority natural habitat type or a priority species, the only considerations of overriding public interest shall be:

(i) those relating to human health or public safety,

(ii) beneficial consequences of primary importance for the environment, or

(iii) further to an opinion from the Commission to other imperative reasons of overriding public interest.'

12. According to the national court, the effect of the domestic provisions is that protection equivalent to that laid down under Article 6(2), (3) and (4) of the Directive will apply to a site from the date on which affected owners and occupiers are notified of a proposal to include that site in a list to be transmitted to the Commission. Such protection will thus apply prior to its inclusion on the list adopted by the Commission as an SCI pursuant to Article 4 of the Directive.

Facts, procedure and questions referred

13. By Decision 2004/813, (4) the Commission adopted a draft list of SCIs pursuant to Article 4(2) of the Directive. That list included a site comprising Lough Corrib and surrounding areas, situated in County Galway, Ireland. The total area of the site extended to some 20 582 hectares.

14. By Decision 2008/23, (5) the Commission repealed Decision 2004/813 and adopted a first updated list of SCIs. That list included the Lough Corrib site, with its area being unchanged.

15. In December 2006, the competent minister notified, within Ireland, an extended Lough Corrib site, comprising some 25 253 hectares. The extension amounted to roughly 4 760 hectares. The extended site includes 270 hectares of limestone pavement, which is a priority natural habitat type listed in Annex I to the Directive.

16. In December 2007, the extended site was included in a list of sites transmitted by Ireland to the Commission pursuant to Article 4(1) of the Directive.

17. By Decision 2009/96, (6) the Commission repealed Decision 2008/23 and adopted a second updated list of SCIs. That list included the extended Lough Corrib site.

18. In the meantime, An Bord Pleanala (the Irish Planning Board) ('the Board'), which is the competent national authority in Ireland for the purposes of Article 6 of the Directive, had adopted a decision ('the decision at issue') on 20 November 2008 to grant development consent to build a proposed road through part of the Lough Corrib site. The proposed road is known as the 'N6 Galway City Outer Bypass road scheme'. The part of the site through which the road is intended to pass falls within the extended area of 4 760 hectares referred to in point 15 above.

19. If the road development proceeds, 1.47 hectares of limestone pavement will be permanently lost. (7) That loss would occur within the extension of the site, which contains 85 of the 270 hectares of limestone pavement located within the entire Lough Corrib site.

20. Prior to the adoption of the decision at issue, the Board appointed an expert inspector to carry out an assessment of the environmental implications of (inter alia) the road development for the site. As part of his duties, he inspected the site over a period of nine months and held a hearing, which took place over a total of 21 days and at which interested parties were represented orally and/or in writing. On the basis of the inspection and the information and arguments presented at the hearing, the inspector produced a report and recommendations which he submitted to the Board. In that report, he took the view that the loss 'in the region of 1.5 hectares' of limestone pavement had to be considered in relation to the 85 hectares of pavement contained within the extension to the original Lough Corrib site – viewing that extension as a 'distinct sub-area' of the whole site – and not in the context of the 270 hectares of pavement contained within the site taken as a whole. He also noted that the area of limestone pavement that would fall to be removed as a result of the road scheme had been reduced by what he considered 'a significant amount' (from 3.8 hectares to 1.5 hectares) as a result of measures taken to mitigate the loss of pavement. As regards the loss itself, the inspector concluded that 'this relatively small loss would not, in terms of quantity, amount to an adverse effect on the integrity of the area'. In relation to issues of fragmentation and disturbance, he found that 'the proposed development would not seriously affect the achievement of the site's conservation objectives and would not seriously affect the integrity of the site'.

21. The inspector also concluded that 'the assessment of a severe negative magnitude of impact, allowing for appropriate mitigating measures' was not unreasonable. It is clear from the order for reference that in using the expression 'severe negative magnitude of impact' in his report, the inspector was following guidelines laid down by the Irish National Roads Authority. The effect of those guidelines was to require that any permanent impact upon a site such as the Lough Corrib site be deemed 'severe negative'. The use of the expression should thus be seen as referring to the permanence of the impact.

22. In the decision at issue, the Board agreed with the inspector's assessment of the environmental impact of the project. The Board concluded that the development 'while having a localised severe impact on the Lough Corrib [site] would not adversely affect the integrity of the [site]. The development … would not, therefore, have

unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area'.

23. Mr Sweetman challenged the decision at issue before the High Court (Ireland), arguing in particular that the Board had been wrong to conclude that the road project would not adversely affect the integrity of the Lough Corrib site. Having lost that application at first instance, Mr Sweetman has lodged an appeal before the Supreme Court, which has referred the following questions for a preliminary ruling:

'(1) What are the criteria in law to be applied by a competent authority to an assessment of the likelihood of a plan or project the subject of Article 6(3) of [the Directive], having "an adverse effect on the integrity of the site"?

(2) Does the application of the precautionary principle have as its consequence that such a plan or project cannot be authorised if it would result in the permanent non-renewable loss of the whole or any part of the habitat in question?

(3) What is the relationship, if any, between Article 6(4) and the making of the decision under Article 6(3) that the plan or project will not adversely affect the integrity of the site?'

24. Written observations have been submitted by Mr Sweetman, the Board, Galway County Council and Galway City Council (together 'the Local Authorities'), Ireland, the United Kingdom Government and the European Commission. At the hearing on 12 September 2012, Mr Sweetman, the Board, the Local Authorities, Ireland, the Greek and United Kingdom Governments and the Commission were represented and made oral submissions to the Court.

Analysis

Admissibility

25. At the time of the decision at issue, the extension to the Lough Corrib site had been notified within Ireland pursuant to Regulation 4 of the Regulations but had not yet been included on the list of sites adopted by the Commission as an SCI. It was thus subject to protection laid down in Regulation 30 but not to that of Article 6(2), (3) and (4) of the Directive. (8) The Supreme Court was, I feel sure, fully aware of this point when it made the reference. The Local Authorities argue, however, that the questions referred therefore relate exclusively to the interpretation of national law and fall outwith the jurisdiction of the Court. The Court should accordingly decline to answer them.

26. In my view, such a narrow interpretation of Article 267 TFEU is not justified.

27. It is clear from the Court's case-law that it has jurisdiction to give preliminary rulings in cases that concern national legislation enacted with a view to implementing EU law, even though the situation in the main proceedings is not, as such, governed by that law.

28. That will be the case where the national provisions at issue seek to adopt the same solutions as those adopted in EU law, provided the provisions in question are made applicable under national law in a direct and unconditional way. The legislation must contain sufficiently precise indications from which it can be deduced that the national legislature intended to refer to the content of the EU provisions. The Court has justified that interpretation of Article 267 TFEU on the ground that, in order to forestall

future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply. (9)

29. That does not mean to say that the Court will accept jurisdiction to give a ruling in every case involving the application of national provisions based on EU law. Thus, in *Kleinwort Benson*, (10) it held that a reference was inadmissible on the ground that the domestic legislation at issue failed to contain 'a direct and unconditional *renvoi*' to the provisions of European law so as to incorporate them into the domestic legal order, but instead took those provisions as a model only. While, moreover, certain provisions of the domestic legislation were taken almost word for word from their European equivalent, others departed from it and express provision was made for the authorities of the Member State concerned to adopt modifications 'designed to produce divergence' from that equivalent.

30. While the scope of Regulation 30 is limited to proposals for road development, and is thus narrower than that of Article 6(3) and (4) of the Directive, it is none the less clear that it seeks to adopt the same solutions in that context as those envisaged by those provisions. Its application is both direct and unconditional. The title of the Regulations makes it apparent that they were enacted for the purpose of transposing European legislation into national law. (11)

31. Against that background, I am of the view that the need to forestall future differences of interpretation as between Regulation 30 of the Regulations and Article 6(3) of the Directive is paramount. Once a site has been included on the list of sites adopted by the Commission as SCIs, it is plain that Regulation 30, in its application to that site, will fall to be interpreted in accordance with Article 6(3). Equally, Regulation 30 must be interpreted and applied consistently under national law, whether or not the site in question has (yet) been so adopted. Consequently, the Irish courts must be sure, when interpreting Regulation 30 in a case where Article 6(3) does not (yet) apply, that they will not have to change that interpretation subsequently in a case where it does apply. (12)

32. The Local Authorities argue that the necessary European dimension is missing: as the site was not, at the relevant time, within the scope of Article 6(3), the Commission would not be competent to give an opinion for the purposes of Article 6(4). That point seems to me to be irrelevant. It does not detract in any way from the need to forestall the differences of interpretation referred to in point 31 above. Furthermore, if (on a correct interpretation of Regulation 30, read in the light of the Directive) the only way the development could proceed is by way of Article 6(4) of the Directive, it seems to me that Ireland would be obliged either to withdraw the site from the list of sites referred to in point 16 above (quite how it would do so is not clear) or wait until the site was designated and then approach the Commission under Article 6(4). But that is merely the logical consequence of aligning national law with the Directive's requirements in advance of the actual point at which Natura 2000 was established.

33. In the light of all of the above, it seems to me that the Supreme Court was entirely right to make a reference to this Court and it is appropriate that this Court should give a ruling.

Question 1

34. By this question, the national court seeks guidance on the interpretation of Article 6(3) and, in particular, the phrase ‘adverse effect on the integrity of the site’.

35. As the Board pointed out at the hearing, this case is unusual in so far as much of the Court’s previous case-law concerns situations where there has been no appropriate assessment in terms of that provision and the question is whether such an assessment is necessary. (13) Here, by contrast, an assessment was undertaken and there is no suggestion that it was improperly conducted – indeed, all the indications are that it was done with great care. (14) Rather, the issue concerns the conclusion reached as a result of that assessment, on the basis of which the Board adopted the decision at issue.

36. While the question covers a single expression used in Article 6(3), that expression must be understood having regard to the context in which it is used. I shall therefore consider the objectives which the Directive sets out to achieve, before turning to the obligations laid down in Article 6 as a whole.

The objectives of the Directive

37. Article 2(1) states that the aim of the Directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild flora and fauna throughout the Member States. Article 2(2) goes on to provide that measures taken pursuant to the Directive must be designed to *maintain at or restore to*, a favourable conservation status, natural habitats and species of wild flora and fauna ‘of Community interest’.

38. The term ‘conservation’ is defined in Article 1(a) as ‘a series of measures required to maintain or restore … natural habitats … at a favourable status’. By Article 1(e), the conservation status of a natural habitat is to be taken as ‘favourable’ when, inter alia, the natural range and areas it covers within that range are *stable or increasing* and the specific structure and functions which are necessary for its long-term maintenance *exist and are likely to continue to exist* for the foreseeable future.

39. To that end, Article 3(1) requires the setting-up, under the ‘Natura 2000’ title, of a coherent European ecological network of special areas of conservation. That network is intended to enable, inter alia, the natural habitat types listed in Annex I to be maintained at or, where appropriate, restored to a favourable conservation status in their natural range.

40. It is thus an essential objective of the Directive that natural habitats be maintained at and, where appropriate, restored to a favourable conservation status. Such an aim is necessary in the context – recorded in the fourth recital in the preamble to the Directive – of a continuing deterioration in those habitats and the need to take measures in order to conserve them. That is *a fortiori* the case as regards priority natural habitat types. Article 1(d) defines these as ‘natural habitat types in danger of disappearance’, stating that the Community has ‘particular responsibility’ for their conservation.

Article 6

41. Article 6 falls to be construed against that background. As regards natural habitats, it provides for necessary conservation measures to be established in relation to SACs (Article 6(1)) and for steps to be taken to avoid the deterioration of those habitats (Article 6(2)), on the one hand, and sets out a series of procedures to be

followed in the case of plans or projects that are not directly connected with or necessary to the management of the site (Article 6(3) and (4)), on the other. Without those provisions, the notions of maintenance and restoration on which the Directive is based would risk being of no practical effect.

42. Of the measures prescribed by Article 6, those laid down by the first paragraph, which relate to the establishment of conservation measures, are not directly relevant to the question. They exist, essentially, in order to ensure that positive steps are taken, on a more or less regular basis, in order to ensure that the conservation status of the site in question is maintained and/or restored.

43. Paragraphs 2, 3 and 4 of Article 6 serve a different purpose. Paragraph 2 imposes an overarching obligation to avoid deterioration or disturbance. Paragraphs 3 and 4 then set out the procedures to be followed in respect of a plan or project which is not directly connected with or necessary to the management of the site (and which is thus not covered by paragraph 1) but which is likely to have a significant effect thereon. Collectively, therefore, these three paragraphs seek to pre-empt damage being done to the site or (in exceptional cases where damage has, for imperative reasons, to be tolerated) to minimise that damage. They should therefore be construed as a whole.

44. Article 6(2) imposes a general requirement on the Member States to maintain the status quo. (15) The Court has described it as 'a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives'. (16) The obligation Article 6(2) lays down is not an absolute one, in the sense that it imposes a duty to ensure that no alterations of any kind are made, at any time, to the site in question. Rather, it is to be measured having regard to the conservation objectives of the site, (17) since that is why the site is designated. The requirement is thus to take all appropriate steps to avoid those objectives being prejudiced. The authenticity of the site as a natural habitat, with all that that implies for the biodiversity of the environment, is thus preserved. Benign neglect is not an option.

45. Article 6(3), by contrast, is not concerned with the day-to-day operation of the site. It applies only where there is a plan or project not directly connected with or necessary to site management. It lays down a two-stage test. At the first stage, it is necessary to determine whether the plan or project in question is 'likely to have a significant effect [on the site]'.

46. I would pause here to note that, although the words 'likely to have [an] effect' used in the English-language version of the text (18) may immediately bring to mind the need to establish a degree of probability – that is to say that they may appear to require an immediate, and quite possibly detailed, determination of the impact that the plan or project in question might have on the site – the expression used in other language versions is weaker. Thus, for example, in the French version, the expression is '*susceptible d'affecter*', the German version uses the phrase '*beeinträchtigen könnte*', the Dutch refers to a plan or project which '*gevolgen kan heben*', while the Spanish uses the expression '*pueda afectar*'. Each of those versions suggests that the test is set at a lower level and that the question is simply whether the plan or project concerned is capable of having an effect. It is in that sense that the English 'likely to' should be understood. (19)

47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). (20) The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may be* such an effect.

48. The requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having *any* effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.

49. The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the Court has termed 'the best scientific knowledge in the field'. (21) Members of the general public may also be invited to give their opinion. Their views may often provide valuable practical insights based on their local knowledge of the site in question and other relevant background information that might otherwise be unavailable to those conducting the assessment.

50. The test which that expert assessment must determine is whether the plan or project in question has 'an adverse effect on the integrity of the site', since that is the basis on which the competent national authorities must reach their decision. The threshold at this (the second) stage is noticeably higher than that laid down at the first stage. That is because the question (to use more simple terminology) is not 'should we bother to check?' (the question at the first stage) but rather 'what will happen to the site if this plan or project goes ahead; and is that consistent with "maintaining or restoring the favourable conservation status" of the habitat or species concerned?'. There is, in the present case, no dispute that if the road scheme is to proceed a part of the habitat will be permanently lost. The question is simply whether the scheme may be authorised without crossing that threshold and bringing into play the remaining elements of Article 6(3) (and, if necessary, Article 6(4)).

51. It is plain, however, that the threshold laid down at this stage of Article 6(3) may not be set too high, since the assessment must be undertaken having rigorous regard to the precautionary principle. That principle applies where there is uncertainty as to the existence or extent of risks. (22) The competent national authorities may grant authorisation to a plan or project *only if they are convinced that it will not adversely affect the integrity of the site concerned*. If doubt remains as to the absence of adverse effects, they must refuse authorisation. (23)

52. How should the reference in that expression to the 'integrity' of the site be construed?

53. Here, again, it is worth pausing briefly to note the differing language versions of Article 6(3). The English-language version uses an abstract term (integrity) – an approach followed, for example in the French (*intégrité*) and the Italian (*integrità*). Some other language versions are more concrete. Thus, the German text refers to the site '*als solches*' (as such). The Dutch version speaks of the '*natuurlijke kennmerken*' (natural characteristics) of the site.

54. Notwithstanding those linguistic differences, it seems to me that the same point is in issue. It is the essential unity of the site that is relevant. To put it another way, the notion of 'integrity' must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned.

55. The integrity that is to be preserved must be that 'of the site'. In the context of a natural habitat site, that means a site which has been designated having regard to the need to maintain the habitat in question at (or to restore it to) a favourable conservation status. That will be particularly important where, as in the present case, the site in question is a priority natural habitat. (24)

56. It follows that the constitutive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is 'why was *this particular site* designated and what are its conservation objectives?'. In the present case, the designation was made, at least in part, because of the presence of limestone pavement on the site – a natural resource in danger of disappearance that, once destroyed, cannot be replaced and which it is therefore essential to conserve.

57. Lastly, the effect on the integrity of the site must be 'adverse'. In any given case, the second-stage appropriate assessment under Article 6(3) may determine that the effect of the plan or project on the site will be neutral, or even beneficial. But if the effect is negative, it cannot proceed – by virtue of that provision, at least.

58. What then is a negative or 'adverse' effect? Here, it may be helpful to distinguish between three situations.

59. A plan or project may involve some strictly temporary loss of amenity which is capable of being fully undone – in other words, the site can be restored to its proper conservation status within a short period of time. An example might be the digging of a trench through earth in order to run a subterranean pipeline across the corner of a site. *Provided* that any disturbance to the site could be made good, there would not (as I understand it) be an adverse effect on the integrity of the site.

60. Conversely, however, measures which involve the permanent destruction of a part of the habitat in relation to whose existence the site was designated are, in my view, destined by definition to be categorised as adverse. The conservation objectives of the site are, by virtue of that destruction, liable to be fundamentally – and irreversibly – compromised. The facts underlying the present reference fall into this category.

61. The third situation comprises plans or projects whose effect on the site will lie between those two extremes. The Court has not heard detailed argument as to whether such plans or projects should (or should not) be considered to generate an 'adverse effect on the integrity of the site'. I consider that it would be prudent to leave this point open to be decided in a later case.

62. Let us assume that a plan or project crosses the threshold laid down in the second sentence of Article 6(3). It is then necessary to consider whether it may proceed under Article 6(4). That provision is triggered by 'a negative assessment for the implications of the site'. Those words must, if Article 6 is to have any sense as a coherent whole, be interpreted so as to mean that paragraph 4 will cut in precisely where paragraph 3 ends, that is to say, once it is found that the plan or project in question cannot proceed under Article 6(3).

63. Article 6(4) is, like Article 6(3), divided into two parts. The first applies to any plan or project which fails to satisfy the requirements of Article 6(3). The second applies only where the site concerned hosts a priority natural habitat type or a priority species.

64. As regards the first – general – set of requirements, the plan or project may proceed only if that is for imperative reasons of overriding public interest and there is no alternative solution. (25) In addition, the Member State concerned must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. While the Commission must be informed of the compensatory measures adopted, it does not, as such, participate in the procedure. The legislation recognises, in other words, that there may be exceptional circumstances in which damage to or destruction of a protected natural habitat may be necessary, but, in allowing such damage or destruction to proceed, it insists that there be full compensation for the environmental consequences. (26) The status quo, or as close to the status quo as it is possible to achieve in all the circumstances, is thus maintained.

65. The second part is narrower. The grounds on which the plan or project may proceed are more limited and it may be necessary for the competent authorities of the Member State concerned to obtain an opinion from the Commission before proceeding. (27)

66. Whilst the requirements laid down under Article 6(4) are intentionally rigorous, it is important to point out that they are not insuperable obstacles to authorisation. The Commission indicated at the hearing that, of the 15 to 20 requests so far made to it for delivery of an opinion under that provision, only one has received a negative response.

67. Seen in that overall context, it seems to me that any interpretation of Article 6(3) that provides a lower level of protection than that which Article 6(4) contemplates cannot be correct. To require the Member States to 'take all compensatory measures necessary' when a plan or project is carried out under the latter provision so as to preserve the overall coherence of Natura 2000 while, at the same time, allowing them to authorise more minor projects to proceed under the former provision even though some permanent or long-lasting damage or destruction may be involved would be incompatible with the general scheme which Article 6 lays down. Such an interpretation would also fail to prevent what the Commission terms the 'death by a thousand cuts' phenomenon, that is to say, cumulative habitat loss as a result of multiple, or at least a number of, lower level projects being allowed to proceed on the same site. (28)

68. The above analysis essentially endorses the line of reasoning put forward by Mr Sweetman, Ireland and the Commission. The Board, the Local Authorities and the United Kingdom adopt a different approach, based closely on the literal wording of Article 6(3). In particular, they emphasise the two-stage process which that provision imposes. Each stage is separate and, they argue, must be understood as having a separate meaning and purpose.

69. I would summarise that alternative approach as follows.

70. In construing Article 6, a line is to be drawn between paragraphs 1 and 2, on the one hand, and paragraphs 3 and 4, on the other. The former exist to govern the day-to-day management of the site. The latter, for their part, deal with plans or projects that are unconnected with that management. They may thus be seen as laying down exceptions to paragraphs 1 and 2. In considering such a plan or project, it is

necessary, first, to consider whether it is likely to have a significant effect on the site. The word 'likely' would be construed in that context as comprising a test of probability (albeit based on the precautionary principle – I do not think there is any dispute in that regard). A plan or project that was not considered likely to have a significant effect could proceed, without there being any need for an assessment of its implications.

71. Conversely, where such an effect was predicted, an assessment would be required. In conducting that exercise, and thus determining whether the plan or project 'adversely affects the integrity of the site', it would be necessary to bear in mind that that expression must mean more than 'adversely affects the site'. Equally, the expression 'adverse effect' must be understood as carrying a stronger meaning than the phrase 'significantly affect' used in the first stage of Article 6(3). If that were not the case, there would be no distinction between the trigger for deciding whether an assessment is required (Article 6(3), first sentence) and the criterion for determining whether a plan or project must be refused permission to proceed (Article 6(3), second sentence).

72. On that basis, the Board argues that the decision to authorise the road scheme at issue in the main proceedings was correctly adopted.

73. The submissions of the parties arguing in support of the approach I have just described are well made. They should certainly not be dismissed out of hand.

74. However, in my view, that approach is not the correct one. In particular, it concentrates on the wording of Article 6(3) read in isolation and fails to take into account the wider context in which that provision must be construed. As a result, it involves an inherent, and irresolvable, tension between allowing certain projects to proceed under Article 6(3), while projects covered by Article 6(4) may go ahead only if full compensatory measures are adopted. It also fails in any way to deal with the 'death by a thousand cuts' argument.

75. Those arguments likewise cannot be reconciled with the Court's case-law laid down in *Waddenvereniging and Vogelbeschermingsvereniging*. (29) In holding, in paragraph 35, that Article 6(3) renders superfluous a concomitant application of the rule of general protection laid down in Article 6(2), the Court was not seeking to stress the differences between those provisions. Rather, it chose to emphasise their *similarity*. It was with that point in mind that it went on to observe, in paragraph 36, that 'authorisation of a plan or project granted in accordance with Article 6(3) of [the Directive] necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2)'. It was for the same reason that the Court held in *Commission* v *Spain* that Article 6(2) and (3) of the Directive is 'designed to ensure the same level of protection'. (30)

76. In the light of all of the above, the answer to Question 1 should be that in order to establish whether a plan or project to which Article 6(3) of the Directive applies has an adverse effect on the integrity of a site, it is necessary to determine whether that plan or project will have a negative effect on the constitutive elements of the site concerned, having regard to the reasons for which the site was designated and their associated conservation objectives. An effect which is permanent or long lasting must be regarded as an adverse one. In reaching such a determination, the precautionary principle will apply.

Question 2

77. By this question, the national court asks whether the precautionary principle requires authorisation of a plan or project to be refused if it would result in the permanent non-renewable loss of the whole or any part of the natural habitat in question. It is implicit in the question that the principle concerned may have a separate role to play in the assessment to be carried out by the national authorities under Article 6(3). That is to say, it assumes that, if the principle is not called in aid, a different result might be reached than if it is.

78. I have described the application of the precautionary principle in point 51 above. It is, as the Local Authorities observe, a procedural principle, in that it describes the approach to be adopted by the decision-maker and does not demand a particular result.

79. The Court held in *Waddenvereniging and Vogelbeschermingsvereniging* that the precautionary principle has been integrated into Article 6(3). (31) It follows, as the United Kingdom observes, that there is no interpretational gap in the scheme of that article to be filled by the application of that principle. It also follows that the fact that the principle is relevant to establishing whether a competent authority can rule out any adverse effect on the integrity of a site does not go to the prior question of what that test means.

80. It is therefore unnecessary to answer Question 2.

Question 3

81. By this question, the national court asks about the interrelationship between paragraphs 3 and 4 of Article 6.

82. I have set out my analysis of that relationship above (32) and have nothing to add.

Conclusion

83. In the light of the above considerations, I suggest that the Court should give the following answer to the questions referred by the national court:

In order to establish whether a plan or project to which Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora applies has an adverse effect on the integrity of a site, it is necessary to determine whether that plan or project will have a negative effect on the constitutive elements of the site concerned, having regard to the reasons for which the site was designated and their associated conservation objectives. An effect which is permanent or long lasting must be regarded as an adverse one. In reaching such a determination, the precautionary principle will apply.

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1 – Original language: English.

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2 – Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, with corrigendum OJ 1993 L 176, p. 29) ('the Directive').

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3 – 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).

4 – Commission Decision 2004/813/EC of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region (OJ 2004 L 387, p. 1).

5 – Commission Decision 2008/23/EC of 12 November 2007 adopting, pursuant to Council Directive 92/43/EEC, a first updated list of sites of Community importance for the Atlantic biogeographical region (OJ 2008 L 12, p. 1).

6 – Commission Decision 2009/96/EC of 12 December 2008 adopting, pursuant to Council Directive 92/43/EEC, a second updated list of sites of Community importance for the Atlantic biogeographical region (OJ 2009 L 43, p. 466).

7 – The Commission asserts that this figure is inaccurate and underestimates the area of limestone pavement that would be sacrificed. That point is not, however, raised either explicitly or by implication in the order for reference. To the extent that the point concerns a question of fact, the Court is unable to address it. To the extent that the Commission's arguments on the point raise questions of interpretation – and hence of law – those questions do not fall within the framework of the questions posed by the referring court, nor do they require to be answered in order to address those questions. I therefore do not consider them further.

8 – The decision at issue was dated 20 November 2008. The Commission's decision to include the extended site on the updated list of SCIs was adopted on 12 December 2008, that is to say, some three weeks after the date of the decision at issue.

9 – See generally, in that regard, Case C-482/10 *Cicala* [2011] ECR I-0000, paragraphs 17 to 19.

10 – Case C-346/93 [1995] ECR I-615, paragraph 16.

11 – See, in that regard, Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10627, paragraph 22.

12 – As, indeed, it now does to the extended Lough Corrib site.

13 – See, for example, Case C-179/06 *Commission* v *Italy* [2007] ECR I-8131; Case C-241/08 *Commission* v *France* [2010] ECR I-1697; Case C-226/08 *Stadt Papenburg* [2010] ECR I-131; and Case C-182/10 *Solvay and Others* [2012] ECR I-0000.

14 – See points 20 to 22 above.

15 – See inter alia, in that regard, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 32; Case

C-535/07 *Commission* v *Austria* [2010] ECR I-9483, paragraph 58; and Case C-404/09 *Commission* v *Spain* [2011] ECR I-0000, paragraph 127.

16 – See *Stadt Papenburg*, cited in footnote 13 above, paragraph 49 and the case-law cited.

17 – See, in that regard, *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above, paragraph 46.

18 – When the Directive was adopted in May 1992, the official languages of the European Community were Danish, German, Greek, English, Spanish, French, Italian, Dutch and Portuguese. The text of the Directive will thus be authentic in each of those language versions.

19 – See Case C-1/02 *Borgmann* [2004] ECR I-3219 as regards the need to construe a provision by reference to the purpose and general scheme of the rules of which it forms part where there is a divergence between the different language versions of an EU measure (paragraph 25 and the case-law cited). See also, as regards the difficulties that differences in language versions can give rise to, my Opinion in Case C-173/07 *Emirates Airlines* [2008] ECR I-5237.

20 – An example of the type of confusion that this poorly-drafted piece of legislation can give rise to can, I suggest, be seen in the judgment in *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above. In paragraph 41, the Court talks of an appropriate assessment being required if there is a 'mere probability' that there may be significant effects. In paragraph 43, it refers to there being a 'probability or a risk' of such effects. In paragraph 44, it uses the term 'in case of doubt'. It is the last of these that seems to me best to express the position.

21 – *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above, paragraph 54.

22 – Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 63.

23 – See, in that regard, *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 15 above, paragraphs 56 to 59.

24 – See, in that regard, point 40 above.

25 – See, in that regard, *Solvay and Others*, cited in footnote 13 above, paragraph 71 et seq.

26 – For an example of steps that do *not* constitute adequate compensatory measures, see point 29 of my Opinion in Case C-388/05 *Commission* v *Italy* [2007] ECR I-7555, '*Valloni e steppe pedegarganiche*'. I leave open the general question as to how to identify what *are* appropriate compensatory measures in any given case.

27 – The legislation refers to the Commission's conclusions being delivered by way of an opinion rather than a decision. They will thus not be directly binding on the parties concerned. It will none the less be open to the Commission to take enforcement action against a Member State which contravenes, or allows others to contravene, its opinion. Alternatively, an aggrieved third party may bring proceedings before a national court seeking an order to the appropriate effect.

28 – Some of the discussion at the hearing turned on whether that phenomenon was one which played a role in determining whether the 'adverse effect on the integrity of the site' test under Article 6(3) was met. In my view, it has no role to play in that context. The criteria that are relevant there are those set out in points 50 to 60 above. It is not necessary to go beyond them.

29 – Cited in footnote 15 above. Where a plan or project subsequently proves likely to give rise to deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error, Article 6(2) will apply so as to ensure that the integrity of the site is restored (see, to that effect, paragraph 37 of the judgment).

30 – Cited in footnote 15 above, paragraph 142.

31 – Cited in footnote 15 above, paragraph 58.

32 – See point 62 et seq.

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

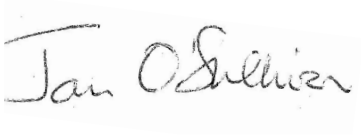
Environmental impact assessment (EIA) is a critical tool in managing and clarifying the complex interrelationships between development and the environment. It is, in essence, a process that provides for an examination of the environmental consequences of development actions in a systematic, holistic 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. 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),

- the European Union (Environmental Impact Assessment and Habitats) Regulations 2011, S.I. No. 473 of 2011 – commenced 21/09/2011,
- the European Union (Environmental Impact Assessment and Habitats) (No. 2) Regulations 2011, S.I. No. 584 of 2011 – commenced 15/11/2011,
- the European Union (Environmental Impact Assessment) (Planning and Development Act, 2000) Regulations 2012 (S.I. No. 419 of 2012) – commenced 31/10/2012.

Prior to these amendments applicants were required, for projects subject to the EIA Directive which were likely to have significant effects on the environment, to submit an environmental impact statement (EIS) with applications for consent. The public and prescribed bodies were notified of the application and EIS and they had a right to make submissions. The competent authority was obliged to consider whether or not the EIS contained the required information and to take account of the EIS and all relevant submissions prior to determining the application.

1.6 The European Court of Justice in its decision on Case C-50/09 (3 March 2011) held that Irish legislation, on the relevant dates applicable to the Court's decision, did not adequately transpose Article 3 of the EIA Directive which makes the competent authority responsible for carrying out an environmental impact assessment (in relevant cases).

1.7 Section 172 of the Planning Act, as amended in the instruments referred to, now specifically requires planning authorities and An Bord Pleanála (the Board) to carry out an environmental impact assessment in relevant cases. The factual situation whereby planning authorities and/or the Board carry out an assessment of effects on the environment in relevant cases is now formally recognised in the legislation.

1.8 Circular Letter PHP 10/11 of 20 December 2011 stated that further guidance would issue on EIA. Since then and since the draft of these Guidelines was issued (July 2012) section 172 has been further amended (see 1.5 above). These Guidelines, of course, refer to the revised/current law

1.9 A new section 171A, defining EIA, was inserted into the Planning Act by section 53 of the Planning and Development (Amendment) Act 2010 (commenced on 19 August 2010). The definition of EIA is based on Article 3 of the EIA Directive and the European Court of Justice decision in case C-50/09.

1.10 The full texts of sections 172 and 171A are set out in Appendices 2 and 3.

1.11 Appendix 4 contains a glossary of terms used in these guidelines.

2

Status, Scope, Purpose and Objectives of the Guidelines

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. 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. 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. 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.

Appendices

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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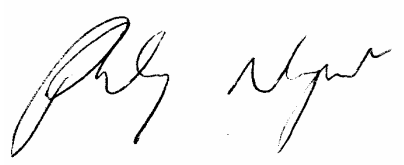


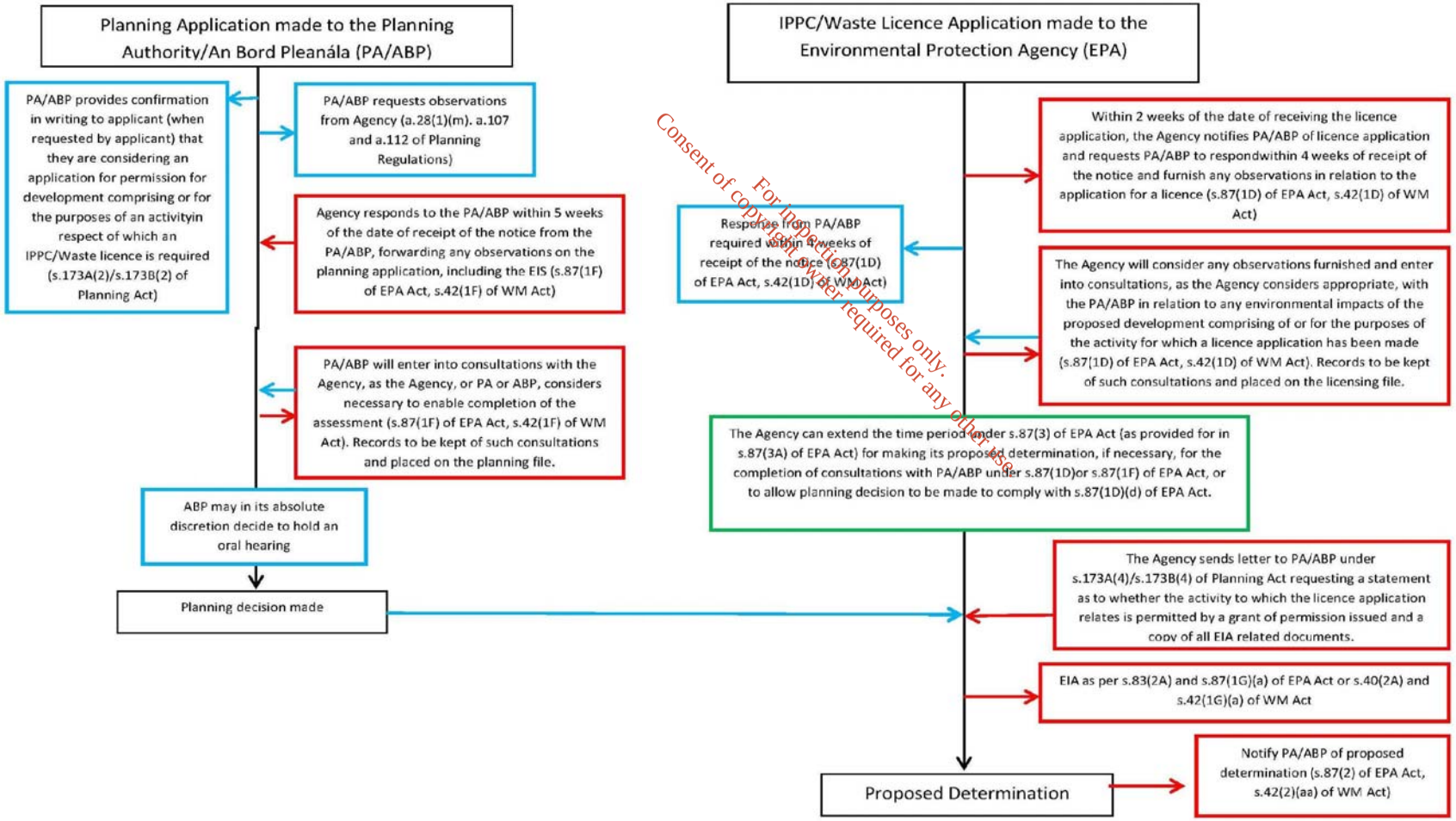
Philip Nugent

Principal Officer

Planning and Housing (Finance and Policy Development)

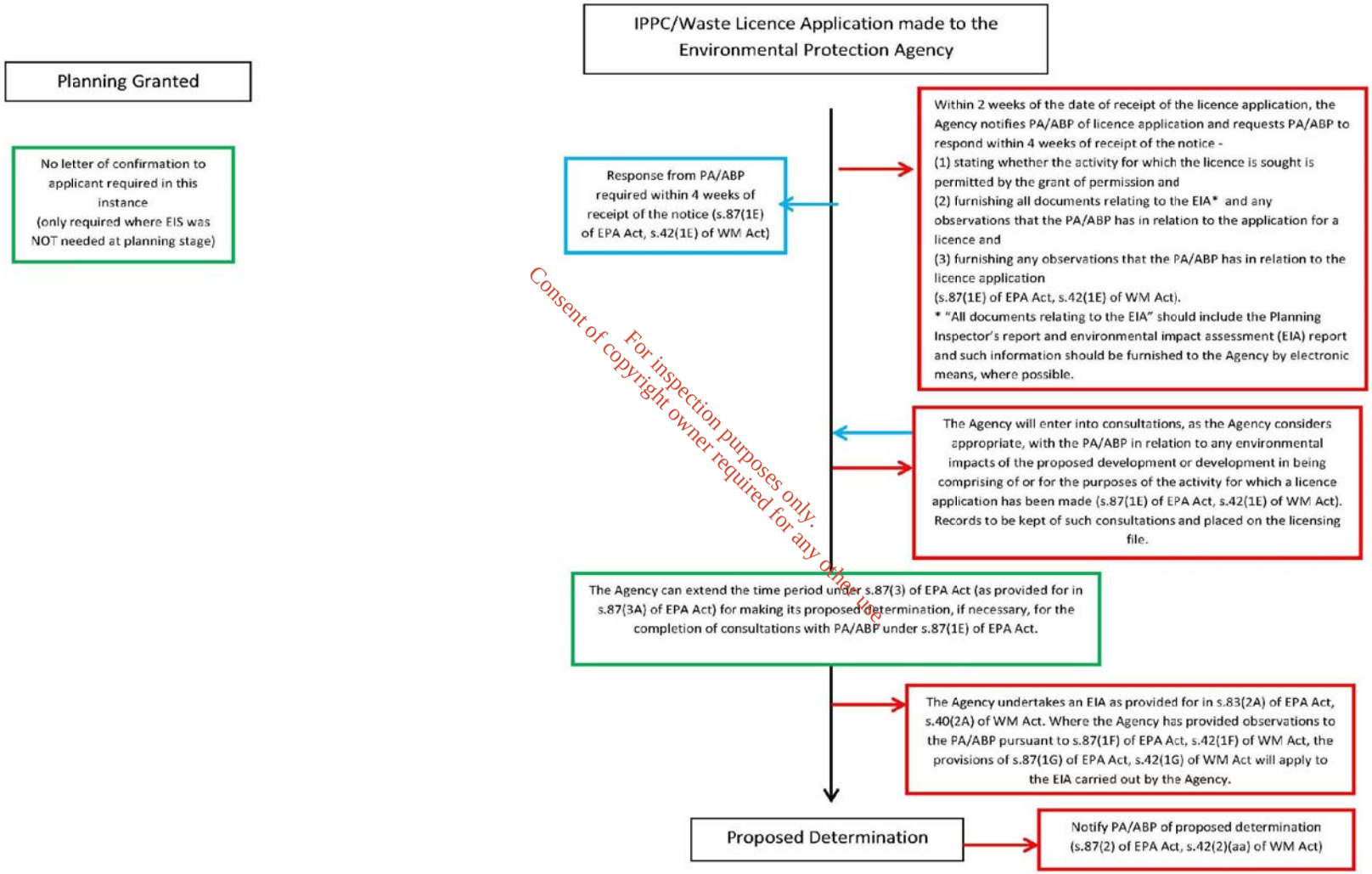
New Activity, Planning UNDER CONSIDERATION, EIA required

Sections 87(1B), (1D), (1F) and (1G) of EPA Act; Sections 42(1B), (1D), (1F) and (1G) of Waste Management Act



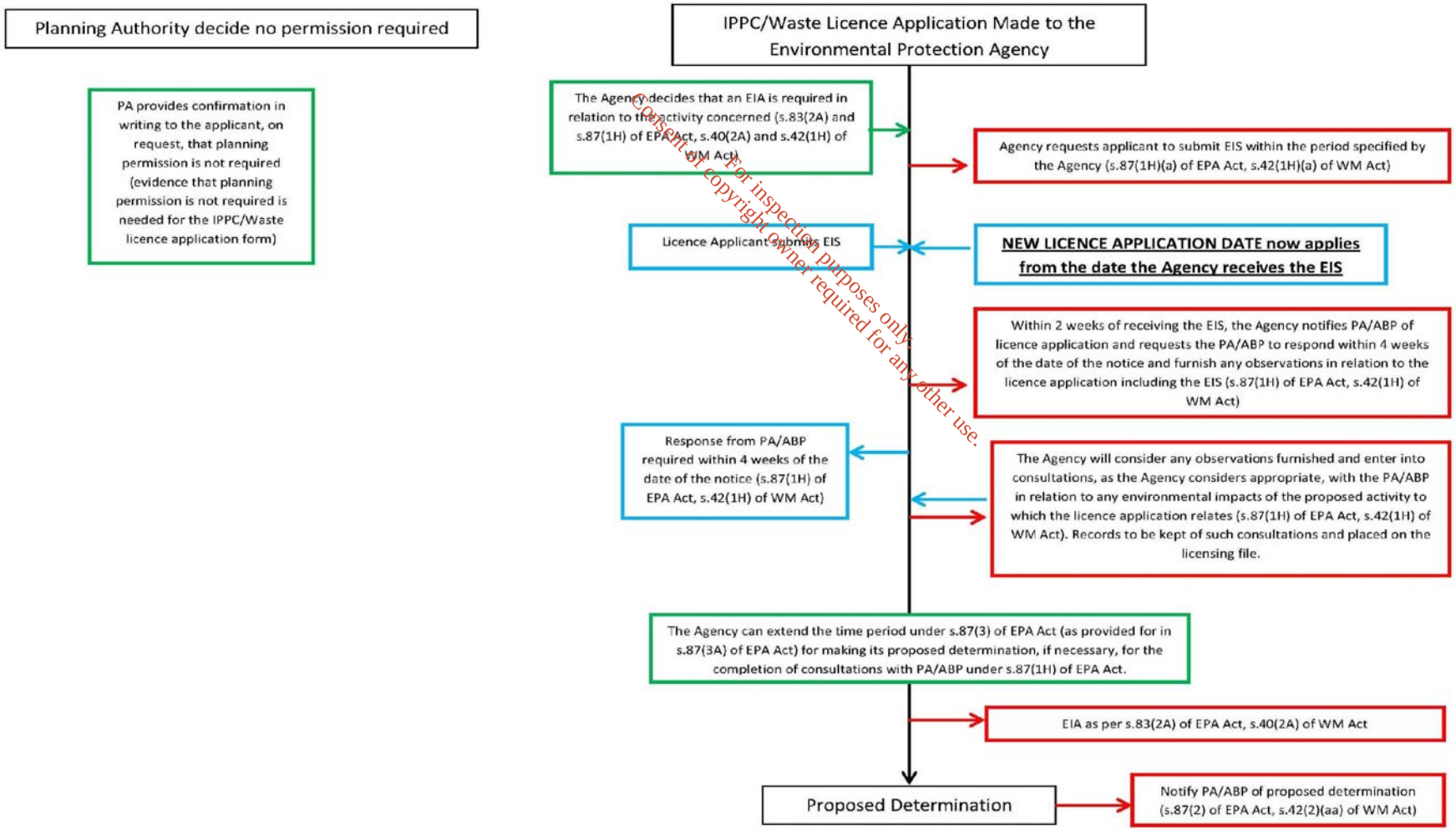
New Activity, Planning GRANTED, EIA required

Sections 87(1B) and (1E) of EPA Act; Sections 42(1B) and (1E) of Waste Management Act



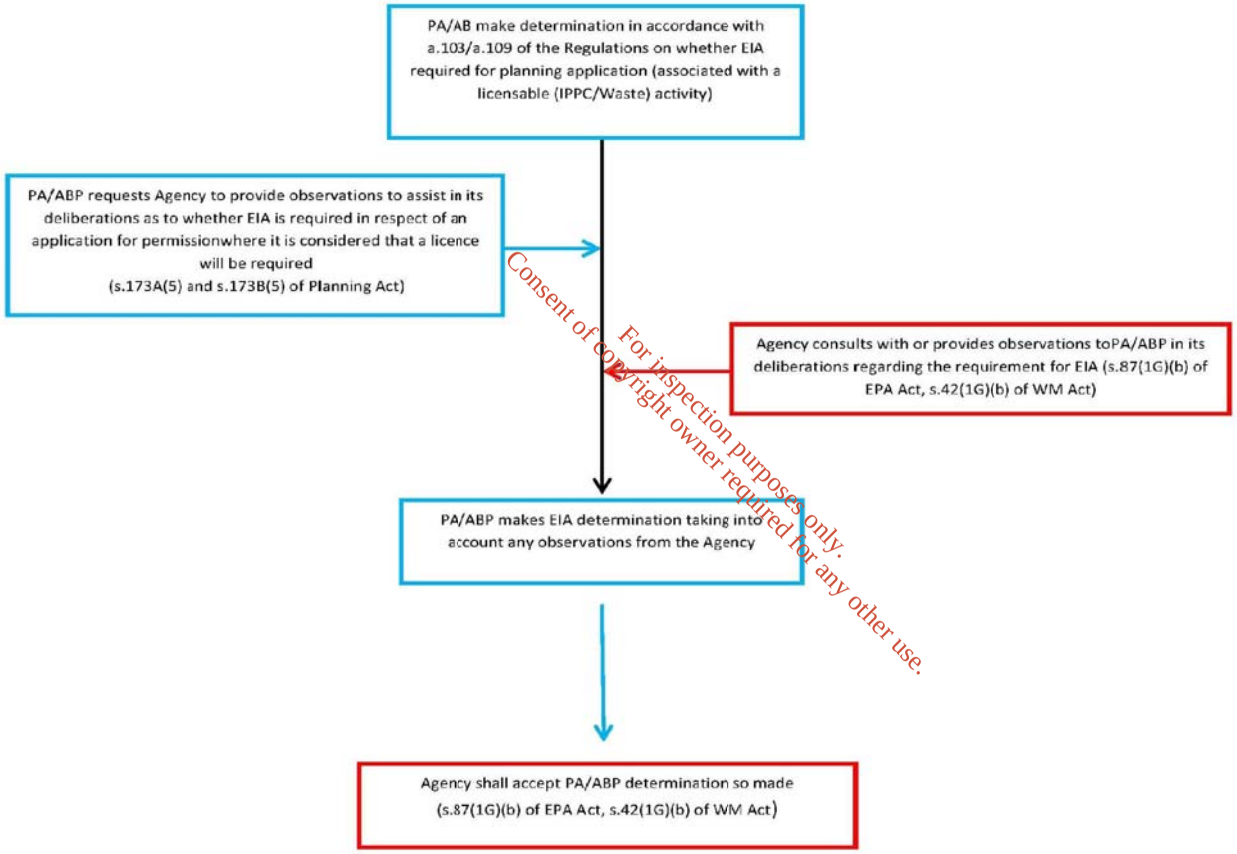
Licence needed, PLANNING NOT NEEDED, Agency decides EIA required

Section 87(1H) of EPA Act; Section 42(1H) of Waste Management Act

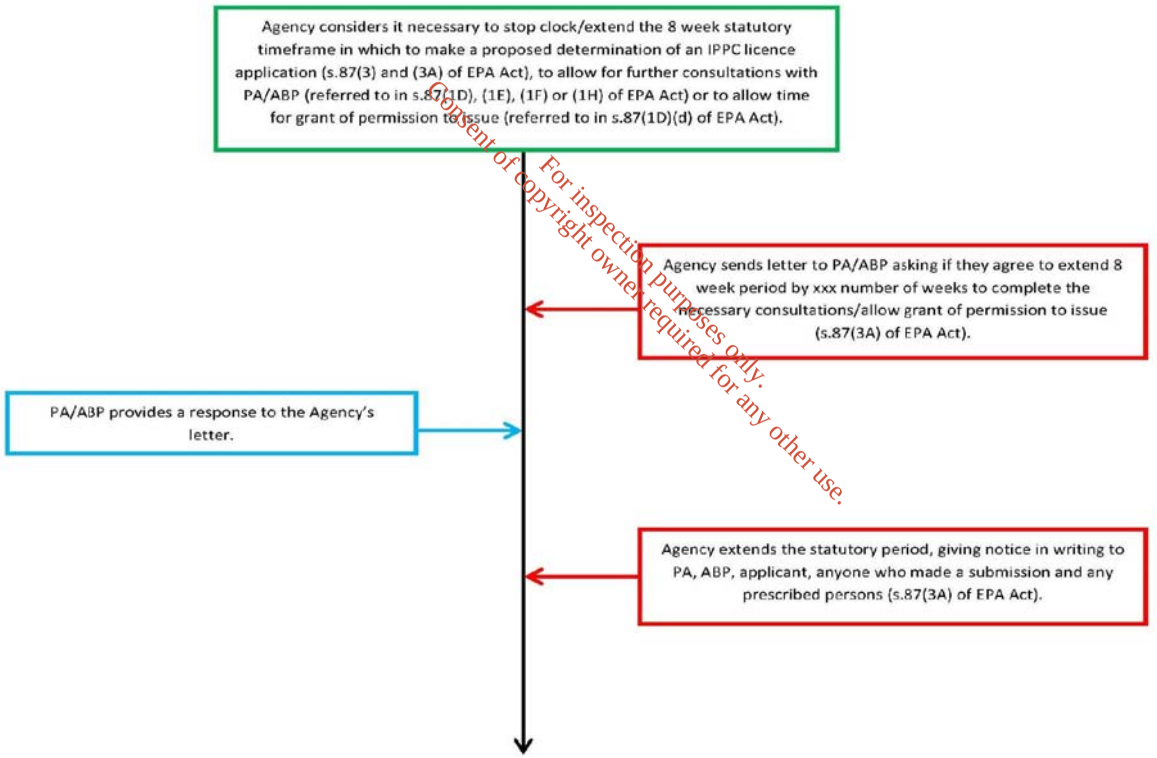


EIAScreening(for proposed development comprising or for the purposes of an activity requiring an IPPC/Waste licence)

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.