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ARTICLES 6(3) AND 6(4) OF THE HABITATS DIRECTIVE LEGAL FRAMEWORK AND RECENT CASELAW

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I. Introduction

1. The objective of this paper is to address the procedural requirements of Articles 6(3) and 6(4) of the Habitats Directive (Directive 92/43/EEC). This will be done with particular reference to relevant caselaw, including the very recent judgment of the High Court in *Sweetman v. An Bord Pleanála (Galway outer by-pass)*, unreported, Birmingham J., October 9, 2009. This paper does not purport to provide legal advice, and readers are expressly referred to the disclaimer at the end of this paper.

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2. In brief, Articles 6(3) and 6(4) introduce an additional layer of control in respect of plans and projects which are likely to have a significant effect on designated sites. This will typically occur in the context of an application for development consent under some other legislation, for example, under the planning legislation or under the Roads Acts. It is important to note, however, that the requirements of the Habitats Directive are in addition to, and distinct from, the underlying legislation pursuant to which the application for development consent has been made. I will return to this point at paragraphs 25 to 28 below.
3. As the procedure required under Articles 6(3) and 6(4) of the Habitats Directive arises in the context of a number of different regulatory schemes, the transposition of the Habitats Directive into national law necessitated the amendment of several different pieces of legislation. Many of these amendments are to be found in the EC (Natural Habitats) Regulations, 1997 to 2005. The assessment function has, in some cases, since been transferred from the Minister for the Environment Heritage and Local Government to An Bord Pleanála under the Planning and Development Act, 2000. Thus, for example, the board now carries out the Article 6 assessment function in the case of Roads Acts' consents.
4. The wording of the national legislation (as amended) largely replicates that of Articles 6(3) and 6(4) of the Habitats Directive and, accordingly, the discussion of these provisions of the Directive can be applied equally to the national implementing legislation. It is essential, however, that a decision-maker identify those provisions of national law governing any particular application for development consent, rather than simply refer to the provisions of the Habitats Directive itself. This is because whereas the wording of the national legislation is similar to that of the Directive, there are important differences. Moreover, the protection under national law applies at an *earlier* stage of the designation process than it does under the terms of the Habitats Directive. Strictly speaking, the provisions of Article 6(3) and 6(4) only apply with full rigour to sites which have been designated by the European Commission as "Sites of Community Interest" ("SCIs").

II. Screening decision

5. The first stage of the procedure under Article 6(3) requires the carrying out of a “screening” exercise. The competent national authority is required to decide whether a “plan” or “project” is likely to have a significant effect on a designated site.

6. The obligation to make a screening decision has, in most instances, been transposed into national law by the EC (Natural Habitats) Regulations, 1997 to 2005. The screening exercise will, typically, be carried out in the context of an application for development consent under some other piece of legislation such as, for example, the planning legislation or the Roads Acts. Thus, for example, a planning authority (and An Bord Pleanála on appeal) in determining an application for planning permission is required to make a screening decision by virtue of Reg.27 of the EC (Natural Habitats) Regulations, 1997. A similar obligation is imposed on An Bord Pleanála in the context of a Roads Acts’ consent by virtue of Reg. 30.

7. As an aside, it should be noted that the requirement to carry out a screening exercise under Article 6(3) may have implications for the availability of “exempted development” under the planning legislation. In the case of exempted development, there will usually be no requirement for any application for development consent, and thus there will be no forum in which a screening exercise can be carried out. An attempt to address this situation has been made under the Planning and Development Regulations, 2001 in that it is expressly provided under Article 9(1)(a) that the benefit of exempted development is not available in certain cases of development which would affect sites of scientific or ecological interest. There is a catch-all provision in respect of operations or activities not subject to control under the planning legislation under Reg.14 of the EC (Natural Habitats) Regulations, 1997. (See also Art.3 of the Planning and Development (Amendment) Regulations, 2008).

8. The interaction between the planning legislation and the EC (Natural Habitats) Regulations, 1997 in this regard is not entirely satisfactory in that the benefit of exempted development is only lost where the preservation of a particular site is an objective of the relevant development plan or draft development plan. This can make it difficult to know in any particular factual scenario whether or not a proposed activity is exempted development (and thus subject to surrogate control under the 1997 Regulations). It is at least arguable—following the judgment of the ECJ in Case C–66/06 *Commission v. Ireland*—that the lack of certainty and precision means that the Habitats Directive has not been properly implemented in this regard.

(i) “Project”

9. The term “project” is not defined under the Habitats Directive. The ECJ has indicated, however, that it is to be given a broad interpretation, and, further, that some guidance in this regard may be had from the caselaw in relation to the Environmental Impact Assessment Directive (“the EIA Directive”). Thus, in Case C–127/02 *Waddenvereniging (“Mechanical cockle fishing”)*, it was held that mechanical cockle fishing was a “project” for the purposes of the Habitats Directive. In this regard, Advocate General Kokott suggested that mechanical cockle fishing, on account of its wide-ranging effects on the upper layer of the seabed, was in principle comparable in terms of environmental impact with the extraction of mineral resources; the Advocate General drew an analogy with the definition of “project” for the purposes of the EIA Directive.
10. The extent to which an *ongoing* activity must be subject to screening is currently being considered by the ECJ in Case C–226/08 *Stadt Papenburg*. On the facts of that case, the relevant municipal authority had issued a consent to a shipyard to carry out dredging for the purpose of allowing newly constructed ships to be navigated from the local shipyard out to sea. This consent was not limited in time, and did not require renewal (“indefinite consent”). Subsequent to this indefinite consent having been granted, the Commission included a site downriver in a draft list of Sites of Community Importance (“SCI”). It appears to have been accepted that the dredging activities were likely to have significant effects on the proposed SCI, but the

argument was made that the Habitats Directive could not apply retrospectively so as to undermine the existing indefinite consent. Advocate General Sharpston rejected this argument. The Advocate General suggested in her Opinion that, to the extent that further projects, or further stages of the same global project, may be distinguished from earlier stages, same should be subject to the provisions of Article 6(3). The Advocate General suggested that the fact that economic considerations can be taken into account, if necessary, under the derogation provided for under Article 6(4) provided sufficient protection for the alleged legitimate expectations of the shipyard owners.

“The principle of legal certainty requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. However, an individual cannot place reliance on there being no legislative amendment whatever, but can only call into question the arrangements for the implementation of such an amendment. Equally, the principle of legal certainty does not require that there be no legislative amendment. Rather, it requires that the legislature take account of the particular situations of traders and provide, where appropriate, adaptations to the application of the new legal rules.”

11. As of the date of writing this paper (November 13, 2009), the ECJ has yet to deliver its judgment on the matter.

(ii) “Plan”

12. The term “plan” is not defined under the Habitats Directive either. The ECJ has ruled in Case C–6/04 *Commission v. United Kingdom* that Article 6(3) applies to land use plans. This is because whereas land use plans do not *per se* authorise development projects (in that a separate grant of planning permission is required), land use plans do have great influence on the (subsequent) decision whether to grant or refuse planning permission. A similar finding was made in Case C–418/04 *Commission v. Ireland (Irish wild birds)*. The ECJ rejected, in terms, an argument advanced on behalf of Ireland to the effect that the carrying out of a strategic environmental assessment in the context of the SEA Directive, and the carrying out of an assessment in the context of the EIA Directive, provided sufficient safeguards at [231].

“Those two directives contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only certain projects and plans. By contrast, under the second sentence of Article 6(3) of the Habitats Directive, a plan or project can be authorised only after the national authorities have ascertained that it will not adversely affect the integrity of the site. Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.”

13. In *Farrell v. Limerick County Council* [2009] I.E.H.C. 274, the High Court accepted that the elected members of a local authority had acted *ultra vires* in seeking to advance amendments to the zoning provisions of a draft local area plan (“LAP”) without proper regard to the requirements of Article 6(3) of the Habitats Directive.

(iii) Not related to conservation management of the site

14. The introductory words of Article 6(3) indicate that plans and projects related to conservation management of the site, either individually or as components of other plans and projects, should generally be excluded from the requirements of the article. However, the Commission guidance document “Managing Natura 2000 sites”¹ indicates at §4.3.3 that a non-conservation component of a plan or project which includes conservation management amongst its objectives may still require assessment.

(iv) Definition of “European site”

15. The protection under national law applies at an earlier stage of the designation process than it does under the Habitats Directive. Under EC law, whereas a Member State is required to take appropriate “protective measures” at the stage of a site being included in a list transmitted to the Commission for possible designation, the full rigor of Article 6(3) and 6(4) only applies once the Commission has adopted a formal decision to designate the site as a SCI. See Case C–177/03 *Società Italiana Dragaggi SpA*, and Case C–244/05 *Bund Naturschutz in Bayern eV*.

¹ Managing Natura 2000 Sites – The provisions of Article 6 of the Habitats Directive 92/43/EEC http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

16. Under national law, conversely, the extensive definition of “European site” (inserted into the EC (Natural Habitats) Regulations, 1997 by s.75 of the Wildlife (Amendment) Act, 2000) means that the obligation to carry out a screening decision occurs at the earlier stage of “notification” of the proposed inclusion of the site in a list to be transmitted to the Commission for the purposes of Reg.4 of the 1997 Regulations.

17. The distinction between the approach of EC law and national law in this regard is illustrated by the facts of *Sweetman v. An Bord Pleanála (Galway outer by-pass)*. The site the subject-matter of the judicial review proceedings lay within the extended Lough Corrib site, which extension had not yet been formally adopted by the Commission as a SCI at the time of An Bord Pleanála’s decision. The local authority sought to argue that Article 6(3) of the Habitats Directive did not therefore apply to the site as of the date of the decision. Mr. Justice Birmingham held that the distinction in this regard was of little or no practical effect at [33].

“However, on closer examination it emerges that the new information is in reality of little or no practical effect. There are two reasons for this. First of all, the decision in Case C–117/03, which makes it clear that protective measure prescribed in Art. 6(2)(3) and (4) were applicable only to sites which have been adopted by the Commission, is absolutely unequivocal in asserting the obligation on Member States to take appropriate protective measures for the purpose of safeguarding the ecological interest of the site, even prior to it being selected by the Commission.

The second reason is that whatever doubts or arguments existed about the position of a portion of the site in European terms, there is absolutely no doubt whatever but that the extended site was certainly a ‘European site’ under national law and in particular under the EC (Natural Habitats) Regulations, 1997 (as amended). As a matter of national law, protection applied from the earlier date of the notification of the proposed inclusion of the extended area on the list to be submitted, that is December, 2006. As will clearly emerge when the details of the domestic and European legislation which it is suggested has been misinterpreted comes to be considered in detail, the protection afforded by domestic law is at least as extensive as that provided for under the Habitats Directive.”

(v) *Likely to have a significant effect*

18. The purpose of the screening exercise is to determine whether it is necessary to carry out what is described as an “appropriate assessment” of the implications for the site of the proposed plan or project. The trigger for the requirement of an “appropriate assessment” is that the plan or project, either individually or in combination with other plans or projects, is “likely to have a significant effect” on the site. The caselaw of the ECJ makes it clear that the trigger for an appropriate assessment is a very light one, and that the *mere probability* or a *risk* that a plan or project might have a significant effect is sufficient to make an “appropriate assessment” mandatory. See Case C-127/02 *Mechanical cockle fishing* at [41] to [43].

“Therefore, the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume – as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled ‘Managing Natura 2000 Sites: The provisions of Article 6 of the “Habitats” Directive (92/43/EEC)’ – that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.

As regards Article 2(1) of Directive 85/337, the text of which, essentially similar to Article 6(3) of the Habitats Directive, provides that ‘Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to an assessment with regard to their effects’, the Court has held that these are projects which are likely to have significant effects on the environment (see to that effect Case C-117/02 *Commission v Portugal* [2004] ECR I-0000, paragraph 85).

It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.”

*Emphasis supplied.

19. It is not necessary that the proposed plan or project impact on the site directly. The Commission advises that a likelihood of significant effects may arise not

only from plans or projects located *within* a designated site, but also from plans or projects located *outside* a projected site.² The example is provided of a wetland which might be damaged by a drainage project located some distance outside the wetland's boundaries.³ See also Case C-98/03 *Commission v. Germany* where the ECJ held that Germany was in breach of its obligations under the Habitats Directive by excluding from assessment certain projects carried outside a designated site.

20. Best practice indicates that a screening decision should be recorded in writing and be available to the public. The Commission advises as follows.⁴

“Determining whether a plan or project is likely to have a significant effect will have practical and legal consequences. Therefore, when a plan or project is proposed, it is important that, firstly, this key issue is considered, and that, secondly, the consideration is capable of standing up to scientific and expert scrutiny.

Proposals that are considered as not likely to have significant effects can be processed without reference to the succeeding steps of Article 6(3) and (4). However, Member States are advised that the reasons for reaching such a conclusion should be justified, and that it is good and prudent practice to record them.”

21. Reference is also made, by analogy, to the very recent caselaw of the ECJ in respect of screening decisions under the EIA Directive. In Case C-75/08 *Mellor* the ECJ emphasised that third parties must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, whether an EIA was or was not necessary. Furthermore third parties must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligations. Thus, whereas there is no *express* obligation that the screening decision must itself contain reasons, the competent authority is obliged to communicate its reasons on request. This communication may take

² *ibid.*, §4.2.

³ *ibid.*, §4.4.2.

⁴ *ibid.*, §4.4.

the form, not only of an express statement of reasons, but also of information and relevant documents.

III. “Appropriate assessment”

22. Article 6(2) imposes a general duty on a Member State to take appropriate steps, *inter alia*, to avoid the deterioration of natural habitats. The interaction between Articles 6(2) and 6(3) has been considered by the ECJ in Case C-127/02 *Mechanical cockle fishing*. The ECJ ruled as follows at [35] and [36].

“The fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2).

Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats 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).”

23. It is arguable that it follows as a corollary of the findings above that authorisation cannot be given under Article 6(3) where a project would give rise to deterioration of a habitat type. This would arguably preclude authorising the destruction or permanent loss of habitat type.
24. In the event that the screening exercise indicates that there is a risk that a plan or project might have a significant effect on a designated site, it is necessary to carry out what is described as an “appropriate assessment”. The Commission has suggested that three steps are required, as follows.⁵ First, it is necessary to identify the conservation objectives of the site and to identify those aspects of the project or plan which are likely to affect those objectives. Secondly, the impact on the designated site should be identified. These are commonly presented as direct and indirect effects; short- and long-term effects;

⁵ Guidance document on the Assessment of Plans and Projects significantly affecting Natura 2000 sites (November 2001) – Methodological guidance on the provisions of Article 6 (3) and (4) of the Habitats Directive 92/43/EEC http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm

construction, operational and decommissioning effect; and isolated, interactive and cumulative effects. Thirdly, once the effects of the project or plan have been identified and predicted, it is necessary to assess whether there will be adverse effects on the integrity of the site as defined by the conservation objectives and status of the site.

25. A potential deficiency in the transposition of this aspect of the Habitats Directive arises from the fact that the principal national implementing regulations, namely the EC (Natural Habitats) Regulations, 1997 to 2005, equate an “appropriate assessment” for the purposes of Article 6(3) of the Habitats Directive with an environmental impact assessment for the purposes of the EIA Directive. See, for example, Reg.27(2) of the EC (Natural Habitats) Regulations, 1997.
26. The legislative approach in this regard fails to recognise critical distinctions between the two forms of assessment. In particular, the Habitats Directive imposes specific obligations on a Member State arising from the outcome of the assessment process. If the assessment indicates that the proposed plan or project is likely to adversely affect the integrity of the site concerned, development consent may only be granted in accordance with the special procedures laid down in Article 6(4). Conversely, the EIA Directive, while intended to ensure that decision-making is better informed, does not mandate any particular action on the part of a Member State depending on the outcome of the assessment. Thus, for example, under the EIA Directive, it is permissible for a national competent authority to grant development consent notwithstanding the fact that the assessment indicates that a project is likely to have significant adverse environmental impacts.
27. This distinction between the objectives of the two forms of assessment has been highlighted by the ECJ in a number of judgments, including, in particular, that in Case C-418/04 *Commission v. Ireland (Irish wild birds)* at [231].

“Those two directives contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only certain projects and plans. By contrast, under the second sentence of Article 6(3) of the Habitats Directive, a plan or project can be authorised only after the national authorities have ascertained that it will not adversely affect the integrity of the site. Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.”

28. The Commission advises that whereas an “appropriate assessment” for the purposes of Article 6(3) may form part of an environmental impact assessment for the purposes of the EIA Directive, the Article 6(3) assessment should be clearly distinguishable and identified within an environmental statement or reported separately.⁶
29. Where an Article 6(3) assessment is carried out in parallel with an environmental impact assessment, this will allow for public participation. In particular, members of the public can make submissions or observations as to the likely impact of the proposed plan or project on the integrity of the site concerned. It should be noted, however, that it is not mandatory under Article 6(3) to engage in public consultation, rather the national competent authorities have a discretion to consult. Thus, if an Article 6(3) assessment is being carried out in isolation, *i.e.* not in parallel with an environmental impact assessment, public consultation will not be mandatory. It should be noted, however, that in most cases a particular project would be subject to both the Habitats Directive and the EIA Directive given that the requirement for an environmental impact assessment is triggered in sensitive locations which, by definition, extend to European sites.

(i) **“Adversely affects the integrity of the site concerned”**

30. The correct interpretation of the phrase “adversely affects the integrity of the site concerned” is currently the subject of an appeal to the Supreme Court in *Sweetman v. An Bord Pleanála*. The case concerns a development consent

⁶ Methodological Guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC Section 2.4

granted by An Bord Pleanála, pursuant to the Roads Acts, for the proposed Galway outer by-pass. The board's decision and the inspectors' report are available at www.pleanala.ie (An Bord Pleanála Ref. PL07.ER2056/CH2305).

31. The proposed road project will involve the loss of an area of approximately 1.47 hectares of Annex I priority habitat type. An Bord Pleanála's inspector's report states that it was accepted in the EIS that direct habitat loss comprises a permanent impact resulting in a "severe negative" impact being ascribed (inspector's report p.137 of 191). An Bord Pleanála in its formal decision indicated that while having a "localised severe impact" on the Lough Corrib candidate Special Area of Conservation, the proposed road would not adversely affect the integrity of the candidate SAC.

32. The principal issue in the judicial review proceedings is as to whether An Bord Pleanála, having found that the proposed project would have a severe impact (albeit described as a "localised" one) could nevertheless conclude that the proposed project would not adversely affect the integrity of the site. An Bord Pleanála's approach seems to have involved measuring the permanent loss of part of the habitat type against the balance of the site. The applicant for judicial review, Peter Sweetman, supported by the State respondents, argued that the concept of "integrity" was not intended to allow such a *de minimis* approach. The fact that the balance of the site might continue to function in its own right could not take away from the fact that there was a permanent loss of the very habitat type for which the site had been designated in the first instance.

33. The judgment of the High Court (unreported, October 9, 2009) emphasised the distinction drawn under the first sentence of Article 6(3) between (i) a likely significant impact and (ii) an impact which adversely affects the integrity of the site concerned. The High Court accepted An Bord Pleanála's argument that there is a legal distinction between the two concepts, and that something more than a severe localised impact is required before an impact could be said to cross the threshold between (i) and (ii) above. Mr. Justice Birmingham, having stated that he was unaware of any specific or unequivocal statement

that a significant effect on the site equates to an effect on the integrity of the site went on to say as follows at [84] to [86].

“I have commented and it is indeed the case that I would be very anxious to give effect to the intentions of the framers of the Directive. However, there is a point at which interpretation ends and legislation begins. From his perspective, it is very natural and understandable that Mr. Sweetman would wish to see the concept of significant impact and the effect on the integrity of the site equated. Unfortunately, from his point of view, the framers of the Directive have chosen to use language that does not do that.

Not having used such language, it is not at all clear to me that such was indeed their intention. On the contrary it seems to me that there are a number of indications present that they had sought to achieve not an absolutist position but one that was more subtle and more graduated and in the process, one that more truly reflected the principles of proportionality. Article 6(3) of the Directive refers to the authorities agreeing to the plan or project where, if appropriate the opinion of the general public has been obtained. If, once an appropriate assessment had established that there would be a significant effect on the site, then this inevitably must lead to the conclusion that the proposal affects the integrity of the site, and so the project could not be permitted to proceed without resort to an alternative procedure, what was there to consult the public about?

The language of the Directive makes clear that regard is to be had to economic, social, cultural and regional requirements. If that is to be done effectively and if at the same time the objectives of preservation, protection and improvement of the quality of the environment is to be achieved, a step by step approach or to use the language of the Commission document, a ‘step-wise’ approach is called for.”

(ii) *Reasons for Article 6(3) decision*

34. The Commission advises that the decision on an Article 6(3) appropriate assessment should be recorded and reasoned.⁷

“In the first place, an assessment should be recorded. A corollary of the argument that the assessment should be

⁷ Managing Natura 2000 Sites – The provisions of Article 6 of the Habitats Directive 92/43/EEC at §4.5.1.

recorded is the argument that it should be reasoned. Article 6(3) and (4) requires decision-makers to take decisions in the light of particular information relating to the environment. If the record of the assessment does not disclose the reasoned basis for the subsequent decision (*i.e.* if the record is a simple unreasoned positive or negative view of a plan or project) the assessment does not fulfil its purpose and cannot be considered ‘appropriate’.”

35. There is no express obligation under the EC (Natural Habitats) Regulations, 1997 to 2005 to state reasons. However, such an obligation is probably implicit in Article 6(3) on the grounds identified by the Commission in the passage cited above. Moreover, in many instances the Article 6(3) appropriate assessment will be carried out in conjunction with an environmental impact assessment for the purposes of the EIA Directive. There is an express obligation under Article 9 of the EIA Directive to state the main reasons and considerations for a decision.

36. The question of the adequacy of reasons was considered in detail by the High Court in *Sweetman v. An Bord Pleanála (Galway outer by-pass)*. The High Court rejected an argument that the reasons and considerations must be stated in the formal decision of the board itself, and that it would not be permissible to have regard to the inspector’s report in order to supplement those reasons. Mr. Justice Birmingham held that there was no statutory duty to state reasons in the body of the decision or as part of the notification of the determination. The judge went on to indicate that, in any event, he was satisfied that the decision of the board, in its own terms, provided sufficient reasons.

“Overall I am quite satisfied that the decision of the Board, even without recourse to the inspector’s report, clearly and succinctly addresses the major issue in the case and leaves no room for doubt as to how and why the Board came to the decision that it did. Indeed, the decision of the Board even without amplification is more comprehensive and precise than the language used in other cases to which I have referred and which passed muster with both the Supreme Court and High Court. For those seeking further elaboration, it seem to me entirely legitimate to have regard to the contents of the inspector’s report given that the agreement of the Board with the inspector’s approach was expressly recorded in its decision. In relation to its contents, while both the State respondent and

the applicant engaged in a fine-combing exercise and as a result have been in a position to formulate certain criticisms, overall it is an admirable document. In the course of his judgment in the Supreme Court in *Ní Éilí* Murphy J. referred to the fact that the hearing officer had performed his task with extraordinary clarity and cohesion and that he fully deserved the compliment that had been paid to him by the Environmental Protection Agency at one of its meeting. It seems to me that this is a language that could very easily be adopted in relation to the work undertaken by Mr. Walsh, the inspector in the present case.”

37. The position in relation to reasons has to be read in light of the judgment of the European Court of Justice in *Mellor*: see paragraph 21 above.

IV. Article 6(4)

38. In the event that an appropriate assessment under Article 6(3) is negative, and concludes that the proposed plan or project would adversely affect the integrity of the site concerned, development consent may only be granted if the procedure laid down in Article 6(4) of the Habitats Directive is followed.
39. Article 6(4) provides as follows.

“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.”

40. Most of the discussion which follows is based on the guidance document on Article 6(4) of the Habitats Directive issued by the Commission in January, 2007.⁸ All citations below are to the sections of that guidance document.

(i) Alternative solutions

41. The first matter to be addressed is the consideration of “alternative solutions”. The Commission advises as follows at §1.3.1.

“In line with the need to prevent undesired impairment of the Natura 2000 network, the thorough revision and/or withdrawal of a proposed plan or project should be considered when significant negative effects on the integrity of a site have been identified. This should be observed especially in the case of effects on priority habitats and/or species protected under the Habitats Directive or globally endangered bird species listed in Annex I of the Birds Directive. The competent authorities have to analyse and demonstrate first the need of the plan or project concerned. Thus, the zero option should be considered at this stage.”

42. The Commission goes on to advise that all feasible alternatives should be analysed. These could involve alternative locations or routes, different scales or designs of development, or alternative processes. The analysis should examine the relative performance of the different alternatives with regard to the conservation objectives of the designated site, and the site’s integrity and its contribution to the overall coherence of the Natura 2000 network. The Commission points out that the various alternatives should normally already have been identified as part of the Article 6(3) appropriate assessment.

(ii) “Imperative reasons of overriding public interest”

43. In the absence of suitable alternative solutions, it will then be necessary to examine whether there are “imperative reasons of overriding public interest” which justify the carrying out of the plan or project in question. The Commission guidance states as follows at §1.3.2.

“The concept of ‘imperative reasons of overriding public interest’ is not defined in the Directive. However, Article 6(4) second sub-paragraph mentions human health, public safety

⁸ http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

and beneficial consequences of primary importance for the environment as examples of such imperative reasons of overriding public interest. As regards the ‘other imperative reasons of overriding public interest’ of social or economic nature, it is clear from the wording that only public interests, irrespective of whether they are promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects developed by private bodies can only be considered where such public interests are served and demonstrated. The Commission has also advised that it seems reasonable to assume that the public interest can only be overriding if it is a long term interest; short term economic interests or other interest which would only yield short-term benefits for society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Habitats Directive.”

(iii) Compensatory measures

44. The Commission advises that the aim of compensatory measures is to offset the negative impact of a project, and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned. The compensatory measures constitute, in the Commission’s view, the “last resort”. They are used only when the other safeguards provided for by the Directive are ineffectual, and a decision has been made to authorise a plan or project having a negative effect on the Natura 2000 site.
45. The Commission suggests that locating compensation with or nearby the designated site concerned in a location showing suitable conditions for the measures to be successful will often be the preferred option. The timing of the compensatory measures should be such so as to ensure a tight coordination between the implementation of the plan or project and the implementation of the measures, and relies on issues such as the time required for habitats to develop and/or for species populations to recover or establish in a given area.
46. In accordance with the “polluter pays” principle, the promoter of a project should ordinarily bear the cost of compensatory measures. A subsidy granted by a public authority in respect of compensatory measure might be considered State aid within the meaning of Article 87 EC.

(iv) *Priority habitats and/or species*

47. More stringent requirements apply in circumstances where the proposed plan or project concerns a site hosting priority habitats and/or species, and is likely to affect these priority habitats and/or species. In particular, the circumstances which may be invoked as “imperative reasons of overriding public interest” are normally limited to human health and public safety and overriding beneficial consequences for the environment. Other circumstances can only be considered where the Commission expresses an opinion on the initiative envisaged. This involves the additional procedural safeguard of an independent appraisal by the Commission. The Commission advises as follows at §1.8.3.

“From its nature, the opinion is not an act having binding legal effects. The national authorities can move away from it and decide to implement the plan or project, even if the opinion is adverse. In the latter case however, one can reasonably expect that the decision will address the Commission’s arguments and explain why its opinion has not been followed. In any case the Commission can assess whether the implementation of the plan or project is in conformity with the requirements of Community Law and, if necessary, initiate the appropriate legal action. While the Directive does not include any specific deadline regarding the adoption of the Commission’s opinion, Commission services will make all necessary efforts to carry out the assessments and to draw the appropriate conclusions as speedily as possible.”

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