Buan Ionadaíocht
na hÉireann
i dTaig an Aontas Eorpach

Permanent Representation
of Ireland
to the European Union

5 February 2010

Ms Catherine Day
Secretary General
Secretariat-General
European Commission
Rue de la Loi, 200
B-1049 Brussels

Re Infringement No – 2007/2166

Dear Secretary General,

I. Introduction and Summary of Ireland's Response

1. My authorities wish me to refer to the Commission's Reasoned Opinion of 29 October 2009, addressed under Article 226 TFEU on account of the alleged failure of Ireland to adequately transpose and apply the provisions of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the Directive").

2. My authorities wish to express their regret that it was not possible to respond to the Commission within the original deadline and to express their appreciation of the opportunity to respond after the initial deadline had expired. Ireland's comprehensive response to the Commission's complaints has already been set out, in some considerable detail, in its written replies of 27th September 2007 and 18th July 2008 to Letters of Formal Notice from the Commission. This correspondence is referred to by the Commission in the Reasoned Opinion at Part 1 Statement of Facts. Notwithstanding, Ireland sets out again below its detailed response to the Commission's contentions that its transposition and application of the Directive remain unsatisfactory.

3. As a preliminary point, however, my authorities wish to explain that, notwithstanding Ireland's continued objections to the Commission's contentions concerning the conformity of certain implementing legislation with certain provisions of the Directive, Ireland has made significant progress towards amending the impugned legislation to allay the Commission's concerns in that regard. As the Commission is aware through informal discussions and correspondence, the relevant national authorities have given detailed consideration to the issues raised in this case relating to transposition of the Directive. A number of legislative amendments, set out in Part IV of this Response have been proposed. Those amendments which can be effected through Regulation will be made by March 2010. A number of proposed amendments must be effected through primary legislation. These amendments are to be included in the Planning and Development (Amendment) Bill 2009. This Bill will also include some enabling provisions to confer a

power on the Minister to amend existing Regulations which amendments are required to fully transpose the Directive. This Bill has been passed by the Seanad and is currently at Second Stage in the Dáil. It is anticipated the Bill will be finalised and enacted by April 2010.

4. It should be made clear that the legislative amendments proposed in this Response will require clearance by the Office of the Attorney General and then will require Government approval. Once approved by the Government, they will be included in the Bill. It is not expected that there will be any material alterations to the amendments as proposed.

5. In summary, it is Ireland's position that it has not failed:

(i) to fulfil its obligations under Article 3(1) of the Directive, either in respect of the NDP or the Management Protocol for Forestry in Hen Harrier proposed Special Protection Areas;

(ii) to fully and correctly transpose the requirements of Articles 2(a), 3(2), 3(3), 3(5), 3(6), 3(7), 5(1), 5(2), 5(3), 5(4), 6(2), 6(3) and 6(4) of the Directive, together with Articles 3 to 10 of the Directive;

(iii) to disclose the administrative instructions governing the preparation of the NDP, as alleged nor to meet its obligations arising under Article 4(3) TFEU (ex Article 10 EC).

II. National Development Plan 2007-2013

6. Ireland repeats its unqualified objection to the Commission's contention that it is in breach of the Directive in relation to the NDP and submits that there is no basis for the Commission's argument that the NDP ought to have been submitted to an assessment under the Directive. Ireland will not repeat all the views expressed in its replies of 27th September, 2007; or 18th July, 2008; however, those views remain applicable, and this letter should be read in conjunction with those replies.

7. The Commission in its Reasoned Opinion purports to rebut three points made by Ireland in its reply of 18th July, 2008. With respect, the Commission's rebuttal is unconvincing, and is not borne out by the wording of the Directive. In particular, the Commission's complaint in respect of the NDP ignores the express wording of the SEA Directive. Article 2(a) provides a definition of "plans and programmes" which is clearly predicated on a requirement that before the SEA Directive can ever apply to a policy document (to use a neutral term) same must have been "required" by a legislative, regulatory or administrative provision. The Commission seeks to ignore this and attempts—improperly—to rely on other, later provisions of the SEA Directive to rewrite the threshold definition of "plans and programmes" Before turning to a more detailed rebuttal of each of the Commission's three points, Ireland wishes to make the following observations on the rationale and nature of the NDP.

8. The NDP sets out indicative financial allocations from within which the Government's investment priorities may be funded, providing guidelines for public servants of the

Government's investment priorities, in order to assist a planned approach to the delivery of investment objectives, many of which are multi-annual in nature. The NDP does not and cannot mandate what financial allocations will be definitively made available for investment purposes in the period 2007-2013. Such allocations are merely indicative in nature, and the NDP makes clear that future funding allocations will be contingent on maintaining economic and budgetary sustainability. As the Commission is well aware, the severe budgetary pressures experienced by Ireland over the last year or so have compelled the Government to make very significant reductions in the allocations for investment over the period of the NDP. This highlights the nature of the NDP as the Government's voluntary financial plan for investment which would and could be adjusted as circumstances dictated.

9. The NDP sets out the investment priorities that the Irish Government considered necessary to fund, in order to: enhance Ireland's economic competitiveness, and provide some assurances in this regard for the private sector investment community, both nationally and globally; improve the quality of life; promote a more socially inclusive society; support cross-border co-operation; promote regional development and the development of the rural economy; and enhance environmental sustainability.

10. The fact that the NDP indicates that funding may, in principle, be available for a particular development project does not obviate the necessity to apply for planning permission in the ordinary way. The planning application will be processed in accordance with the procedures laid down under the Planning and Development Act, 2000 (as amended), and will be determined against the relevant statutory development plan and any local area plan applicable. The policy underlying the NDP would have to have been translated into a statutory plan or programme, such as the relevant development plan, in order to have legal effect.

11. The NDP is not a legal document: it neither prescribes nor dictates what will be funded over its seven-year lifespan. Nor was there any requirement on the Irish Government to prepare such a plan. There is no legislative, regulatory or administrative provision requiring the preparation of such a plan.

12. In summary, and despite the Commission's arguments to the contrary, therefore, the NDP:
    (i) is not "required" by any legislative, regulatory or administrative provision;
    (ii) indicates, in broad terms, the level of the resources which, subject to the overall policy of maintaining economic and budgetary sustainability, would be available to finance the delivery of those investment priorities; and
    (iii) sets out in a single document the investment objectives that the Government intends to prioritise over the period 2007-2013 and provides an indicative breakdown of how the overall level of resources could be allocated amongst several different investment priorities and within the investment priorities.

13. There are a number of criteria that must be met in order for a plan or programme to be governed by Article 2 of the Directive which are pertinent in this case. First, the plan has to be required by legislative, regulatory or administrative provision: the NDP clearly fails this test. No administrative provision *"required"* this plan. The contention that a plan is required by an administrative provision unless it has been prepared without the necessary legal authority confuses what is lawful with what is required. Second, the plan or programme must set the framework for future development consent of projects. Thirdly, the NDP is clearly a financial or budget plan, and is therefore excluded under Article 3(8)

of the Directive. Nothing in the Directive allows for this clear-cut exclusion to be nullified or overridden if some of the qualifying criteria are met. Because the third test is so clear-cut, it overreaches and governs all of the qualifying criteria. Accordingly, unless it can be demonstrated that the NDP is not a financial or budgetary plan, any examination of the other ingredients of the plan to consider if it may qualify for application of the Directive is redundant and inappropriate.

(a) Definition of "plans and programmes": Article 2(a) of the Directive

14. Ireland submits that the NDP simply does not come within the definition of "plans and programmes" under Article 2(a) of the Directive. The point has been repeatedly made that the NDP is not "required" by any legislative, regulatory or administrative provision. The Commission itself, in the "Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment", has emphasised that a *voluntary* plan does not come within the definition: see paragraph 3.15 of the Commission's Guidance document.

15. However, in the Reasoned Opinion (paragraphs 3.4 to 3.8), as in the Additional Letter of Formal Notice, the Commission puts forward an entirely different test of what must be met by a "plan or programme" in order to bring it within the threshold definition at Article 2(a) of the Directive. The Commission states that the Directive must be taken to:

> "extend to administrative provisions consisting of the lawful administrative instructions that emanate from a government or other authority to its officials and agencies to prepare a plan or programme that would in other respects come within the scope of Articles 3(2), 3(3) and 3(4) of Directive 2001/42/EC." (Reasoned Opinion, paragraph 3.5)

16. With respect, there is simply no basis for reading into the Directive what amounts to an entirely new definition of the phrase "required by administrative provisions". On the Commission's interpretation, the SEA Directive would apply to each and every policy document prepared on behalf of the Government. Ireland considers that the interpretation advocated by the Commission is extraordinary in view of the unambiguous text of the SEA Directive itself. Ireland respectfully submits that this was clearly not the intention of the Community legislator; to contend otherwise, would be to set at naught the necessity to meet the condition expressly set out at the second indent of Article 2(a) of the SEA Directive.

17. As the Commission is well aware, the Court of Justice, in interpreting Community legislation, looks, first and foremost, at the words used, and considers the "actual" or "express" wording of the provision in question (see, by analogy, Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, paragraph 83, where the Court of Justice rejected an interpretation which would be contrary to the "express" wording of the relevant provisions). The Commission cannot, therefore, choose an interpretation which departs from and is not dictated by the normal meaning of the words actually used in a Directive (see, to that effect, Case C-238/96 *Ireland v Commission* [1998] ECR I-5801, paragraph 81).

18. There is nothing ambiguous in the wording of Article 2(a) of the SEA Directive. By laying down a series of conditions which have to be fulfilled—including that the plan or programme be "required" and not, as the Commission seems to suggest at paragraph 3.7 of the Reasoned Opinion "*requested* by administrative provisions"—it was clearly the intention of the Community legislator that not every plan and programme ought to fall within the scope of the Directive. Reference to the literal meaning of the text is sufficient to establish its true construction. Indeed, legal certainty ought to exclude any interpretation departing from the normal meaning of the words used, and there is nothing about either the nature and scheme of the measure in question or the circumstances in which the provision was adopted to suggest otherwise.

19. By contrast, the Commission's approach ignores the clear scheme of the SEA Directive by seeking to rewrite the threshold definition of "plans and programmes" by reference to other, later provisions of the SEA Directive. Such an approach to interpretation is incorrect. The scheme of the Directive is that, if a policy document does not come within the definition under Article 2(a), the SEA Directive simply does not apply.

20. The Commission's attempts to dismiss Ireland's argument as set out above are without substance.

21. Firstly, it is alleged, at paragraph 3.5 of the Reasoned Opinion, that the purpose of the reference to "required by administrative provisions" is to:

> "include plans or programmes that are not statutorily required but are required by *an authority's lawful internal administrative instructions* while excluding those plans and programmes which are prepared without the necessary legal authority (and which as such cannot subsequently serve as a lawful framework for purposes of Article 3 of Directive 2001/42/EC."

22. This interpretation requires that the plain wording of the Directive be ignored and that the condition that the plan *"be required"* by an administrative provision be replaced with a condition that the plan be prepared with the necessary legal authority. The first indent of the definition of "Plans and Programmes" assumes that the plan is prepared or adopted by an authority through a lawful process. The second indent imposes the additional condition that the plan be *"required"*. The Commission's interpretation seeks to conflate the two conditions. It is the plan or programme which must be *"required"* by *"administrative provisions"*. It is not sufficient that it is prepared pursuant to lawful instructions. The Commission's interpretation only excludes a plan or programme which is prepared without lawful authority. That of course is not a true exclusion because the Union is based on the rule of law and the premise of any legislation is that Member States and national bodies will only act lawfully. To exclude therefore only plans and programmes unlawfully prepared is in effect to include all plans and programmes because it must be presumed that Member States will only act lawfully. Were it the intention to include all plans and programmes this could have been achieved by reference to the first indent of the definition and the second indent of the definition would have been unnecessary.

23. Furthermore, this purported justification does not make sense. There is no basis in the Directive or elsewhere for interpreting the definition of "administrative provisions" to cover "lawful internal administrative instructions". To give the phrase such a broad meaning is

not only unwarranted but would, in any event, be impossible to apply in practice given the vague and ambiguous interpretation suggested by the Commission. Furthermore, to the extent that it is to be presumed that authorities to which the Directive applies are in any event acting "lawfully", the distinction that the Commission seeks to make between lawful internal instructions, on the one hand, and those prepared without the "necessary legal authority", on the other hand, would be to no effect.

24. Second, paragraph 3.6 of the Reasoned Opinion claims that Ireland provides no alternative explanation for or interpretation of "*required by ... administrative provisions*"; rather, it is claimed, Ireland seeks a "blanket exclusion" for all plans and programmes that are not required by a pre-existing legislative or regulatory framework and fails to attach any significance to the Directive's reference to administrative provisions.

25. By this argument, the Commission has fundamentally misinterpreted Ireland's position. With respect, it is nowhere claimed that all plans and programmes not required by legislative and regulatory requirements are to benefit from a "blanket exclusion". Ireland restricts its objection to the fact that the NDP is not required by "administrative provisions" and, therefore, does not fall within the scope of the Directive. This cannot sensibly be interpreted as claiming that no plans or programmes could fall within that definition, still less that, even if they did, they would benefit from a "blanket exclusion" on the basis that they are not required by a pre-existing legislative or regulatory framework. Furthermore, Ireland's case is limited to the specific characteristics of the NDP and why it cannot properly be considered as having been required by "administrative provisions" for the purposes of Article 2(a), second indent, of the Directive and a detailed explanation as to why that is so has been given. In the circumstances, it is not necessary for Ireland to provide an alternative explanation for or interpretation of "administrative provisions".

26. Third, Ireland's approach cannot properly be considered to attach "no meaning " to the express reference to plans or programmes required by administrative provisions, and the Commission is wrong to suggest that this is the case, as it does at paragraph 3.7 of the Reasoned Opinion.

27. As regards the Commission's objections to the claim that it is sought, unjustifiably, to bring within the scope of the Directive all voluntary policy documents, Ireland repeats here its principal contentions in that regard. There are, as has already been stated, very obvious reasons for excluding voluntary policy documents from the scope of the Directive. It would be entirely unworkable and unnecessary to require that a SEA be carried out in respect of such voluntary documents. One of the fundamental values of the Directive is that there is a hierarchy in terms of policy. It was never the intention of the Directive that SEA be duplicated, with an assessment being carried out at each stage of the hierarchy. Indeed, Article 4 of the Directive expressly addresses the need to avoid duplication, as does Recital (9) of the Preamble to the Directive.

28. Conversely, on the Commission's interpretation, the Directive could apply to each and every policy document prepared on behalf of the Government or an authority at national, regional or local level, irrespective of whether the express requirement under Article 2(a) of the Directive that the plan or programme have been required by any legislative, regulatory or administrative provision has been met.

29. At paragraph 3.8 of the Reasoned Opinion, the Commission seeks to limit the impact of its interpretation, by suggesting that it would bring within its scope only those documents which are expressions of policy but which also have the "character of plans or programmes". This interpretation involves circular reasoning. It is self-evident that the definition could not apply to a document which was not a plan or programme. The plain wording of the definition specifically states that the term *"shall mean plans and programme"*. The definition however goes on to make clear that not every plan or programme is covered by the Directive but only those plans or programmes which meet the two specified conditions. The fact that something has the character of a plan or programme could not therefore be sufficient to fulfil the specified conditions.

30. The Commission's interpretation seeks to ignore the clear terms of the Directive. It is not supported by the Commission's reference to Articles 3(2), (3) and (4) of the Directive. The character of being a plan or programme cannot as a matter of plain meaning or indeed logic satisfy the relevant criterion which describes the class of *"plans and programmes"* covered by the Directive. Furthermore Recital (5) of the Preamble to the Directive does no more than provide an expression of the general underlying purpose of the Directive itself and offers no support for the interpretation relied upon by the Commission.

31. The Commission attempts to force a voluntary plan, such as the NDP, which is prepared pursuant to a Government request and not pursuant to any "administrative provision", into the definition under Article 2(a) by suggesting that the mere giving of instructions to civil servants to prepare a policy document means that the preparation of the plan is to be regarded as having been required by an "administrative provision". With respect, this is nonsense. Under Article 2(a), it is the *obligation to* adopt the plan, and not any *instruction* to civil servants to implement a voluntary decision to adopt a plan, which must have been required by administrative provisions. In the present case, it is only the decision to adopt the policy document, i.e. the NDP, which is relevant for the purposes of Article 2(a). This decision was a voluntary decision; the drawing up of the plan thereafter merely constitutes the implementation of that voluntary decision.

32. The Minister for Finance, in 2005, recommended that the Government agree to the preparation of the NDP 2007-2013. The Minister also made recommendations with regard to the broad contents of the proposed NDP. The Government, in its considerations of the proposals from the Minister for Finance, decided that an NDP would be prepared along the grounds proposed.

33. The practical work carried out by Irish civil servants, as part of the preparation and finalisation of the plan, cannot be considered as having been "required" by an administrative provision. No such administrative provision has been identified by the Commission, and none exists. All work on the preparation and finalisation of the NDP was done on behalf of the Irish Government. Such work is legally the work of the Government and cannot be considered distinct from the Government.

34. There are no legislative, regulatory or administrative provisions requiring the Irish Government to prepare the NDP. The NDP is not a legal document; it is a high level statement of Government policy. The NDP was not prepared in response to any administrative provision. It was not prepared by a body distinct from the Government in response to a request from the Government.

35. Furthermore, it is irrelevant that, as the Commission maintains, the NDP describes itself as a plan and contains reference to specific measures, as stated at paragraph 3.9 of the Reasoned Opinion. It is self-evident from the definition that the mere fact that something is a *"plan or programme"* does not mean it is a plan or programme for the purposes of the Directive. For that to be so, two additional conditions must be satisfied. .

36. Finally, in respect of the claim that, by failing to make available to the Commission the record of instructions given by the political level to the administrative authority to prepare the NDP, as sought in the Letter of Formal Notice, and of the allegation that Ireland has failed to comply with its obligations under Article 4(a) TEU (ex Article 10 EC), it is Ireland's position that, since the NDP does not fall within the scope of Article 2(a) of the Directive, there is no corresponding obligation to comply with the Commission's request.

37. That the NDP was not required by administrative provision is in any event evident from the memorandum from the Department of the Taoiseach to the Department of Finance, dated 6 July 2005, referring to a memorandum submitted by the Minister for Finance, and stating that the Government had agreed to the preparation of an NDP covering the seven years 2007 – 2013 (see **Annex I**).

(b) Financial / Budgetary Plan: Article 3(8) of the Directive

38. Ireland maintains that, even if the NDP came within the definition of Article 2(a), second indent, of the Directive—which is denied for the reasons set out above—it is nevertheless excluded from the scope of application of the Directive by virtue of Article 3(8). Under Article 3(8), financial or budget plans or programmes are specifically excluded from the requirements of the Directive. The financial and budgetary characteristics of the NDP are considered in some detail below.

39. In the first place, the NDP indicates the broad level of the resources (€184bn) which, subject to the overall policy of maintaining economic and budgetary sustainability, would be available to finance the delivery of investment priorities, and provides an indicative breakdown of how the overall level of resources would be distributed amongst several different investment priorities and within the investment priorities. Its financial framework is structured around five Investment Priorities (Economic Infrastructure; Enterprise Science and Innovation; Human Capital; Social Infrastructure; Social Inclusion), each of which has an indicative financial envelope. These five Investment Priorities consist of 28 Programmes which are in turn broken down into 88 thematic Sub-Programmes (all of which have an indicative financial allocation).

40. The NDP represents the Irish Government's view of what allocations might be available, subject to the overriding objective of maintaining economic and budgetary sustainability, for certain investment objectives. As regards the financial envelopes for the 88 Sub-Programmes over the period 2007-2013, allocations are not guaranteed. Exchequer investment and expenditure under the NDP is in fact provided by the Oireachtas (Parliament) as part of the annual budgetary process. The indicative provisions outlined in the NDP for investment and expenditure programme do not displace the need for specific approval under the budgetary process and no commitments can be entered into, other than on that basis.

41. It is evident from the content and nature of the NDP that it is, quintessentially, a financial or budget plan. Firstly, it is a strategic document, aiming to match resource allocation with strategic economic and social investment priorities, and taking a longer-term view of the direction budgets and investment ought to take over the period of the NDP. It simply sets out how much money ought to be spent and in which fields (see, for example, the Priority Spending Areas identified at pp.14-18 of the Executive Summary).

42. However, the NDP makes it clear that the ability to fund the levels of investment set out within it will require economic and budgetary policies that deliver sustainable growth and, thereby, provide the necessary resources. On 2nd July, 2008, in Dáil Éireann (the House of Representatives of the Oireachtas), An Taoiseach, Mr. Brian Cowen TD, pointed out the character of the NDP as a budget or financial plan and the firm link with the availability of resources when he said that:

> "[w]hen the NDP was published, it stated clearly on page 16 that it was subject to a prudent budgetary policy fully consistent with the Stability and Growth Pact. That was reiterated by me and my colleagues on numerous occasions. It is stated on the same page that the NDP will "allow for reallocation as necessary depending on evolving priorities and the economic and budgetary situation." The NDP is the same as a budget or anything else in that it has to be subject to the availability of resources."

43. Indeed, it is worth noting that, in the light of very severe budgetary pressures and several very significant budgetary reviews , the Exchequer capital allocations under the NDP are currently forecast to fall from a figure of €65bn set out in the published NDP to €48bn (as of Budget 2010), a reduction of some €17bn.

44. In the second place, the NDP is indicative. It simply provides pointers as to areas considered to be of such importance to the national interest that they ought to be prioritised over other competing claims on the Exchequer's resources. In deciding on priorities, and the weight attached to individual programmes within them, the Government assessed key strengths and weaknesses of the economy (p.23 of the Executive Summary). Indeed, very significant reallocations and reductions of Exchequer allocations have already occurred.

45. Thirdly, the NDP is non-binding: there is no guarantee that a project included within it will proceed, and neither the Government nor any other party is bound by the guidance in the NDP. There is an in-built flexibility to allow for reallocation as necessary depending on evolving priorities and the economic and budgetary situation" (p.12 of the Executive Summary).

46. Ireland maintains its reliance on the judgment of the High Court (Smyth J.) in the case of *Kavanagh .v. The Government of Ireland & Ors. (Unreported)* at p. 55, where the NDP as a budgetary or financial plan was been confirmed, as a finding of fact. At pp. 50 and 51 of that judgment, the judge referred to the "mere provision of the funding envisaged by the NDP" being indicative of how an activity could be financed.

47. The logical implication of the Commission's contention in respect of the NDP is that all financial or budgetary plans that provide resources for actions that may impinge on the physical environment should be subject to an SEA. This would include financial plans such as the annual Budget Statement or annual Estimates voted by the Oireachtas (which could conceivably make a commitment to allocate or legally allocate resources to actions that impinged on the physical environment). With all due respect, Ireland submits that this would be an entirely unworkable proposition, and contrary to the express exclusion for financial or budget plans or programmes under Article 3(8).

48. As regards the Commission's contentions, at paragraph 3.12 of the Reasoned Opinion, Ireland does not accept that the NDP has a similar character to programmes under the Structural Funds, which fall within the scope of the Directive. Structural Funds programmes are explicitly drawn up and implemented within the framework of Community Law, specifically the Structural Funds regulations. Structural Funds programmes have a legal character that is fundamentally different from a high level policy statement like the NDP which sought to set out the Government's view at the time of its finalisation what financial resources would be available for investment over the period 2007-2013.

49. In any event, even if the NDP had a similar character to programmes under the structural funds, this would not suffice to bring the NDP outside the definition of a "financial or budget plan or programme". Neither, in Ireland's view, is it determinative that Annex II, paragraph 1, first indent, of the Directive, refers to the allocation of resources in determining the likely significance of effects referred to in Article 3(5). There may be plans or programmes that are not "financial or budget plans and programmes" for the purposes of Article 3(8) of the Directive but which nonetheless can be considered to set a framework for projects and other activities by allocating resources. However, that does not necessarily mean that any plan or programme which may be considered to play a role in allocating resources without more also can be considered to "set a framework" for projects, still less that it must be excluded from consideration as a financial or budget plan or programme, within the meaning of Article 8, second indent, of the Directive.

50. In any event, the Commission suggests, at paragraph 3.13 of the Reasoned Opinion, that documents which have a purely budgetary or financial character are excluded from the Directive. It is Ireland's submission that such an interpretation is not borne out by Article 3(8). In particular, where it was intended to restrict the scope of the derogation at the first indent of that provision, the legislator made clear that, as regards plans and programmes in respect of national defence or civil emergency, that had to be their "sole purpose". Such a limiting provision is conspicuously absent in respect of financial or budgetary plans or programmes. The Commission is seeking to substitute plain the reference in Article 3(a) to *"financial or budget plans and programmes"* with a reference to plans or programmes *"which have a purely budgetary or financial character"*. Again, the Commission seeks to modify the wording of the Directive. It is sufficient (for inclusion) if the plan or programme is a *"financial or budget"* plan or programme. No further modification or refinement of the exception such as the introduction of a qualification that the plan or programme be of *"purely"* budgetary or financial character is permissible. By any criterion, the NDP is a financial or budgetary plan.

51. As regards the Commission's contention that the fact that the NDP describes itself as a "road map for removing infrastructure bottlenecks, has an objective of decisively tackling structural infrastructure deficits and includes reference to specific projects" (at paragraph

3.13 of the Reasoned Opinion) is sufficient to establish that it is not a financial or budget plan or programme, it is Ireland's position that this cannot be the case. In practice, it is difficult to conceive of a situation where a budgetary plan or programme could be drafted *without* outlining the broad objectives that it seeks to meet in order to set out in a meaningful way the resources which may be allocated to meeting such objectives. Furthermore, as submitted above, it is perfectly within the proper meaning of Article 3(8), second indent, for a plan or programme to encompass such elements while still having as its principal purpose the service of financial or budgetary ends or financial or budgetary considerations as its defining characteristic.

(c) Framework for Future Development: Article 3(2), (3) and (4) of the Directive

52. Without prejudice to the points made at (i) and (ii) above, the NDP does not, in any event, set the framework for future development consent and therefore does not fall within the scope of the Directive. Ireland does not resile from its three principal arguments in support of this contention, as set out in its reply of 18th July 2008, and summarised by the Commission at paragraph 3.15 of the Reasoned Opinion.

53. In summary, and for the reasons set out below, Ireland contends as follows. Firstly, it reiterates the significance and relevance of paragraph 3.25 of the Commission's Guidance Document on the Directive for the purposes of determining what is properly understood as "setting the framework". Second, in respect of individual examples cited by the Commission in earlier correspondence, it is statutory land use plans and not the NDP that set a framework for those individual projects. Third, in view of consistent case-law applied by the Irish courts, sections 34 and 143 of the Planning and Development Act 2000 (as amended) cannot have the meaning contended for by the Commission, and do not lend any weight to its argument that the NDP sets a framework.

54. Firstly, Ireland respectfully reminds the Commission of what it itself has said with regard to the meaning of "setting the framework" for development consent in its Guidance document, in particular at paragraph 3.25. There, it is expressly acknowledged that while Annex II to the SEA Directive states that, one way of "setting the framework" may be through the way resources are allocated, the exemptions in Article 3(8) should be borne in mind:

> "The Directive does not define the meaning of 'resources' and in principle, they may be financial or natural (or possibly even human). A generalised allocation of financial resources would not appear to be sufficient to 'set the framework', for example, a broad allocation across an entire activity (such as the whole resource allocation for a country's housing programme). It would be necessary for the resource allocation to condition in a specific, identifiable way how consent was to be granted (e.g. by setting out a future course of action (as above) or by limiting the types of solution which might be available)."

55. Ireland rejects the Commission's contention, at paragraph 3.27 of the Reasoned Opinion, that there is no contradiction between the Guidance Document, on the one hand, and the position it has taken in these proceedings to date, on the other. For the reasons set out at paragraphs 35 to 40 above, the NDP cannot be viewed as anything other than a generalised indicative allocation of resources.

56. In that regard but also in relation to Ireland's second point, it is respectfully submits repeated, first, that whilst the NDP does refer to a limited number of key projects, such projects are mentioned only as illustrative examples of the types of projects which might be funded under the NDP. The NDP does not and was not in any sense intended to override the normal town and country planning process (involving the preparation of development plans and local area plans) which must apply to all projects, whether mentioned in the NDP or not, in line with the relevant statutory procedures.

57. An application for planning permission ("development consent") falls to be determined by reference to the relevant development plan (and, if applicable, the relevant local area plan), and any regional planning guidelines. Provision is made under national law for an SEA to be carried out in respect of each of these types of plans and programmes.

58. It is these plans and programmes, not any general statement of Government policy, which set the framework for the grant of development consent within the meaning of the SEA Directive. The development plan is a key consideration in any application for planning permission. A planning authority is expressly precluded from granting planning permission in respect of a development project which would involve a material contravention of the development plan, unless it goes through a special procedure involving referring the matter to the democratically elected members of the local authority. There is, therefore, a legal presumption that any decision on a planning application will be made in accordance with the development plan. This is imposed by s.34(6) of the Planning and Development Act 2000. Furthermore, where An Bord Pleanála exercises its power to grant planning permission, on appeal, there is a requirement under s.37(2)(c) of the Planning and Development Act 2000 to give additional reasons, indicating the main reasons and considerations for contravening materially the development plan. By contrast, there are no such presumptions in respect of general Government policy.

59. As regards the examples which the Commission itself cited at page 3 of its Additional Letter of Formal Notice, Ireland rejects the Commission's suggestion, at paragraph 3.30 of the Reasoned Opinion, that these decisions may be referable to more than one framework. Furthermore, it is simply not the case that those decisions show that the NDP is "amongst the key frameworks governing decision-making by the Planning Appeals Board. A review of the relevant planning documentation indicates that, in each case, the policy in favour of the proposed development is, in fact, to be found in the relevant development plan itself, as is evident from the analysis of those decisions at **Annex II** to this Response.

60. Thirdly, the Commission has sought—incorrectly—to attach great significance to s.143 of the Planning and Development Act 2000 (amended under the Planning and Development (Strategic Infrastructure) Act 2006), which provides that An Bord Pleanála shall have regard to the policies and objectives of the Government. The Commission engages in a circular argument in this regard, by implying that the reference to Government policy in s.143 should be understood as reference to the NDP. This is fallacious. Government policy is a very general concept, and is not to be taken as gathered together in a single document. Government policy, by definition, is constantly evolving. As explained earlier, the NDP represents the Irish Government's view, as of a particular date, of what budgetary allocations might be available; it does not determine whether development consent should be granted for any particular project. Moreover, the provisions of s.143 merely require An Bord Pleanála to keep itself informed of Government policy in general, there being no

specific obligation to have regard to the NDP. The key determinant of any application for planning permission, conversely, is the policy objectives as stated in the statutory development plan and local area plan (if applicable). The decision on any particular application is to be made by reference to the statutory policy documents referred to above.

61. In this respect, Ireland refers to judicial determination of the scope of a statutory obligation to "have regard to" a particular policy in a number of judgments of the Irish courts, including *McEvoy v Meath County Council* [2003] 1 I.R. 208, referring, in particular, to *Glencar Explorations plc v Mayo County Council (No. 2)* [2002] 1 I.R. 84, and *Aer Rianta CPT v Commissioner for Aviation Regulation* [2003] IEHC 168 (unreported). Copies attached as **Annex III**.

62. In *McEvoy v Meath County Council*, the High Court (Quirke J.), considered whether the Council had breached the obligation imposed upon it by s.27(1) of the Planning and Development Act 2000 to "have regard to" planning guidelines for the greater Dublin area when making and adopting its development plan. The judge held, *inter alia,* that the Council did have to inform itself fully of and give reasonable consideration to any relevant guidelines; however, it did not necessarily have to adopt the strategy and policies contained in the guidelines, and could depart from them for *bona fide* reasons consistent with the proper planning and development of the area. The actions connoted by the term "regard" were deemed to be permissive in nature, that is involving volition, rather than taking an action or reaching a conclusion pursuant to prescription without any choice.

63. The court referred to judicial interpretation of the phrase in the case of *Glencar Explorations plc v Mayo County Council (No. 2)*, in relation to the statutory obligation imposed upon a local authority, pursuant to s.7(1)(e) of the Local Government Act 1991, to have regard, in certain circumstances to policies and objectives of the government or any Minister of the Government. In that judgment of the Supreme Court, Keane C.J. (at p. 142) stated that the fact that a body is obliged to have regard to policies and objectives "does not mean that, in every case, they are obliged to implement the policies and objectives in question".

64. Ireland also refers to the judgment of the High Court (O'Sullivan J.) in *Aer Rianta CPT v Commissioner for Aviation Regulation,* in which the court considered the construction of a statutory obligation on a decision-maker to "have regard to" certain matters defined in a statute, in that case, s. 33 of the Aviation Regulation Act 2001. In that context, the judge relied upon the observations of the Chief Justice in *Glencar*, as well as upon those of Lords Hoffmann and Keith in the House of Lords in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, as indicating that it is a "matter for the decision maker to determine what weight should be attached to the relevant statutory objectives and indeed in Lord Hoffmann's view, it is for the decision-maker to decide to give them 'whatever weight the planning authority thinks fit or no weight at all'".

65. These judgments indicate, therefore, that the phrase "have regard to" connotes an action involving volition (as opposed to taking an action or reaching a conclusion pursuant to a prescription with no choice involved). A duty to "have regard to" a policy direction does not require that the recipient must adopt or implement the policies and objectives in question; on the contrary, it is not bound to comply with them and may depart from them for *bona*

fide reasons. It is for the decision-maker to decide what weight should be attached to the relevant objectives which, consequently, may be given no weight at all.

66. Furthermore, while planning authorities and An Bord Pleanála may "have regard to" the Government policy, this is only one of a wide range of considerations taken into account by those bodies when reaching a decision. Government policy does not, in any way, take precedence over the provisions of the development plan. In fact, Government policy only really becomes a relevant consideration on an application for planning permission if it has passed through the intermediary of a development plan or a local area plan.

67. In view of the above considerations, Ireland maintains its position that there has been no failure to undertake an SEA in respect of the NDP because, since the NDP does not fall within the scope of the Directive, such an assessment is not required. It is submitted, therefore, that there has been no breach of the requirements of Articles 3 to 9 of the Directive, in that respect.

68. As regards the complaint, at paragraph 3.31 of the Reasoned Opinion, that a breach of Article 10 of the Directive also arises in as much as the NDP has not been made subject to the binding monitoring referred to, it is Ireland's case that, since the NDP does not fall within the scope of Article 2(a) of the Directive, there is no breach of Article 10.

69. As regards the alleged breach of Article 4 TFEU (ex Article 10 EC), in respect of the claim that, by failing to make available to the Commission the record of instructions given by the political level to the administrative authority to prepare the NDP, it is Ireland's case that, since the NDP does not fall within the scope of Article 2(a) of the Directive, there is no corresponding obligation to comply with the Commission's request.

III. Management Protocol for Forestry in Hen Harrier pSPAs (proposed Special Protection Areas)

70. The Hen Harrier Protocol ("the Protocol") was agreed between the Minister for the Environment, Heritage and Local Government and the Minister for Agriculture, Fisheries and Food in the context of, and for the specific purposes of, the Forest Consent System introduced under the EC (Environmental Impact Assessment) (Amendment) Regulations, 2001 (S.I. No. 538 of 2001). The Protocol was designed to assist the Forest Service to comply with the requirements of Article 6(3) of the Habitats Directive by setting upper limits on the overall area of afforestation that could be consented to within Special Protection Areas designated for the protection of Hen Harrier. It also was designed to prevent afforestation on certain habitat types within these SPAs. These restrictions do not apply outside these sites. The Protocol merely provided for additional restrictions on development in certain areas, above and beyond those that apply in general. My authorities acknowledge that the Protocol is prescriptive in its terms, and is intended to inform the decision on individual applications for Forest Consent within six Hen Harrier SPAs. In effect, the protocol introduces a form of "quota" system for afforestation within these sites.

71. My Authorities accept, however, that the Protocol does come within the definition of a "plan or programme" for the purposes of the SEA Directive and, should, in principle, have

been subject to a strategic environmental assessment as it sets the framework for future development consent or projects listed in Annexes I and II to Directive 85/337/EEC, by placing an upper limit on the amount of forestry permitted within certain areas.

72. Having considered the further arguments made by the Commission in the Reasoned Opinion and in the Additional Reasoned Opinion under Infringement No. 2002/4259 and the fact that the Protocol is an integral part of the process required by legislation and was issued in the context of and for specific purposes of the Forest Consent System introduced under the EC (Environmental Impact Assessment) (Amendment) Regulations 2001 S.I. No. 538 of 2001 and was prepared to enable the Minister to discharge his legislative obligation, Ireland now accepts that the Protocol accordingly fulfils the additional criteria under Article 2 of the SEA Directive of being required by legislative provision.

73. As regards the complaint, at paragraph 3.36 of the Reasoned Opinion, that a breach of Article 10 of the Directive also arises in as much as the Hen Harrier Protocol has not been made subject to the binding monitoring referred to, Ireland concedes that such binding monitoring has not occurred. However, detailed monitoring has been ongoing within these sites for the purposes of assessing the impact of forestry development on the Hen Harrier populations, and fulfilling the obligations regarding the protection of a species for which these Special Protection Areas have been designated.

IV. Conformity of Ireland's transposition of the Directive

74. The Commission articulates a number of specific complaints about Ireland's transposing legislation, namely the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations, 2004, S.I. No.435 of 2004 ('S.I. No. 435 of 2004') and the Planning and Development (Strategic Environmental Assessment) Regulations, 2004, S.I. No. 436 of 2004 ('S.I. No. 436 of 2004'). Ireland maintains its position that the criticisms are misconceived, for the reasons set out in detail in its reply of 18th July 2008.

75. Strictly without prejudice to its position in this regard, Ireland is prepared to make certain amendments to the national legislation and regulations. Specifically, as the Commission is aware through informal discussions and correspondence, the Irish Authorities have given detailed consideration to the issues raised in this case relating to transposition, and proposed amendments to both primary and secondary legislation to meet the concerns articulated by the Commission in its Letters of Formal Notice and Reasoned Opinion. Ireland is confident that the proposed amendments, the details of which are outlined in the following paragraphs, will meet these concerns.

76. As regards the timing of the proposed primary and secondary legislative amendments, any amendments to Regulations that are not reliant on facilitating amendments to statute will be made by March 2010. The proposed amendments to primary legislation will be made through the Planning and Development (Amendment) Bill 2009. The amendments to the Bill will also include some enabling provisions conferring a power to amend existing Regulations where this is required to complete transposition of the Directive. The Planning and Development (Amendment) Bill 2009 has been passed by the Seanad and is currently at Second Stage in the Dáil; it is anticipated that the Bill will be finalised and enacted by April 2010. While the legislative amendments proposed in this response will require clearance by the Office of the Attorney General, Government and ultimately the

Oireachtas, it is expected that the thrust of the amendments will remain unchanged. In view of this, Ireland respectfully submits that the Commission's complaints on these specific matters will be fully addressed without the need to progress to infringement proceedings before the Court of Justice, and requests that the Commission and Ireland continue to liaise in this regard to allow a satisfactory resolution of these matters.

(a) Plans and programmes: Article 3(2) of the Directive

77. To recap, Article 3(2) of the SEA Directive provides as follows:

"Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC."

78. In its Additional Letter of Formal Notice, the Commission contended that S.I. No. 435 of 2004 and S.I. No. 436 of 2004 do not cover "programmes", as distinct from "plans" within the sphere of town and country planning. With respect, this is an entirely technical objection and is without merit. The reason there is no specific reference to "programmes" in S.I. No. 436 of 2004 is that, whereas national town and country planning law provides for development plans, local area plans, regional planning guidelines and planning for strategic development zones, it makes no reference to "programmes" as such. Ireland cannot, therefore, be expected to introduce a requirement for SEA in respect of a concept which does not exist within the national town and country planning regime. The omission of the term "programme" does not, in any way, undermine the objectives of the Directive in that all relevant policy documents are subject to SEA.

79. The Commission made a related point that the exclusion from the Regulations of the term "programme" may cause difficulties in respect of the obligation to have regard to the cumulative effect of a plan with other plans and programmes. The Commission also says that the exclusion of the term "programmes" from the implementing Regulations has a knock-on effect on the information to be contained in an environmental report.

80. In its response of 18th July 2008, Ireland referred to the publication by the Department of the Environment, Heritage and Local Government of detailed statutory Guidelines for Regional and Local Authorities on the implementation of the SEA Directive (**Annex IV**). There is specific provision—under s.28(1) of the Planning and Development Act 2000—for planning authorities to have regard to such Guidelines in the performance of their functions. Section 2.5 of the Guidelines specifically requires that a plan's "relationship (both vertical and horizontal) with other plans/programmes" be considered in the SEA process. While the Guidelines themselves do not set the framework for development consents, they do provide general direction to planning authorities on planning policy and

best practice. Ireland maintains that this direction should meet the concerns raised by the Commission.

81. Strictly without prejudice to all of the foregoing, however, it is proposed to amend Article 9(1)(a) of S.I. No. 435, which defines the sectoral plans and programmes which require environmental assessment, by adding the phrase "town and country planning or land use", subject to the exclusion of specified types of land use plans listed in Art. 3(2) of S.I. No. 435. The effect of this proposed amendment will be that, if a programme (as distinct from a plan) which related to land use planning and which meets the necessary criteria (such as being required by legislative, regulatory or administrative procedures and which set the framework for future development consents of EIA-type projects), then SEA will be required.

82. The following amendment is therefore proposed (new wording in bold):

> "9. (1) Subject to sub-article (2), an environmental assessment shall be carried out for all plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, ~~and~~ tourism a**nd town and country planning or land use,** and which set the framework for future development consent of projects listed in Annexes I and II to the Environmental Impact Assessment, or
>
> which are not directly connected .... any such site. "

83. There is no requirement to amend S.I. No. 436, because those regulations relate only to specified land use plans, i.e. a small sub-set of all plans and programmes which are covered within the scope of S.I. No. 435.

(b) Alleged lack of provision for assessing NDP and other similar plans

84. The Commission, in its Additional Letter of Formal Notice, referred to a number of Government building programmes that are excluded from the provisions and scope of S.I. No. 436 of 2004. Ireland reiterates its position that this complaint is based, in the first place, on a misunderstanding of what the Commission contends to be programmes. In particular, these policy statements do not come within the definition of "plans and programmes" provided under Article 2(a) of the Directive. For example, what is described as the school building programme is, in fact, a budgetary programme detailing the costs of various school building projects (including provision of additional classrooms in existing schools) that are currently being considered. Inclusion of a particular project on what is in fact a list does not mean that the project will proceed. The budgetary programme is merely an indication of projects that may be provided with the necessary financial allocation to commence, subject to ongoing review in light of budgetary circumstances.

85. In the second place, appearance on this list does not, in any way, set the framework for future development consent, as required by Article 3(2)(a) of the Directive. Rather it merely indicates the possibility of financial resources being made available. To be capable of setting the framework for future development consent, such a policy document would

have to pass through the intermediary stage of a statutory plan such as a development plan. Accordingly, the appropriate time for the carrying out of SEA is at the stage of the making of a development plan. Any particular school building project that ultimately proceeds remains subject to the planning development consent process (with EIA, where appropriate), which in turn is determined by reference to the provisions of the relevant development plan.

86. Under the provisions of the Prisons Act 2007, any decision to build a prison in Ireland is ultimately taken by the Oireachtas and is subject to a thorough public EIA procedure. As with schools, there is a budgetary programme detailing prison building works (including refurbishment and enhancement works to existing prisons).

87. At the risk of labouring the point, Ireland reminds the Commission that budgetary programmes are specifically excluded from the scope of the Directive. Further, and in any event, this budgetary programme does not provide a framework for development, and thus is legitimately excluded from the Directive on this basis also.

88. Ireland thus maintains its position that there is no requirement to undertake an SEA in respect of programmes of this character as they do not fall within the scope of the Directive. It is denied that there is a breach of the requirements of Articles 3 to 9 of the Directive or of Article 10 in respect of the NDP.

(c) Modifications of certain land-use plans and amendments to regional planning guidelines and statutory planning schemes: Articles 2(a) and 3(2) of the SEA Directive

89. The Commission contends, at paragraph 3.43 of the Reasoned Opinion, that Ireland has failed to correctly transpose Article 2(a) of the Directive, in combination with Article 3(2), in relation to major modifications of certain land-use plans within its scope, in particular, changes or amendments to regional planning guidelines or a Strategic Development Zone (SDZ) planning scheme. It further alleges that, in so far as Ireland has made inadequate provisions for transposing those provisions, there is a concomitant failure to comply with Article 3(1) of the Directive, in combination with Articles 4 to 9.

90. In that regard, Ireland maintains that, in relation to the plans that are drawn up under Irish planning law, Article 5 (c) of S.I. No. 436 of 2004 clearly states *"plan" for the purpose of Schedules 2A and 2B, means, where the context requires, a development plan, a variation of a development plan, a local area plan (or an amendment thereto), regional planning guidelines or a planning scheme;"*. Thus, land-use plans and variations to these plans are subject to the SEA process.

91. In relation to S.I. 435 of 2004, specific reference is made to plans and programmes throughout those regulations, and Article 2 of the S.I. defines plans and programmes as being *"plans and programmes, as well as any modifications to them"*. Ireland is, therefore, satisfied that the Directive has been fully transposed into Irish law.

92. Without prejudice to the foregoing, as regards the application of appropriate SEA procedures to major modifications of certain land-use plans such as amendments to either

regional planning guidelines or to SDZ planning schemes, Ireland indicated in its response of 18th July 2008 that legislative amendments to the relevant provisions would be considered.

93. Consequently, the following legislative amendments have been proposed as part of the **Planning and Development (Amendment) Bill 2009**. The effect of these amendments will be to impose an obligation to provide for a further public consultation period (of not less than 4 weeks) in the preparation of draft regional planning guidelines under section 24 of the Planning and Development Act 2000, where any proposed amendments are deemed, through an SEA or Habitats Directive Appropriate Assessment screening, to be likely to have significant effects on the environment.

Proposed legislative amendment:
"Replace section 24(6) of the Planning and Development Act 2000 with the following text:

(6)(a) Following the consideration of submissions or observations under subsection (5), and subject to section 25, the regional authority shall make the regional planning guidelines subject to any amendments or modifications considered necessary.

(b) If it is proposed to make amendments to the draft regional planning guidelines, the director of the regional authority shall determine whether such amendments would, in his or her opinion, if made, be a material alteration of the draft guidelines or would be likely to have significant effects on the environment or on a European site and would therefore require assessment under the Strategic Environmental Assessment Directive or the Habitats Directive.

(c) The director of the regional authority, not later than 4 weeks after a determination under paragraph (b), shall specify such a period as he or she considers necessary as being required to facilitate an assessment referred to in paragraph (b).

(d) The regional authority shall publish notice of the proposed amendment and where appropriate in the circumstances, the making of a determination that an assessment referred to in paragraph (b) is required, in at least one newspaper circulating in its area. The notice shall state—

(i) that a copy of the proposed material amendments to draft guidelines, and a copy of any environmental assessment of such amendments may be inspected at a stated place or places and at stated times during a stated period of not less than 4 weeks (and the copy shall be kept available for inspection accordingly),

(ii) that a copy of the proposed material amendments, and a copy of any environmental assessment of such amendments to the draft regional planning guidelines will also be made available on the website of the regional authority during the period stated in paragraph (d)(i), and

(iii) that written submissions or observations with respect to the proposed material amendments to the draft guidelines and with respect to any environmental assessment of such amendments made to the

regional authority within the stated period will be taken into consideration before the guidelines are adopted.

(e) The regional authority shall cause an assessment referred to in paragraph (b) to be carried out within the period specified by the director under paragraph (c), in accordance with the requirements set down in Article 15D of the 2001 Regulations."

94. Further to the above proposed amendment to section 24(6), Ireland also intends to provide for a specific reference in Article 10 of the 2004 Regulations (S.I. No. 436) in relation to proposed amendments for regional planning guidelines. This text will be drafted once the primary legislative language has been agreed with Parliamentary Counsel, approved by the Houses of the Oireachtas and enacted.

95. Similarly, it is proposed to amend section 169(4) of the Planning and Development Act 2000 in relation to proposed variations to a draft SDZ planning scheme by a planning authority to allow for SEA screening and a possible further public display, and also to consider amendments to section 169(7) of the Act in relation to material changes which might be proposed by the Board.

Proposed legislative amendment:
"Insert the following after section 169(4)(b) of the Planning and Development Act 2000:

(4)(bb) (i) Where the planning authority proposes to make one or more amendments to the draft planning scheme, the manager of the planning authority shall determine whether such proposed amendments would, in his or her opinion, if made, be a material alteration of the draft guidelines or would be likely to have significant effects on the environment or on a European site and would therefore require assessment under the Strategic Environmental Assessment Directive or the Habitats Directive, or would be a material alteration of the draft planning scheme.

(ii) The manager, not later than 4 weeks after a determination under subparagraph (i), shall specify such a period as he or she considers necessary as being required to facilitate an assessment referred to in subparagraph (i).

(iii) The planning authority shall publish notice of the proposed amendment or amendments and where appropriate in the circumstances, the making of a determination that an assessment referred to in subparagraph (i) is required, in at least one newspaper circulating in its area. The notice shall state—

(a) that a copy of the proposed amendment or amendments, and a copy of any environmental assessment of such amendments may be inspected at a stated place or places and at stated times during a stated period of not less than 3 weeks (and the copy shall be kept available for inspection accordingly),

(b) that a copy of the proposed amendments to the draft planning scheme, and a copy of any environmental assessment of such

amendments will also be made available on the website of the planning authority during the period stated in paragraph (a), and

(c) that written submissions or observations with respect to the proposed amendment(s) and with respect to any environmental assessment of such amendments be made to the planning authority within the stated period will be taken into consideration in deciding upon the scheme.

(iv) The planning authority shall cause an assessment referred to in subparagraph (i) to be carried out within the period specified by the manager under subparagraph (ii) in accordance with Part 14 of the Planning and Development Regulations 2001."

96. As above, it is intended to reflect appropriate changes to the regulations through amendments to Part 14 of the 2001 Regulations, once the primary legislative language has been agreed with Parliamentary Counsel, approved by the Houses of the Oireachtas and enacted.

(d) Transposition of articles 3(3), (5), (6) and (7): plans and programmes involving screening

97. Article 3(3) of the Directive states that:

"Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects."

98. The provisions in Articles 3(5) to (7) of the Directive apply to the process of determining whether an SEA is necessary. The Commission alleges that Ireland has failed to transpose properly Article 3(3) of the Directive, and that there is a concomitant failure to comply with Article 3(1) in combination with Article 4 to 9 of the Directive.

(i) Thresholds: population criterion applied to land-use plans

99. The national regulations set a threshold based on population (10,000 people). The Commission maintains that Article 3(3) of the Directive has not been transposed correctly in terms of "*small areas at local level*". In particular, the Commission complains that the threshold set for determining whether particular plans should be subject to SEA is too high.

100. The Commission, at paragraph 3.49 of the Reasoned Opinion, states that the fact that a plan or programme is screened for the purposes of Article 3(3) is not in itself a justification for limiting the scope of application of Article 3(2) of the Directive. However, in this regard, Ireland maintains that the Commission has not given significant weight to the fact that the threshold of 10,000 people is employed in *conjunction with* case-by-case screening in respect of sub-threshold plans. The population threshold of 10,000 is not, in any sense, intended to be definitive. The figure is, in effect, an outer threshold over which, regardless of whether there is a significant environmental impact or not, an environmental assessment must be undertaken. This threshold is employed in conjunction with provision for case-by-case screening, as allowed for under the Directive. The threshold does not

mean that the SEA process does not apply where a land use plan relates to an area with a lower population threshold. Far from it. All such plans are subject to the SEA process. The first step of that SEA is a screening decision whereby the relevant authority, as required by the SEA Directive, must consider the matter and decide whether or not there is likely to be significant environmental effects. If that decision is that there will be no significant environmental effects, then no further environmental assessment need be undertaken. Making such a screening decision is fully in compliance with the SEA Directive.

101. Ireland would also point out that, in making the screening decision, proper consideration must be given to Annexes I and II of the SEA Directive, which are replicated in full in the relevant Schedules to S.I.s No. 435 and 436 of 2004. In addition, the statutory Guidelines, at paragraph 3.5, state that:

> "*the key to deciding if SEA will apply will be whether the plan would be likely to have significant effects on the environment. The decision should not be determined by the size of an area alone. It will also be influenced by the nature and extent of the development likely to be proposed in the plan and its location (e.g. close to or within an SAC, SPA, or NHA), and its broad environmental effects*".

102. Notwithstanding the above points, the Irish authorities proposed, at a meeting with Officials from the Commission to discuss infringement cases held in Dublin on Thursday, 18 June 2009 that SEA should be made mandatory for local area plans where the population is less than 10,000 but where the area covered by the plan exceeds 60 square kilometres, and also that SEA should be mandatory, regardless of population size, where a local area plan is being prepared for a town and its environs.

103. However, in consideration of separate amendments to thresholds for local area plans proposed in the Planning and Development (Amendment) Bill 2009, which would raise the population threshold for mandatory LAPs from 2,000 to 5,000 persons, it may also now be appropriate to reduce the mandatory SEA threshold from 10,000 to 5,000 to provide for consistency of approach to local area plans.

104. Accordingly, it is proposed to replace Article 14A of the 2001 Regulations (S.I. No. 436) with the following amendment:

> "14A. (1) This article shall apply to a local area plan or an amendment to a local area plan for an area the population of which is less than **5000** persons **and / or where the area covered by the local area plan is less that 60 square kilometres**.

105. It is also proposed to amend Article 14B of the 2001 Regulations (S.I. No. 436) with the following amendments (highlighted in bold).

> "14B. Where –
> (a) the population of an area of a local area plan is **5,000** persons or more, or
> (b) **the area covered by the local area plan is greater that 60 square kilometres**, *or*
> (c) **the local area plan is being prepared for a town and its environs area,** or