



COMMISSION OF THE EUROPEAN COMMUNITIES

SECRETARIAT-GENERAL

Brussels, 03 XI 2009

ACCUSÉ DE RÉCEPTION

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**Irish PRB
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**03-11-2009
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SG-Greffe(2009)D/ **8251**
PERMANENT REPRESENTATION
OF IRELAND TO THE
EUROPEAN UNION
Rue Froissart, 89-93
1040 BRUSSELS

Subject: Reasoned Opinion
Infringement No 2007/2166

Please find enclosed the text of the Reasoned Opinion addressed by the Commission of the European Communities to Ireland under Article 226 of the Treaty establishing the European Community, on account of the 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

For the Secretary-General,



Encl. C(2009) 8165

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.10.2009

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REASONED OPINION

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1. Statement of facts

1.1 Following the opening of an own-initiative file, on 29 June 2007 the Commission addressed a letter of formal notice to Ireland (ref. SG(2007)D/203942) on account of the failure to submit Ireland's National Development Plan 2007-2013 (hereinafter referred to as "the NDP") to an assessment pursuant to Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (hereinafter referred to as "Directive 2001/42/EC" or "the Directive").

1.2 Ireland's responded by letter dated 27 September 2007 (ref.SG(2007)A/7417). It contested the Commission's argument that the Directive was applicable to the NDP.

1.3 In the meantime, the Commission carried out a wider examination of the legislation notified by Ireland for purposes of Article 13 of the Directive. This consists of two statutory instruments:

- European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations, 2004, S.I.No.435 of 2004 (hereinafter "S.I.No.435") and
- Planning and Development (Strategic Environmental Assessment) Regulations, 2004, S.I.No.436 of 2004 (hereinafter "S.I.No.436").

1.4 The basic legislation is S.I.No.435. This relates to the categories of plan set out in Article 3(2)(a) of the Directive but, with the exception of a review of the master-plan for the Dublin Docklands Area, excludes from the scope of its detailed provisions "*town and country planning and land use*". Instead, for town and country planning and land use, S.I.No.435 amends the Planning and Development, Act 2000 ("the 2000 Act"), which is Ireland's principal framework for land-use planning, inserting ministerial powers to adopt detailed regulations under the Act to give effect to the Directive in relation to different types of land-use plans provided for under the Act.

1.5 The ministerial powers were exercised by S.I.No.436. This covers the following categories of land-use plan which are referred to in the 2000 Act: a development plan, a variation of a development plan, a local area plan (or an amendment thereto), regional planning guidelines or a planning scheme.

1.7 On 4 April 2008, the Commission sent Ireland an additional letter of formal notice (ref.SG(2008)D/201578), maintaining its position with regard to the NDP and also identifying a wider set of points on which it considered S.I.No.435 and S.I.No.436 to be in non-conformity with the Directive.

1.8 Ireland responded by letter dated 18 July 2008. It maintained its position that the Directive does not apply to the NDP. It also largely rejected Commission arguments concerning the conformity of the Irish implementing legislation, although it did signal a

willingness to consider the adoption of new legislation to alleviate certain Commission concerns. Since then, no new legislation has been communicated.

2. Provisions of Directive

2.1 As set out in its Article 1, the objective of the Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with the Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

2.2 Article 2 of the Directive sets out the following definitions:

"(a) "plans and programmes" shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

- 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, and

- which are required by legislative, regulatory or administrative provisions;

(b) "environmental assessment" shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;

(c) "environmental report" shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I;

(d) "The public" shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups."

2.3 Article 3 of the Directive provides as follows:

"1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. 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.

3. 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."

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

6. In the case-by-case examination and in specifying types of plans and programmes in accordance with paragraph 5, the authorities referred to in Article 6(3) shall be consulted.

7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public.

8. The following plans and programmes are not subject to this Directive:

- plans and programmes the sole purpose of which is to serve national defence or civil emergency,*
- financial or budget plans and programmes.*

9. This Directive does not apply to plans and programmes co-financed under the current respective programming periods(11) for Council Regulations (EC) No 1260/1999(12) and (EC) No 1257/1999(13)."

2.4 Article 4 of the Directive provides as follows:

"1. The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.

2. The requirements of this Directive shall either be integrated into existing procedures in Member States for the adoption of plans and programmes or incorporated in procedures established to comply with this Directive.

3. Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, Member States shall apply Article 5(2) and (3)."

2.5 Article 5 of the Directive provides as follows:

"1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I.

4. The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report."

2.6 Article 6 of the Directive provides as follows:

"1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

3. Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.

4. Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.

5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States."

2.7 Article 7 of the Directive provides as follows:

"1. Where a Member State considers that the implementation of a plan or programme being prepared in relation to its territory is likely to have

significant effects on the environment in another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the plan or programme is being prepared shall, before its adoption or submission to the legislative procedure, forward a copy of the draft plan or programme and the relevant environmental report to the other Member State.

2. Where a Member State is sent a copy of a draft plan or programme and an environmental report under paragraph 1, it shall indicate to the other Member State whether it wishes to enter into consultations before the adoption of the plan or programme or its submission to the legislative procedure and, if it so indicates, the Member States concerned shall enter into consultations concerning the likely transboundary environmental effects of implementing the plan or programme and the measures envisaged to reduce or eliminate such effects.

Where such consultations take place, the Member States concerned shall agree on detailed arrangements to ensure that the authorities referred to in Article 6(3) and the public referred to in Article 6(4) in the Member State likely to be significantly affected are informed and given an opportunity to forward their opinion within a reasonable time-frame.

3. Where Member States are required under this Article to enter into consultations, they shall agree, at the beginning of such consultations, on a reasonable timeframe for the duration of the consultations."

2.8 Article 8 of the Directive provides as follows:

"The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."

2.9 Article 9 of the Directive provides that

"1. Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed:

(a) the plan or programme as adopted;

(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and

(c) the measures decided concerning monitoring in accordance with Article 10.

2. The detailed arrangements concerning the information referred to in paragraph 1 shall be determined by the Member States."

2.10 Article 10 of the Directive provides that

"1. Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

2. In order to comply with paragraph 1, existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication of monitoring."

3. Law

3.1 For the reasons set out below, the Commission maintains its view that Ireland's transposal and application of the Directive remain unsatisfactory.

National development plan

3.2 In the letter of formal notice and the additional letter of formal notice, the Commission contended that the NDP ought to have been submitted to an assessment under the Directive.

3.3 In their responses to the letter of formal notice and the additional letter of formal notice, the Irish authorities advance three main arguments as to why the NDP should not be considered as subject to the requirements of Directive 2001/42/EC:

- The NDP does not come within the definition of "plans and programmes" found in Article 2(a) of Directive 2001/42/EC because it is not required by "*legislative, regulatory or administrative provisions*". Ireland refers to a judgment of the Irish High Court of 31 July 2007 – the *Kavanagh* case – in which the High Court judge determined that "*unlike previous development plans, which were required by EU regulations to draw down EU structural funds, the 2007 NDP is not required by any legislative, regulatory or administrative requirement*". Ireland submits that the NDP is a voluntary plan and rejects the Commission's argument that the plan is required by administrative provisions.
- The NDP constitutes a financial plan within the meaning of Article 3(8) of Directive 2001/42/EC. Again Ireland refers to the above-mentioned judgment of the Irish High Court in which the judge considered that the NDP was a financial plan within the meaning of Article 3(8) of the Directive.
- The NDP does not represent a framework for future development consent of projects for purposes of Article 3(2)(a) of Directive 2001/42/EC. Again Ireland refers to the above-mentioned High Court judgment.

Arguments based on Article 2(a) of Directive 2001/42/EC

3.4 The Commission accepts that the NDP is not required by any legislative or regulatory provisions. However, it considers that the NDP comes within the scope of the reference in Article 2(a) to plans required by administrative provisions.

3.5 The Commission's additional letter of formal notice noted that the interpretation of what is meant by the reference in the final clause of Article 2(a) of Directive 2001/42/EC to "*required by ... administrative provisions*" is ultimately a matter for the European Court of Justice (ECJ). However, it submitted that, having regard to the broad purpose of Directive 2001/42/EC evident in Article 1 as well as to the links between the definition in Article 2(a) and the substantive scope-of-application provisions of Article 3 of Directive

2001/42/EC, the reference to administrative provisions in Article 2(a) should 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 Article 3(2), 3(3) and 3(4) of Directive 2001/42/EC. The Commission considered that, provided the instructions are lawful and binding on the officials and agencies concerned, the plan to be thus prepared comes within the scope of Article 2(a) because it is required by administrative provisions. It submitted 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).

3.6 Ireland's response to the Commission's additional letter of formal notice does not provide any alternative explanation for or interpretation of the reference to "*required by ... administrative provisions*." Instead, Ireland appears to seek a blanket exclusion for all plans and programmes that are not required by a pre-existing legislative or regulatory framework. In its response to the Commission's additional letter of formal notice, Ireland points to the importance of the express wording of a provision of Community law in interpreting its scope. However, Ireland fails to attach any significance to the Directive's *express* reference to plans or programmes that are required by administrative provisions.

3.7 The approach advanced by Ireland – i.e. of attaching no meaning to the express reference to plans or programmes required by administrative provisions – has far-reaching implications. It would take outside the scope of the Directive all self-originated plans and programmes prepared by an authority outside of a pre-existing legislative or regulatory framework, even if such plans and programmes, requested by administrative provisions, are likely to have significant effects on the environment and have subsequent legal effects. The additional letter of formal notice observed that this approach would seem to be applied in practice to other plans and programmes in Ireland. Ireland has not denied this.

3.8 Ireland suggests that the Commission's interpretation unjustifiably seeks to bring within the scope of the Directive all voluntary policy documents. This is not the case. The Commission has not referred to documents which are solely expressions of policy: it has referred to documents which, although they may be expressions of policy, also have the character of plans or programmes. Furthermore, the Commission has made it clear that the interpretation it advances only extends to those plans and programmes that would in other respects come within the scope of Article 3(2), (3) and (4) of the Directive. In this context, the Commission would refer to Recital (5) of the Directive, which explains that the adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making, and that the inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions.

3.9 With specific reference to the NDP, Ireland asserts that this is a "voluntary" policy document. It considers that the practical work of preparing it cannot be considered as required by administrative provisions. It considers that any instructions to an administrative authority by the political level to undertake such work do not come within the scope of "*required by ... administrative provisions*". In response, the Commission

observes that the NDP is undoubtedly a policy document in the sense that it reflects Irish Government policy. However, it is more than that: the NDP describes itself as a plan and it contains reference to specific measures.

3.10 The Commission recalls that, in the letter of formal notice, it sought details of the administrative instructions that governed the preparation of the NDP, referring to Article 10 of the EC Treaty. Ireland's response did not provide details. In their response to the additional letter of formal notice, the Irish authorities assert that the Commission has not identified any administrative provision requiring the preparation of the NDP and that none exists. The Commission submits that this is unreasonable as, notwithstanding a specific Commission request, Ireland did not provide details of the administrative instructions that governed the preparation of the NDP. As it stated in the additional letter of formal notice, the Commission assumes that, in the absence of any details being provided, the preparation of the NDP represented a lawful exercise of government powers and that the administrative authority that prepared it had the necessary authority and instructions to do so. In the light of the stance taken by Ireland, the Commission also considers 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, Ireland has failed to comply with its obligations under Article 10 of the Treaty.

Arguments based on Article 3(8) of Directive 2001/42/EC

3.11 In the additional letter of formal notice, the Commission accepted that the NDP has a financial dimension, with the financial resources needed to meet its objectives being set out. However, it observed that the NDP describes itself as a "roadmap" marking out the development challenges faced by Ireland including *"removing the remaining infrastructure bottlenecks that constrain ... economic development and inhibit balanced regional development and environmental sustainability."* It sets out a number of objectives including *"decisively tackling structural infrastructure deficits"* and identifies a number of specific infrastructure projects. It is of a similar character to programmes under the Structural Funds which are subject to SEA. The Commission observed that, in the light of this, it would be anomalous to treat the NDP as being outside the scope of the Directive while treating Structural Fund programmes as being within it. It also submitted that the fact that a plan or programme has a financial dimension and sets out the anticipated resource allocation for particular objectives does not necessarily bring it within Article 3(8) of the Directive. Indeed, Annex II of the Directive specifically refers to the allocation of resources as amongst the criteria for determining the need for SEA where this is discretionary.

3.12 In their response to the additional letter of formal notice, the Irish authorities continue to take the view that the NDP is a financial or budget plan within the meaning of Article 3(8), referring to the *Kavanagh* case. They do not comment on the fact that the NDP has a similar character to programmes under the Structural Funds which are subject to SEA, nor do they comment on the fact that Annex II of the Directive specifically refers to the allocation of resources.

3.13 The Irish authorities suggest that the Commission is seeking to have all financial and budget plans and programmes covered by the Directive. This is not the case. The Commission accepts that documents which have a purely budgetary or financial character are excluded from the Directive by virtue of Article 3(8). However, as already noted, 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.

Arguments based on Article 3(2), (3) and 3(4) of Directive 2001/42/EC

3.14 In the letter of formal notice and the additional letter of formal notice, the Commission drew attention to examples of where the NDP could be considered as setting a framework for a development subject to the requirements of Directive 85/337/EEC. Apart from these examples, the Commission also drew attention to two provisions of the 2000 Act, which governs project decision-making by Irish local authorities and Ireland's Planning Appeals Board, including in relation to projects falling within the scope of Directive 85/337/EEC: Section 34 contains an explicit reference to planning authorities having regard to *"the policy of the Government, the Minister or any other Minister of the Government"*; Section 143 provides that the Planning Appeals Board (which will often be the final decision-maker in projects involving an EIA under Directive 85/337/EEC) *"shall, in performing its functions, have regard to the policies and objectives for the time being of the Government, a state authority..."*. It observed that the influence of the NDP on the decisions of local authorities and the Planning Appeals Board in relation to projects falling under Directive 85/337/EEC is not a matter of arbitrary choice: it is founded on requirements contained in Irish planning legislation. As regards what constitutes a framework for purposes of Article 3(2) of Directive 2001/42/EC, the Commission observed that it is not necessary for the relevant plan or programme to dictate the outcome of the project decision in order for it to constitute a framework. By analogy, this is evident from the criteria set out in Annex II of Directive 2001/42/EC.

3.15 Ireland makes three submissions in response. First, it draws attention to paragraph 3.25 of the Commission's guidance document on the Directive for purposes of commenting on the meaning of what constitutes setting a framework. Second, it argues that it is land use plans and not the NDP that set a framework for the individual examples cited by the Commission. Third, relying on case-law of the Irish courts in relation to the formula *"shall have regard to"* it argues that Sections 34 and 143 of the 2000 Act do not support the Commission's argument that the NDP sets a framework because the authorities concerned are only required to have regard to the NDP.

3.26 In response, the Commission comments as follows.

3.27 It does not accept that there is any contradiction between the guidance document and the letter of formal notice and additional letter of formal notice. The NDP is more than a generalised indicative allocation of resources: it sets out objectives, some very specific in terms of both the infrastructure identified as necessary and the location of that infrastructure (the Landsdowne Road stadium being an example). Furthermore, the NDP does not exist in a legal vacuum: it is tied into decision-making on individual development consent applications by virtue of Sections 34 and 143 of the 2000 Act.

3.28 The Commission accepts that Sections 34 and 143 of the 2000 Act do not legally oblige local authorities and the Planning Appeals Board to automatically make development consent decisions in favour of projects and objectives that figure in the NDP. However, the Directive does not require this. The national case-law to which Ireland refers indicates that the local authorities and the Planning Appeals Board are legally obliged to fully inform themselves of the NDP and to give reasonable consideration to it when making their decisions. In the Commission's view, this is sufficient to show that the NDP sets a framework.

3.29 Moreover, nothing in the Directive suggests that a particular plan or programme must set the only framework for decisions under Directive 85/337/EEC. It is possible that decisions for purposes of Directive 85/337/EEC will be made within several overlapping frameworks, for example a land-use framework and a sectoral framework.

3.30 As for the examples that the Commission cited, Ireland does not dispute these, but it disputes the significance of explicit references to the NDP in the development consent decisions concerned, arguing that the key framework for such decisions was the relevant land-use development plan rather than the NDP. However, as has already been mentioned, it is possible for a decision to be referable to more than one framework and the Commission maintains its view that the decisions in question show that the NDP is amongst the key frameworks governing decision-making by the Planning Appeals Board. Indeed, as far as the Commission is aware, the Planning Appeals Board has never rejected any project that figures in or has been endorsed by the NDP.

3.31 Against this background, the Commission maintains its position that the failure to undertake an SEA in respect of the NDP represents a breach of the requirements of Articles 3 to 9 of Directive 2001/42/EC inclusive. A breach of Article 10 also arises in as much as the NDP has not been made subject to the binding monitoring referred to in the provision of Directive 2001/42/EC.

2007 forestry plan excluded from SEA

3.32 In the additional letter of formal notice, the Commission observed that the interpretation that Ireland gives to Directive 2001/42/EEC in relation to the NDP opens the prospect of other plans and programmes being treated as outside the scope of Directive 2001/42/EC. It gave the example of a 2007 forestry plan - termed a forestry management protocol - creating a framework for the establishment of new forestry plantations - which will in practice consist almost entirely of non-native conifer species - in areas identified as requiring classification as special protection areas (SPAs) for the Hen harrier, a species figuring on Annex I of Directive 79/409/EEC on the conservation of wild birds¹. The Commission took the view that the failure to undertake an SEA in respect of the forestry protocol represents a breach of the requirements of Articles 2 to 9 of Directive 2001/42/EC inclusive. A breach of Article 10 also arises in as much as this forestry plan has not been made subject to the binding monitoring referred to in that provision of Directive 2001/42/EC.

3.33 In their response, the Irish authorities contend that the protocol is not a plan because it is a voluntary document and is not therefore within the scope of the Directive. Furthermore, the Irish authorities consider that it is more appropriate to assess the impact of forestry at the level of individual projects in accordance with Directive 85/337/EEC.

3.34 The Commission comments as follows.

3.35 As with the NDP, the Commission considers that the protocol is not a voluntary plan but a plan required by administrative provisions. Moreover, it represents a major framework for an Annex II project category under Directive 85/337/EEC, viz. initial

¹ The failure of Ireland to classify any areas for the species is the subject of a December 2007 ruling of the European Court of Justice in Case C-418/04, *Commission v Ireland*.

afforestation within areas protected pursuant to Directive 79/409/EEC. As for Ireland's argument that assessment at project level is more appropriate, assessment under Directive 85/337/EEC is not an alternative to assessment under Directive 2001/42/EC. Furthermore, the Commission understands that, to date, no assessments have been carried out pursuant to Directive 85/337/EEC on any individual afforestation projects coming within the scope of the forestry plan.

3.36 Against this background, the Commission maintains its position that the failure to undertake an SEA in respect of the forestry plan represents a breach of the requirements of Articles 3 to 9 of Directive 2001/42/EC inclusive. A breach of Article 10 also arises in as much as the forestry plan has not been made subject to the binding monitoring referred to in the provision of Directive 2001/42/EC.

Conformity of Ireland's transposal of Directive 2001/42/EC

Transposal of Article 3(2) of the Directive: principal plans and programmes

3.37 The Directive requires all plans and programmes coming within the scope of its Article 3(2) to undergo an SEA in accordance with its Articles 4 to 9.

Lack of coverage of programmes within the sphere of town and country planning and land-use

3.38 In its additional letter of formal notice, the Commission observed that S.I.No.435 and S.I.No.436 do not cover programmes (as distinct from plans) within the sphere of town and country planning and land-use. This narrows the scope of application of the Directive. Thus, important Government building programmes such as for decentralised offices, schools and prisons are excluded, although these may have significant land-use implications and have an important bearing on those types of plan that come within the scope of S.I.No.436. As a result, in as much as Ireland has made inadequate provisions for transposing Article 3(2) of the Directive, there is a concomitant failure to comply with Article 3(1) of the Directive in combination with Articles 4 to 9.

3.39 In their response, the Irish authorities contended that the relevant Irish legislation does not recognise any category of programme in the sphere of town and country planning. The types of programmes referred to by the Commission were not covered by the Directive, being voluntary and in the nature of budgetary programmes. Nonetheless, Ireland would consider making provision for programmes through amending legislation.

3.40 The Commission comments as follows. To date, Ireland has not communicated any amending legislation. The Commission maintains its view that the lack of Irish legislative provision for programmes in the sphere of town and country planning is unjustified. Even if it were to be accepted that certain programmes do not come within the scope of the Directive, it cannot be totally excluded that programmes coming within the Directive's scope will ever be proposed. In this regard, the Commission would refer to the fact that the Directive includes programmes required by administrative provision and that Ireland (in the Commission's view unjustifiably) currently attaches no meaning to this.

Lack of provision for assessing NDP and other similar plans

3.41 In its additional letter of formal notice, the Commission observed that, for purposes of Article 2(a) in combination with Article 3(2) of the Directive, S.I.No.435 and S.I.No.436 exclude certain categories of plan with a land-use dimension, notably the NDP and other plans that originate in and are adopted by the Irish Government. As a result, in as much as Ireland has made inadequate provisions for transposing Article 2(a) and 3(2) of the Directive, there is a concomitant failure to comply with Article 3(1) of the Directive in combination with Articles 4 to 9.

3.42 The arguments that Ireland has made in relation to the applicability of the Directive to the NDP are already noted above. Under this heading, the Commission maintains its position that there has been an inadequate transposition of Article 2(a) and Article 3(2) of the Directive.

Major modifications of certain land-use plans

3.43 In its additional letter of formal notice, the Commission pointed out that S.I.No.436 would not appear to have completely and correctly transposed Article 2(a) in combination with Article 3(2) of the Directive in relation to major modifications of certain land-use plans within its scope. In particular, whereas Article 2(a) of the Directive covers modifications to plans and programmes, S.I.No.436 does not cover changes or amendments to regional planning guidelines or a planning scheme, even though these may concern very large areas. As a result, in as much as Ireland has made inadequate provisions for transposing Article 2(a) and 3(2) of the Directive, there is a concomitant failure to comply with Article 3(1) of the Directive in combination with Articles 4 to 9.

3.44 In their response, the Irish authorities appear to concede that there is a legislative gap in S.I.No.436 and allude to an intention of adopting new legislation. However, no new legislation has yet been communicated.

Transposal of Article 3(3), (5), (6) and (7): plans and programmes involving screening

3.45 The Directive provides that plans and programmes coming within the scope of Article 3(2) which determine the use of small areas at local level and minor modifications to plans and programmes referred to in Article 3(2) shall require an SEA only where the Member States determine that they are likely to have significant effects. The provisions of Article 3(5) to (7) of the Directive apply to the process of determining whether an SEA is necessary.

3.46 In the additional letter of formal notice, the Commission contended that Ireland has made inadequate provision in its legislation for transposing Article 3(3) of the Directive and that there was a concomitant failure to comply with Article 3(1) in combination with Article 4 to 9 of the Directive.

"Small areas at local level"

3.47 The additional letter of formal notice noted that S.I.No.436 uses a population criterion of 10,000 people to establish a dividing line between land-use plans requiring an SEA pursuant to Article 3(2) of the Directive and land-use plans subject to case-by-case screening for the possible need for SEA. The Commission indicated that it was not convinced that the areas excluded from the scope of the provisions of Article 3(2) by this threshold correspond to the terms "*small areas at local level*" referred to in Article 3(3)

of the Directive since, in thinly populated districts, the threshold could result in sizeable and environmentally important surface areas being excluded. Even in more densely populated areas, plans covering entire towns may be excluded by the threshold: this would appear to go beyond what is possible by reference to the terms "*small areas at local level*". Moreover, the Irish legislation does not appear to contain any provisions to avoid plan-splitting, i.e. the division of related plan-making exercises on a population basis so as to cause each exercise to fall below the threshold, notwithstanding the cumulative impact, thus unjustifiably reducing the scope of application of Article 3(2) of the Directive and increasing the scope of application of Article 3(3). In this context, the Commission referred to the 10th recital of the Directive which indicates that the plans mentioned there should as a general rule be made subject to environmental assessment. The plans referred to in Article 3(3) are an exception to this general rule and the Commission considered it inappropriate that Article 3(3) should be given an enlarged application at the expense of Article 3(2).

3.48 In their response, the Irish authorities stress that, while not automatically requiring an SEA, plans and programmes covered by Article 3(3) still need to be screened for assessment. As for the risk of plan-splitting, the Irish authorities argue that there was no question of this arising in practice but that they would consider a technical amendment to the Irish legislation.

3.49 The Commission comments as follows. The fact that a plan or programme is screened for purposes of Article 3(3) is not in itself a justification for limiting the scope of application of Article 3(2) of the Directive. Ireland has not offered any arguments to demonstrate that the threshold of 10,000 people represents a satisfactory reflection of the concept of "*small areas at local level*". Furthermore, Ireland has not shown how plan-splitting is precluded under its existing legislation and it has not presented any new legislation. The Commission accordingly maintains the arguments that it presented in the additional letter of formal notice that Ireland has incorrectly transposed Article 3(3) of the Directive in as much as it has provided for an excessively wide concept of "*small areas at local level*". There is a concomitant failure to correctly transpose Article 3(2) of the Directive, since the effect of widening the scope of application of Article 3(3) is to reduce the scope of application of Article 3(2).

Minor modifications to plans and programmes

3.50 The additional letter of formal notice noted the following:

- S.I.No.436 would not appear to have completely and correctly transposed Article 2(a) in combination with Article 3(3), (5), (6) and (7) of the Directive. In particular, whereas Article 2(a) of the Directive covers modifications to plans and programmes, S.I.No.436 makes no provision for the possible SEA of changes or amendments to regional planning guidelines or a planning scheme.
- S.I.No.436 would appear deficient in relation to the determination of whether a modification of a proposed development plan, proposed variation of a development plan, proposed local area plan or proposed amendment of a local area plan requires SEA. In particular, it would appear from the wording of S.I.No.436 that where a proposed plan in these categories is determined not to require an SEA or where an SEA is deemed necessary and an environmental report is prepared, any subsequent amendment to the proposal will procedurally escape requirements deriving from the Directive even where such an amendment is likely to have significant environmental effects. This may operate as a

significant omission as important re-zonings of land may be introduced very late in a plan-adoption process.

3.51 In their response, the Irish authorities indicated that they were considering introducing amending legislation. However, no legislation has yet been communicated. Against this background, the Commission considers that Ireland has inadequately transposed Article 2(a) in combination with Article 3(3),(5),(6) and (7) of the Directive by making inadequate provision for the assessment of modifications of plans and programmes.

Reference to "other programmes" in Annex II of the Directive

3.52 The additional letter of formal notice further noted that, as regards the criteria of Annex II of the Directive referred to in Article 3(5), in particular the criterion set out in Annex II.1, second indent², the schedule of S.I.No.436 that corresponds to Annex II contains no reference to "other programmes". The Commission observed that this omission is potentially significant as there is an important relationship between development plans and local area plans, on the one hand, and infrastructure or pollution-control programmes, on the other. For example, a land zoning may lead to urban development that causes a settlement to come within an agglomeration size carrying waste-water collection and treatment obligations under Directive 91/271/EEC concerning urban waste water treatment and have implications for an updated implementation programme under Article 17 of that directive. Or such a rezoning may have implications for a pollution reduction programme under Directive 2006/11/EC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community.

3.53 In their response, the Irish authorities accepted that the omission existed but pointed out that the point was covered in a national guidance document. Furthermore, they indicated that they were considering adopting new legislation on the matter.

3.54 Since then, no new legislation has been communicated. As for the guidance document, this cannot be considered a substitute for binding legislation. Consequently, the Commission maintains its view that Ireland has failed to completely and correctly transpose Article 3(5) in combination with Annex II of the Directive.

Transposal of Article 5(1) to (3): environmental report

3.55 The additional letter of formal notice pointed out that Article 5(1) to (3) of the Directive contain provisions relating to the content of the environmental reports that are to form part of the SEA process. Annex 1 of the Directive sets out information to be given. The letter argued that S.I.No.436 is deficient in its transposal of Annex I because it contains no reference to the other programmes explicitly mentioned in Annex 1(a). As noted above, there may be an important relationship between a land-use plan and infrastructure and pollution-reduction programmes.

3.56 In their response, the Irish authorities again referred to their intention of considering the adoption of new legislation. However, no new legislation has been communicated. Accordingly, the Commission maintains its view that, by failing to make adequate

² "the degree to which the plan or programme influences other plans and programmes, including those in hierarchy".

provision for information on other programmes, Ireland has inadequately transposed Article 5(1) to (3) of the Directive in combination with Annex I of the Directive.

Transposal of Article 5(4): consultation of environmental authorities with regard to scope and level of detail of the information which must be contained in the environmental report

3.57 The additional letter of formal notice pointed out that Article 5(4) of the Directive provides for consultation of the environmental authorities referred to in Article 6(3) of the Directive. As noted below, S.I.No.435 and S.I.No.436 have unduly narrowed the list of environmental authorities requiring consultation. There is a corresponding undue narrowing of the list of environmental authorities requiring consultation under Article 5(4) (see comments on Article 6(3) below).

3.58 The Irish authorities address this point in conjunction with the related Article 6(3) point. The Commission comments in more detail below and confirms that it maintains this ground of complaint in the present Reasoned Opinion.

Transposal of Article 6(3): designation of environmental authorities to be consulted

3.59 The additional letter of formal notice noted that Article 6 of the Directive sets requirements for the consultation of environmental authorities designated pursuant to Article 6(3). It observed that Ireland does not appear to have formally designated any authorities as it is required to do under Article 6(3) of the Directive. Instead, S.I.No.435 and S.I.No.436 envisage the consultation of only three environmental authorities – Ireland's Environmental Protection Agency, Ireland's environment ministry and Ireland's marine ministry. Moreover, whether these need to be consulted is left to the discretion of the authority preparing the plan or programme: it is not clearly evident that consultation of these authorities is mandatory. The Commission also contended that, apart from the lack of formal designation of authorities for purposes of Article 6(3), the Irish legislation would appear to be unduly narrow in terms of the extent of consultation of environmental authorities that it envisages. It observed that

- in 2007, Ireland's marine ministry was broken up, with certain responsibilities transferring to its agricultural ministry. It was not evident that provision has been made for consultation of the latter ministry for purposes of Articles 5(4) and 6(3).
- there is provision for possible consultation of the environment ministry only with regard to a limited set of its functions, i.e. nature conservation and archaeological and architectural heritage: there is no provision for consulting it with reference to its central role in planning and allocating resources for environmental infrastructure such as waste-water treatment plants and drinking water treatment facilities. Combined with the omissions concerning programmes already referred to above, this creates a strong risk that tasks related to SEA in the sphere of land-use planning will not take adequate account of the views of strategic environmental decision-makers.
- there is no provision for consultation of authorities such as the Heritage Council, which has an important national role in relation to the physical and natural heritage, and the National Museum, which has important functions in relation to safeguarding the archaeological heritage. Nor is there provision for consulting fisheries boards, despite their considerable responsibilities in relation to water pollution and fisheries.
- there is no provision for consultation of local authorities responsible for land-use or environmental quality. For example, a county council may prepare a land-use

plan for dormitory towns of a neighbouring city which is under the responsibility of a city council. The land-use plan may provide for substantial urban expansion which in turn substantially increases motor vehicle-related impacts, including air quality impacts, in the neighbouring city. Similarly, one local authority may propose a land-use plan which proposes urban expansion without adequate provision for waste-water treatment: this may negatively impact on a neighbouring authority charged with ensuring compliance with bathing water or other water quality standards. Neither S.I.No.435 nor S.I.No.436 treats the affected authority as a designated authority for purposes of Article 6(3) and Article 5(4) of the Directive. There is also no provision for consultation of the Planning Appeals Board, although the Board may subsequently be obliged to take account of plans in its project decision-making.

3.60 In their response, the Irish authorities contended that Article 6(3) gives Member States a wide discretion and that Ireland has acted in accordance with this. They also presented the following arguments:

- Ireland has designated three authorities, the EPA, the Minister for Environment, Heritage and Local Government (with regard to a limited number of functions) and the Minister for Communications, Marine and Natural Resources (now the Minister for Agriculture, Food and Forestry).
- Other bodies referred to by the Commission operate under the aegis of these ministries.
- Guidelines encourage the consultation of neighbouring or affected local authorities.

Ireland also referred to an intention of considering legislative amendments.

3.61 The Commission comments as follows.

3.62 It notes that Ireland has not communicated any new legislation.

3.63 With regard to Ireland's contention that Article 6(3) of the Directive gives Member States a wide discretion in terms of consultation of environmental authorities, the Commission would observe that the express wording of Article 6(3) indicates that there ought to be consultation of those environmental authorities which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. This is underscored by Recital (15) which states: *"In order to contribute to more transparent decision making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable, it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion."*

3.64 The Commission maintains its view that the Irish legislation fails to sufficiently ensure that relevant authorities with environmental responsibilities are designated. It would make the following observations. It is noteworthy that, for purposes of Directive 85/337/EEC, Ireland has identified far more environmental authorities to be consulted than it has for Directive 2001/42/EC. Bodies with environmental responsibilities such as the fisheries boards and Heritage Council exercise those responsibilities independently of the Irish environment minister and agriculture minister. As regards affected neighbouring local authorities, a guidance document is not a substitute for designation. As regards the

two ministers that are to be consulted, it is noteworthy that these are only to be consulted with regard to limited aspects of their portfolios. For example, the minister for the environment is responsible for preparing and monitoring investment programmes for urban waste water infrastructure but there is no provision for consulting the minister in relation to environmental reports on land-use plans that will have serious implications for this ministerial responsibility. Furthermore, for purposes of Article 6(3), Ireland has designated *none* of the main authorities with land-use responsibilities in Ireland, viz. local authorities and the Planning Appeals Board. In the light of the foregoing, Ireland has largely left without a meaning the provision for consultation of authorities with relevant environmental responsibilities.

3.65 Against this background, the Commission maintains its view that there has been inadequate transposal of Article 6(3) of the Directive.

Transposal of Article 6(2) and (4): consultation of the public

Lack of transposal of Article 6(4)

3.66 The additional letter of formal notice noted that Article 6(4) requires Member States to identify the public for purposes of consultation: it includes a specific reference to the public affected and to non-governmental organisations. The additional letter of formal notice contended that the provisions of Article 6(4) are not been transposed into Irish law.

3.67 In their response, the Irish authorities contended that the Commission had failed to particularise this complaint and that, in any case, there is no need for specific transposal as Irish law does not restrict the entitlement to participate in an SEA.

3.68 The Commission comments as follows.

3.69 It rejects the claim that it has failed to particularise this ground of complaint. In the additional letter of formal notice, the Commission referred to an absence of transposal in the Irish legislation. Ireland has not claimed that there is any explicit transposal but instead relies on the fact that, under the Irish legislation, it is open to all members of the public to participate in the SEA.

3.70 The Commission would point out that the identification of the public affected for purposes of Article 6(4) is linked to the duty to make the environmental report available as well as the duty to ensure that the public has an early and effective opportunity to express an opinion. A plan or programme requiring an SEA under the Directive may have impacts or consequences in any or all parts of Ireland. The additional letter of formal notice gave the example of an aquaculture programme which may affect a remote coastal community (see also below). In this regard, there is a link between the inadequate transposal of Article 6(2) and the absence of transposal of Article 6(4). On the one hand, the relevant authorities are not required to identify the affected public pursuant to Article 6(4). On the other hand, they are not explicitly required to ensure that that public has an early and effective opportunity to express an opinion. The duty of the authorities is limited to making a newspaper publication in the area affected by the plan and to ensuring that the environmental report is made available at a stated place. In the absence of express transposal of Article 6(4) and the relevant part of Article 6(2) of the Directive, it cannot be assumed that the place where the report is made available is related to the physical location of the affected public. The requirements of the Irish legislation may

thereby be satisfied without the affected public being given an effective opportunity to express an opinion.

Failure of Irish legislation to include a reference to the public being given an early and effective opportunity to express an opinion

3.71 The additional letter of formal notice noted that Article 6(2) of the Directive provides that the public shall be given an early and effective opportunity to express an opinion on a draft plan or programme and the accompanying environmental report. It contended that the relevant Irish legislation does not expressly transpose a requirement to ensure that the public is given an early and effective opportunity to express an opinion. Instead the legislation provides for a duty on the competent authorities to publicise in a newspaper the proposed preparation of a plan or programme and the availability for inspection of the relevant documents *"at a stated place or places and at stated times during a stated period of not less than 4 weeks from the date of the notice"*. In the absence of an express duty to ensure an effective opportunity to express an opinion, the wording of the Irish legislation allows for the possibility that the relevant documents will only be made available at a remote location and during restricted hours. The Commission observed that, combined with the lack of transposal of Article 6(4) of the Directive, this has the potential to undermine the objectives of the Directive. For example, under Irish law, Ireland's largest non-governmental environmental organisation, An Taisce, has an important statutory role in relation to projects coming within the scope of development plans. However, SEA-related documents concerning a development plan may only be made available for inspection by An Taisce in buildings hundreds of kilometres from where An Taisce is based, making the consultation process ineffective. For ordinary citizens, a plan made by, for example, a Government ministry may only be made available for inspection at a ministry office hundreds of kilometres from where the citizens live. For instance, an aquaculture programme affecting an off-shore island in the north-west of Ireland may be prepared by the agricultural ministry and made available for inspection at its offices in Clonakilty in the far south of the country. Thus, an affected member of the public may need to make an overnight round-trip of several hundred kilometres in order to have access to the documentation. The Commission stated a view that, against this background, the provisions of the Irish legislation appear to fall short of what is required for an early and effective opportunity to express an opinion.

3.72 In their response, the Irish authorities argued that, pursuant to Article 6(5) of the Directive, Ireland had made practical arrangements for public consultation and that the appropriate test for judging these arrangements was whether they made public participation virtually impossible or excessively difficult. They also referred to a national guidance document which encouraged authorities to be proactive and indicated an intention of considering new legislation.

3.73 The Commission comments as follows. It accepts that Article 6(2) of the Directive does not stipulate how public consultation should take place. However, Article 6(2) expressly refers to the public being given an early and effective opportunity to express an opinion. The Irish legislation does not require those authorities responsible for consulting the public to ensure that the public has such an opportunity and, for the reasons set out in the additional letter of formal notice, the arrangements that have been put in place do not of themselves ensure such an outcome. The test is not whether public participation is made virtually impossible or excessively difficult: it is whether the public has an early and effective opportunity to express an opinion. The guidance document

referred to by Ireland is not a substitute for an express transposal of this requirement and Ireland has not submitted any new legislation.

3.74 Against this background, the Commission remains of the view that Ireland has failed to fully and completely transpose Article 6(2) of the Directive.

FOR THESE REASONS

THE COMMISSION OF THE EUROPEAN COMMUNITIES

after giving Ireland the opportunity to submit its observations by letter of formal notice dated 29 June 2007 (ref. SG(2007)D/203942) and additional letter of formal notice dated 4 April 2008 (ref.SG(2008)D/201578) and in view of the replies of the Government of Ireland dated 27 September 2007 (ref.SG(2007)A/7417) and 18 July 2008,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

under the first paragraph of Article 226 of the Treaty establishing the European Community that

- by failing to subject Ireland's National Development Plan 2007-2013 and a forestry plan covering areas important for the conservation of the Hen Harrier to an environmental assessment in accordance with Article 3(1) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, and

- by failing 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 said Directive 2001/42/EC, Ireland has failed to fulfil its obligations under Articles 3 to 10 of the said Directive 2001/42/EC, and

- by failing to disclose the administrative instructions governing the preparation of Ireland's National Development Plan 2007-2013,

Ireland has failed to respect the obligations that it has under Article 10 of the EC Treaty.

Pursuant to the first paragraph of Article 226 of the Treaty establishing the European Community, the Commission invites Ireland to take the necessary measures to comply with this Reasoned Opinion within two months of receipt of this Opinion.

Done at Brussels, 29.10.2009

For the Commission

Stavros DIMAS

Member of the Commission

