

The IPI Autumn Planning Conference

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ENVIRONMENTAL IMPACT ASSESSMENT, APPROPRIATE ASSESSMENT AND STRATEGIC ENVIRONMENTAL ASSESSMENT – AN OVERVIEW

1. As a practitioner in the area of planning and environmental law the increasing importance of Environmental Impact Assessment (EIA), Appropriate Assessment (AA) and Strategic Environmental Assessment (SEA) should not be underestimated.
2. **Environmental Impact Assessment (EIA) Directive and its implementation in Ireland**
 - 2.1 EU Directive 85/337/EEC (Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment) as amended by Directives 97/11, 2003/35 and 2009/31 is commonly known as the EIA Directive. This requires a process of assessment of environmental impacts for all projects listed in the Directive which are likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location. The types of developments or projects to be included within the assessment obligation were originally set out under two separate annexes - Annex 1 classes of development automatically require Environmental Impact Assessment whereas Annex 2 developments and projects only require EIA to be carried out if certain thresholds are met.
 - 2.2 In addition, provision is made for sub-threshold development where although not meeting or exceeding the thresholds set out in Annex 2, a development could still be likely to have significant effects on the environment. The method of assessing those effects for the purposes of deciding whether or not sub-threshold development does in fact create a significant effect on the environment are set out in Annex 3 to the Directive inserted by the 1997 amending Directive.
 - 2.3 The Irish government decided to implement EIA (and AA) through the framework of our pre-existing planning process. That decision has led to some debate as to whether or not we have appropriately provided for EIA to be implemented in Ireland in the context of all projects which require to be permitted or licensed to proceed. In any event, the EIA Directive is currently enacted through our Planning and Development Acts 2000 to 2011 specifically part X of the Acts and Part X and Schedules 5, 6 and 7 of the Planning and Development Regulations 2001 to 2011. Schedules 5 and 6 set out types of development which automatically or, subject to threshold, require EIA to be carried out. Schedule 7 sets out the criteria for determining whether a development would or not be likely to have significant effects on the environment which is the acid test for EIA and in practice is used as guidance for consent authorities in Ireland in assessing sub-threshold development. The Department of the Environment Guidelines notes that consent authorities must have regard to the criteria set out in Schedule 7 in forming an opinion as to whether or not a sub-threshold is likely to have significant effects on the environment.
 - 2.4 Practitioners will therefore need to be aware not only of what is considered to automatically require EIA, and the thresholds which automatically apply, but also must consider development which but for meeting the threshold might still due to the specific circumstances surrounding its proposed development, trigger EIA, having being reviewed and considered a sub-threshold development. It is also essential for practitioners to ensure that when a local authority considers this issue in respect of any proposed development, that it makes a decision and notes the fact of making that

decision on its file for the record. The criteria set out in Schedule 7 concern the characteristics of the proposed development, the location of the proposed development and the characteristics of potential impacts of that development on the environment. It is necessary for there to be a finding that there will not be any significant effects on the environment, having considered all of the above for a decision to be taken that a sub-threshold development does not require EIA.

2.5 In order to achieve this outcome it is not unusual for a series of reports to be furnished on matters for example such as hydrology, ecology and natura impacts. The issue is possibly one of the most hotly contested matters from the point of view of objectors to developments and has resulted in a large amount of case law. The case law can be divided between those cases where individual developments are being objected to by way of judicial review in the High Court, and those cases where Ireland is found to be in breach of its obligations to implement or fully implement the EIA Directive in the context of specific examples provided to the European Commission by way of complaint.

3. Direct Effect of EIA Directive

3.1 A recent High Court judgment in *Lackagh Quarries Ltd v. Galway City Council*¹, declined to give “direct effect” to the EIA Directive despite the fact that the Court of Justice has ruled in a series of cases that the relevant provisions of the EIA Directive are directly applicable. The leading case is that of Case C-72/95 *Kraaijeveld*.

3.2 The Lackagh Quarries case involved a challenge by a quarry operator to the refusal of an extension of the life of a planning permission. There had been an important change in planning policy since the original planning permission had been granted, in that the boundaries of the Lough Corrib candidate Special Area of Conservation (“cSAC”) had been amended, with the result that the amended site now adjoined the quarry. The planning authority sought to rely on this change in refusing to extend the life of the planning permission.

3.3 The parties in this case agreed that the EIA Directive did not have direct effect. In light of this concession, the High Court appears to have confined its consideration to whether the national implementing legislation imposed an obligation to carry out an EIA in the context of an application for an extension of the life of a permission. The position under national law, following amendments introduced under the Planning and Development (Amendment) Act 2010, is that there is no *express* requirement to address EIA issues in the context of an application to extend the life of a permission where the application is grounded on “substantial works” having been carried out. If, however, the application for an extension is based on the alternative ground introduced under the 2010 Act, namely the one based on considerations of a commercial, economic, or technical nature beyond the control of the applicant, then the planning authority must be satisfied, *inter alia*, that an EIA or an AA for the purposes of the Habitats Directive were carried out (if required) before the (original) permission was granted. It is important to note that this restriction only applies where the development has not yet been commenced.

3.4 As a matter of national law, therefore, there was no obligation to consider EIA or Habitats Directive issues in the circumstances arising in *Lackagh Quarries Ltd*, i.e. an extension of time based on “substantial works” having been carried out.

¹ Unreported, High Court, Irvine J., December 21, 2010.

- 3.5 Arising from a consideration of this case it should be noted that the Court of Justice has ruled that the definition of “development consent” under the EIA Directive is a European law concept, and must be given an autonomous and uniform interpretation throughout the Union.² A Member State does not enjoy any discretion in this regard, and thus even if one approached the matter from first principles, without reliance on the previous case law of the Court of Justice, it has been strongly argued by commentators including Garrett Simons S.C. there is no convincing basis for saying that the case had to be decided solely by reference to the national legislation, without any need to refer to the Directive itself.³

4. **EU Commission refers Ireland back to the ECJ:**

- 4.1 In late November, the EU Commission announced it was closing a case it had taken against Ireland for breach of Article 10(a) of the EIA Directive. The case (Case 4-270/07) being closed concerns a ruling of the European Court of Justice of July 16, 2009 in which the court found that Ireland had failed to transpose into national law Article 10(a) which introduced changes to the Environmental Impact Assessment Directive,⁴ including provisions on public participation in the decision-making process and access to justice. Amongst other matters, the ECJ decision related to lack of transposition and in particular, a requirement that information on review procedures should be made available to the public and that access to the Irish courts should not be prohibitively expensive for citizens and NGOs. The court held that the discretionary practice whereby an Irish court may order an unsuccessful party to pay costs was insufficiently certain to constitute transposition of Article 10(a) of the EIA Directive.
- 4.2 Since the judgment, Section 50B of the Planning and Development (Amendment) Act 2010 was enacted. It provides for new rules as to costs in judicial review proceedings to which Article 10(a) applies, whereby each party was responsible for payment of their own costs and an unsuccessful environmental litigant was generally not required to pay the costs of the other side.
- 4.3 The changes brought about by Section 50b are sufficiently important in terms of costs that I have set out the text **as recently amended** in full below:

“(1) This section applies to proceedings of the following kinds:

(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of—

(i) any decision or purported decision made or purportedly made,

(ii) any action taken or purportedly taken, or

(iii) any failure to take any action, pursuant to a law of the State that gives effect to—

(I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public

² See Case C-287/98 *Linster* [2000] E.C.R. I-6917 at [43]; Case C-201/02 *Wells* [2004] E.C.R. I-723 at [37]; and Case C-290/03 *R. (Barker) v London Borough of Bromley* [2006] E.C.R. I-3949 at [40].

³ Garrett Simons EIA Directive and Direct Effect (2011) 18(2) IEPLJ67

⁴ Directive 85/337

participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies (EIA Directive),

(II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive), or

(III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies (IPPC Directive); or

(b) an appeal (including an appeal by way of case stated) to the Supreme Court from a decision of the High Court in a proceeding referred to in paragraph (a);

(c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b).

“(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.”

“(2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.””

(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.

(4) Subsection (2) does not affect the Court’s entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

(5) In this section a reference to ‘the Court’ shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the Supreme Court, as may be appropriate.”

4.4 The Commission considered that the enactment of Section 50B addressed the issues in Case 4-270/07 and therefore closed that case. Section 21 of the Environment (Miscellaneous Provisions) Act 2011 has been enacted, and commenced on 23 August 2011. Section 21(a) inserts minor textual amendments to Section 50B(2) to include reference to the newly inserted Section 50B(2A). Section 21(b) inserts a new subsection (2A) which provides (as above) that the costs of proceedings (or an appropriate portion of those costs as determined by a Court) may be awarded to a successful applicant and borne by the respondent or notice party to the extent that their acts or omissions contributed to the applicant obtaining relief. In short, a no-win position on legal costs for a developer, and less risk for an objector than was contained in the first iteration of this provision.

5. Case C-50/09:

5.1 The ECJ has ruled that Irish law transposing the EIA Directive is inadequate and in breach of the EIA Directive.⁵ The court held that the provisions of Irish domestic legislation which purported to transpose the EIA Directive, namely the Planning and Development Act 2000 (as amended) (“PDA 2000”) and the Environmental Protection Agency Act 1992 (as amended) (“EPA Act 1992”) and the Regulations made thereunder did not fully or effectively transpose the EIA Directive in three key respects.

5.2 First, the court noted that Section 173 of the PDA 2000 and the associated provisions of the Planning and Development Regulations 2001 (as amended) prescribed the contents of an EIS to be submitted by a developer and the requirement on the competent authority to ensure this information provided by the developer is correct and meets the statutory requirements. However, the court considered that this obligation did not comply with the wider requirements of Article 3 of the EIA Directive that the competent authority *itself* is to carry out an EIA in light of the factors set out in that provision.

5.3 Second, the court found the existing legislative procedures (notably Section 98 of the EPA Act 1992) governing the approval of development where several authorities were involved with the decision to approve a development were in breach of the EIA directive. This could arise in circumstances where the EPA could alone decide to issue a waste or IPPC licence prior to a grant of planning permission without an EIA having been conducted. The court noted:

“Ireland has neither established, nor even alleged, that it is legally impossible for a developer to obtain a decision from the Agency [EPA] where he has not applied to the planning authority for permission.”⁶

5.4 The court rejected an argument by Ireland that this “gap” in the legislation was filled by Section 256 of the PDA 2000 which enables a planning authority to refuse an application for planning permission on “environmental grounds”. The ECJ went on to state:

“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. Nonetheless, 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

⁵ Decision of the First Chamber of March 3, 2011.

⁶ At para.79 of the judgment.

alone decide, without an environmental impact assessment complying with Articles 2 to 4 of Directive 85/ 337, on a project as regards pollution aspects.”

- 5.5 The final ground upon which the ECJ held Ireland had failed to comply with the EIA Directive was the general exclusion of demolition works from the requirement to be subject to an EIA and in particular, the provisions of the National Monuments Act 1930 which did not require that the demolition of a National Monument necessitated an EIA. However, this position has since changed with the introduction of Section 5 of the Planning and Development (Amendment) (No. 2) Regulations, 2011 (S.I. No. 454/2011) (the “**2011 Regulations**”), which inserts a new Article 9 (1)(a)(vii) into the Planning and Development Regulations, 2001 (S.I. No. 600/2001) (the “**2001 Regulations**”), as follows:

“Article 9 of the Regulations is amended by the substitution of the following sub-paragraphs for sub-paragraph (1)(a)(vii):

(9(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act— (a) if the carrying out of such development would—)

“(vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation, conservation or protection of which is an objective of a development plan or local area plan for the area in which the development is proposed or, pending the variation of a development plan or local area plan, or the making of a new development plan or local area plan, in the draft variation of the development plan or the local area plan or the draft development plan or draft local area plan,

(viiA) consist of or comprise the excavation, alteration or demolition of any archaeological monument included in the Record of Monuments and Places, pursuant to section 12 (1) of the National Monuments (Amendment) Act 1994 , save that this provision shall not apply to any excavation or any works, pursuant to and in accordance with a consent granted under section 14 or a licence granted under section 26 of the National Monuments Act 1930 (No. 2 of 1930) as amended,

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,

(viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000 .”

- 5.6 Section 19 of the 2011 Regulations also amends Schedule 5, Part 2 (Development for the Purposes of Part 10 (Part 10 being Environmental Impact Assessment)) of the 2001 Regulations by the insertion of the following new sections 14 and 15:

“14. Works of Demolition - Works of demolition carried out in order to facilitate a project listed in Part 1 or Part 2 of this Schedule where such

works would be likely to have significant effects on the environment, having regard to the criteria set out in Schedule 7.

15. Any project listed in this Part which does not exceed a quantity, area or other limit specified in this Part in respect of the relevant class of development but which would be likely to have significant effects on the environment, having regard to the criteria set out in Schedule 7.” ”

5.7 Accordingly, Schedule 5, Part 2 of the 2001 Regulations, now includes “works of demolition” in the list of developments for the purposes of Part 10 of the 2001 Regulations. This means that demolition works carried out by a local authority are now subject to the EIS procedure, as set out in section 175 of the Planning and Development Act 2000 (as amended).

5.8 The 2011 Regulations came into effect at the date of signature, which was 6 September 2011.

6. **Appropriate Assessment**

6.1 Appropriate Assessment is required to be carried out under the Habitats Directive⁷ and specifically Article 6(3) thereof for plans or project likely to have significant effects on Natura 2000 sites. It is most recently implemented under the European Communities (Birds and Natural Habitats) Regulations 2011.⁸ Appropriate Assessment is required to be carried out for development on or adjacent to sites classified by the Minister pursuant to the regulations as special areas of conservations (SACs) or special protection areas (SPAs). Specifically Article 42(1) of the 2011 Regulations requires public authorities to screen for Appropriate Assessment a plan or project, which is not directly connected with or necessary to the management of the site as a European Site⁹, in view of best scientific knowledge and the conservation objectives of the site, to assess the plan or project not only individually but also in combination with other plans or projects likely to have a significant effect on the European site.

6.2 An Bord Pleanála or the Planning Authority at first instance, can only authorise the development if it is satisfied that there is no reasonable scientific doubt as to the absence of effects which would adversely affect the integrity of an area of special protection, in light of the site’s conservation objectives. This is an extraordinarily high threshold to have to overcome in order to be entitled to develop. In order to reach this view, it has to be established that a proposed development will not disrupt those factors that maintain a favourable condition, or will not interfere in any significant way with any of the species referred to as “qualifying interests” or “special conservation interests”.

6.3 To many of us working in this area, it almost seems to be an oxymoron to characterise a test standard only being achieved where there can be no reasonable

⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

⁸ [S.I. 477 of 2011] operative since 21st September 2011

⁹ The latest definition of European Site is provided under Regulation 56 (15) of the European Communities (Birds and Natural Habitats) Regulations 2011 which amends Regulation 2 of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 substituting the following definition for the definition of “European Site”-

European Site” means-

(a) a candidate site of Community importance, (b) a site of Community importance, (c) a candidate special area of conservation, (d) a special area of conservation, (e) a candidate special protection area, or (f) a special protection area”.

scientific doubt. Scientists rarely if ever will agree that there is absolutely no doubt over any given matter, and each scientist's doubt will no doubt be considered reasonable in that scientist's mind. What is or is not a reasonable scientific doubt therefore is extremely arguable. Nonetheless the one area where we do not have doubt is that our law does protect habitats, whether or not a site has been finally or only provisionally designated.

- 6.4 There are also inherent conflicts between the various tests to be applied in the same situation. For instance, the Birds Directive arguably applies even stricter tests. The Birds Directive provides at Article 4(4) that "*Member States shall take appropriate steps to avoid pollution or deterioration or any disturbances affecting the birds insofar as these would be significant having regards to the objectives of this Article.*" The objectives of the Article, in summary are the protection of the habitat of specified bird species "*in order to ensure their survival and reproduction in their area of distribution.*" In addition, Member States are required to "*pay particular protection to the protection of wetlands and particularly to wetlands of international importance.*" This is a strict test insofar as no derogations are allowed. Contrast that with Article 6(4) of the Habitats Directive which does allow for development in the event of a significant impact under certain specific extreme conditions.

6.5 **Article 6(4) Habitats Directive**

Article 6(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."

- 6.6 An example of how Appropriate Assessment can stop a development can be found in the decision of An Bord Pleanála Ref. No. 29N.PA007 dated the 4th of June 2010 which was a decision to refuse to permission under Section 37G of the Planning and Development Act 2000 as amended which was to develop additional port facilities with access to deep water berths at the north eastern part of Dublin Port.
- 6.7 The proposed development was refused on the following basis:

“REASONS AND CONSIDERATIONS

The proposed development is partly within the South Dublin Bay River Tolka Estuary proposed Special Protection Area (pSPA), designated under the Birds Directive. On the basis of the submissions made in relation to the proposed development, it is considered that

(a) *the significance of the permanent loss of wetland habitat from the pSPA arising from the proposed development has not been clearly or adequately established,*

(b) *the full extent of long-term changes to the morphology, sediment regime and consequent impacts on the benthic food resource within the Tolka Estuary as a result of the hydrodynamic changes generated by the proposed development has not been adequately established,*

(c) *the significance of the development site for use by bird species that are qualifying interests for the pSPA has not been clearly established, and*

(d) *the significance of the permanent loss of the benthic food resource as a result of the proposed development has not been adequately established.*

Accordingly, the Board is not satisfied that the proposed development would not adversely affect the integrity of the South Dublin Bay and River Tolka Estuary pSPA and is not satisfied that it would not adversely affect the natural heritage of Dublin Bay, contrary to the proper planning and sustainable development of the area.”

7. **Introduction to Strategic Environmental Assessment (“SEA”)**

The SEA Directive¹⁰ integrates environmental considerations into the preparation and adoption of plans and programmes, with a view to promoting sustainable development and a high level of protection of the environment. It requires an environmental assessment of certain plans and programmes which are likely to have significant effects on the environment, prior to their adoption.

The relevant Irish implementing regulations are the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 to 2011 (S.I. 435 of 2004 and S.I. 200 of 2011) (“SEA Regulations”).¹¹

What is an environmental assessment/SEA?

7.1 Strategic environmental assessment involves Local, Regional and National Authorities in the:

- (i) preparation of an environmental report (the “SEA ER”),
- (ii) carrying out of public and stakeholder consultation,
- (iii) taking into account of the SEA ER and the results of the consultation in decision-making, and
- (iv) publication of information on the decision.

The SEA ER must be prepared by the relevant Authority or plan or programme maker during the preparation of the plan or programme. It must identify, describe and evaluate the likely significant effects on the environment and the reasonable

¹⁰ Directive 2001/42/EC.

¹¹ Ireland has also implemented the SEA Directive through provisions in the Planning and Development (Strategic Environmental Impact Assessment) Regulations 2004 (SI 436 of 2004, the “PD Regulations”).

alternatives. It should also contain the information specified in Schedule 2 of the SEA Regulations and take account of any submission or observation received during the initial scoping process. It should be of sufficient quality to meet the requirements of the SEA Regulations.

When is SEA required?

7.2 SEA is required for all plans or programmes¹² which are prepared for certain sectors (e.g. energy, agriculture) which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directives.¹³ Projects likely to have a significant effect on a site protected by the Habitats Directive¹⁴ or the Birds Directive¹⁵ (“Natura 2000” sites), or which set the framework for future development consent of projects which are likely to have significant effects on the environment are also subject to SEA.

SEA compared to environmental impact assessment (“EIA”)

7.3 The SEA and EIA processes are similar. The key distinction between EIA and SEA is the subject matter of the environmental assessment:

- (i) SEA focuses on the assessment by authorities of plans and programmes, whereas
- (ii) EIA focuses on individual projects and requires the submission of an EIS by the developer.

SEA compared to Appropriate Assessment (“AA”)

7.4 AA is required under the Habitats Directive for plans or projects likely to have significant effects on Natura 2000 sites. The key distinctions between SEA and AA are that:

- (i) AA is required for plans, programmes and projects;
- (ii) AA prescribes an outcome that can prohibit the grant of consent for a project/making of a plan or programme (SEA/EIA does not, it is merely a process).

The information required to conduct an AA can be contained in the SEA ER.

7.5 The most recent Regulations which came into effect on 3rd May 2011¹⁶ amend the 2004 Regulations by:

¹² Defined by Reg. 2 of the SEA Regulations to be plans and programmes which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government. The plan or programme must be required by legislative, regulatory or administrative provisions.

¹³ Directives 85/337/EEC, 97/11/EC, 2003/35/EC and 2009/31/EC (the “EIA Directives”). Annexes I and II would, for example, bring a plan or programme which sets the framework for the development consent of a wind farm with more than five turbines or having a total output greater than five megawatts within the scope of the SEA Directive.

¹⁴ Council Directive 92/43/EEC.

¹⁵ Directive 2009/147/EC (this is the codified version of Directive 79/409/EEC as amended).

¹⁶ European Communities (Environmental Assessment of Certain Plans and Programmes (Amendment) Regulations, 2011 [S.I. No. 200 of 2011]

- (a) including "town and country planning land use" within the definition of "plans or programmes".
- (b) expanding the Minister's role as a designated environmental authority for the purposes of SEA and including the Minister for Arts, Heritage and Gaelteacht Affairs in light of the transfer of responsibilities for archaeological, architectural and natural heritage under the remit of that Department, and
- (c) making plans, reports and decisions more accessible to the public.

8. Recent case law on SEA

8.1 Northern Ireland

The draft Northern Area Plan 2016¹⁷ was published in 2005 and the draft Magherafelt Area Plan 2015 was published in 2004 (the "Plans"). The Plans and the Environmental Assessment of Plans and Programmes Regulations (NI) 2004 (the "NI Regulations"), which purport to transpose the SEA Directive, have been the subject of judicial review.

In *Re Seaport Investments Ltd*¹⁸ the NI High Court found that the NI Regulations had improperly transposed the SEA Directive on two counts. The NI Regulations provide that the Department of the Environment (the "DoE") is the environmental consultation body in respect of plans or programmes, except when the DoE itself is the responsible authority as regards a particular plan or programme.¹⁹ There is no provision for another body to step in, therefore the court held that the NI Regulations failed to correctly transpose the SEA Directive. The second instance of non-transposition related to the omission in the NI Regulations to provide time limits for the referral to consultation and for receipt of responses in relation to plans or programmes and the associated SEA ER.²⁰

Despite this, Weatherup J refused to quash the provisions in default. It was decided that to quash the provisions would remove those aspects of the SEA Directive which had been transposed, without addressing the omissions in the NI Regulations. Weatherup J decided instead to make declarations to remedy the omissions in the NI Regulations. These transposition issues do not arise with the SEA Regulations.

In addition, the draft Plans themselves were held to be in breach of the NI Regulations. The SEA ERs were not in substantial compliance with the requirements of Schedule 2 of the NI Regulations. In particular the North Area Plan SEA ER failed to fully address the requirement to set out:

- (i) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

¹⁷ Ballymoney Borough, Coleraine Borough, Limavady Borough, and Moyle District Council Areas.

¹⁸ [2007] NIQB 103 and [2007] NIQB 62.

¹⁹ Reg. 4 of the NI Regulations.

²⁰ Article 6.2 of the SEA Directive concerns the need for the authorities and the public to be given an "early and effective opportunity" to be afforded "within appropriate timeframes" to express their opinion on the draft plans or programmes. The Commission guidance on Article 6.2 states that the timeframe needs to be laid down in legislation. See Reg. 13 of the SEA Regulations by comparison.

- (ii) the environmental characteristics of areas likely to be significantly affected;
- (iii) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as Natura 2000 sites;
- (iv) the likely significant effects on the environment, including short, medium and long-term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects on certain issues; and
- (v) an outline of the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken.²¹

The non-technical summaries of the SEA ERs were also found to be inadequate.²² Similar comments were made in relation to the Magherafelt Area Plan. In addition, it was found that the draft North Area Plan had reached an advanced stage of development before the preparation of the SEA ER, rather than being developed in parallel with it and being informed by it.²³ The Magherafelt Area Plan had issued a full year before a SEA ER.

Weatherup J again decided not to quash the Plans, reserving the position until the second judicial review (outlined below) had been resolved. A declaration was made that the Plans were not in compliance with the NI Regulations.

The decision of Weatherup J demonstrates that the requirements of SEA are onerous.²⁴ This decision, as it relates to non-transposition, was appealed by the DoE. The NI Court of Appeal has yet to give judgment.

Reg. 6.2 of the NI Regulations provides that SEA of a particular plan is not required if the responsible authority decides that such assessment is not feasible and informs the public of its decision. After the High Court judgment, the DoE issued a determination of non-feasibility in respect of the Plans. This derogation is available where the first formal preparatory act is before 21 July 2004 and the plan or programme has not been adopted or submitted to the legislative procedure for adoption before 22 July 2006.

The DoE have now requested that the draft North Area Plan be the subject of an Independent Examination before the Planning Appeals Commission. The Magherafelt Plan has been the subject of Independent Examination.

The legal proceedings have also led to delays in the adoption of other plans, such as the Armagh Area Plan 2018 and the West Tyrone Area Plan 2019.

8.2 **England**

In *St. Albans City and DC v Secretary of State for Communities and Local Government*²⁵ the English High Court quashed planning policies contained in the East

²¹ The requirements of paras 2, 3, 4, 6, 8 of Schedule 2 of the NI Regulations.

²² Para. 10, Schedule 2 of the NI Regulations.

²³ This was held to be in breach of the scheme of Art. 4 and 6 of the SEA Directive and Reg. 11 and 12 of the NI Regulations, which clearly envisaged the SEA ER and the plan or programme being developed in parallel.

²⁴ Thornton, "Case Comment: strategic environmental assessment", *J. Env. L.* 318.

of England plans as contrary to the SEA Directive. No reasonable alternatives to development that might affect the green belt in certain towns had been identified or examined in the SEA ERs, or therefore, considered before the plan was made.

The UK Government had to accept another negative judgment in a similar challenge to policies in the South East Plan by various local authorities and the Campaign to Protect Rural England. In August 2009, the Secretary of State conceded that insufficient consideration had been given to alternatives to the proposed urban extension in the certain green belts. The Secretary of State issued a Consent Order in April of this year to remove certain aspects of the South East Plan in response to the action. The UK Government also withdrew the emergent South West Regional Spatial Strategy for further consideration as a result of these cases.²⁶

8.3 **Ireland**

In Ireland there has been no relevant reported case law for current purposes.

8.4 **Conclusions from the case law**

It is vital that the contents of any SEA ER are in compliance with the requirements of the SEA Directive and implementing provisions. It is also crucial that consideration is given to reasonable alternatives, and that the draft plans or programmes are developed alongside the SEA ER.

In the *Seaport Investments* case, as well as in *St. Albans*, the courts have adopted principles enunciated in the context of EIA.²⁷ This means that failure to adhere to the requirements of the SEA Directive will most likely lead to plans or programmes being quashed.

9. **The EPA SEA Review 2011**

- 9.1 Finally, a review of the efficacy of SEA is being undertaken by the EPA, following the publication of their initial report entitled: SEA Methodologies for Plans and Programmes in Ireland in 2003. Their updated report is awaited.

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²⁵ [2010] JPL 70; [2009] EWHC 1280 (Admin).

²⁶ N.B. In May 2010 the Liberal Democrat-Conservative Government abolished Regional Special Strategies, but this decision was held to be unlawful in a judicial review action in which judgment was handed down on 10 November 2010. The strategies will be abolished by statute shortly.

²⁷ *Berkeley v. Secretary of State for the Environment* [2000] 3 W.L.R. 420.

