Buan Ionadaíocht
na hÉireann
chuig an Aontas Eorpach

Permanent Representation
of Ireland
to the European Union

18 July 2008

Ms. Catherine Day
Secretary General
Secretariat-General
Commission of the European Communities
B-1049
Brussels

Ref: Additional Letter of Formal Notice – Infringement No. 2007/2166

Dear Secretary General,

I refer to your additional letter of formal notice of 3rd April, 2008 concerning the application of Directive 2001/42/EC ("the SEA Directive") to Ireland's National Development Plan 2007-2013 ("the NDP"), and the transposition by Ireland of certain provisions of that Directive.

I also refer to your letter of 8th May, 2008 in which Ireland was notified of an extension of the deadline for its response to 4th July, 2008, and to the subsequent extension to 18th July 2008. I wish to express the appreciation of my authorities of the Commission's willingness to provide Ireland with the additional time required to give comprehensive consideration to this important issue.

Your additional letter of formal notice is divided into three sections. For ease of reference, Ireland's response is divided into the same sections.

I. National Development Plan 2007-2013

From the outset, Ireland reiterates its categorical rejection of the Commission's contention that it is in breach of the SEA Directive in relation to the NDP. Ireland will not repeat all the views expressed in its response of 27th September, 2007; however, those views remain applicable, and this letter should be read in conjunction with the response made on 27th September, 2007.

The Commission in its Additional Letter purports to rebut three points made by Ireland in its response of 27th September, 2007. 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.

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.

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.

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.

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.

In summary, therefore, the NDP:

(i) is not "required" by any legislative, regulatory or administrative provision;
(ii) sets out in a single document the investment objectives that the Government intends to prioritise over the period 2007-2013;
(iii) 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;

(iv) provides an indicative breakdown of how the overall level of resources could be allocated amongst several different investment priorities and within the investment priorities.

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

The first point made in Ireland's response of 27th September, 2007 was that the NDP does not come within the definition of "plans and programmes" under Article 2(a) of the SEA Directive. In particular, the point was 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.

In the Additional Letter, however, the Commission puts forward an entirely different test, suggesting that the SEA 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."

With respect, there is simply no basis for reading into the SEA 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.

As the Commission is well aware, the European 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).

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"—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.

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 (to use a neutral term) does not come within the definition under Article 2(a), the SEA Directive simply does not apply.

There are very obvious reasons for excluding voluntary policy documents (to use a neutral term) from the scope of the SEA Directive. It would be entirely unworkable and entirely unnecessary to require that a SEA be carried out in respect of such voluntary documents. One of the fundamental values of the SEA 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 SEA Directive expressly addresses the need to avoid duplication, as does Recital (9) of the Preamble to the Directive.

On the Commission's interpretation, conversely, the SEA Directive would 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 SEA Directive that the plan or programme have been required by any legislative, regulatory or administrative provision has been met.

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 simply not the case. 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.

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.

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.

In conclusion, therefore, 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.

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

Even if the NDP came within the definition of Article 2(a)—which is denied for the reasons set out above—it is nevertheless excluded from the SEA Directive under Article 3(8). Under this Article, 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.

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).

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 programmes do not displace the need for specific approval under the budgetary process and no commitments can be entered into, other than on that basis.

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 planning permission.14-18 of the Executive Summary).

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."

Second, 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).

Third, 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 inbuilt flexibility to allow for reallocation as necessary depending on evolving priorities and the economic and budgetary situation" (p.12 of the Executive Summary).

Given the above, Ireland respectfully suggests that the selective quotations from the NDP that the Commission has taken out of context and relied upon in its Additional Letter of Formal Notice do not accurately reflect the true nature of the plan. Both quotations are from the Overview Summary included in the NDP. The first quotation is from p. 15 of the NDP (the phrase cited by the Commission is italicised):

> "To optimise our choices for a better long-term future we need a roadmap, clearly marking out the landmark challenges we face such as:

> *removing the remaining bottlenecks that constrain our economic development and inhibit balanced regional development and environmental sustainability;*
>
> further equipping our children and youth with the skills and education to grasp the opportunities presented to us;
>
> creating and sustaining high value employment opportunities; and
>
> redistributing the product of wealth to foster an inclusive society, including adequately catering for those who have already contributed to Ireland's success over previous decades."

It is quite clear from the context that the cited phrase is intended to list the challenges facing Ireland which the provision of funding under the NDP is intended to address. The second quotation is from p. 17 of the NDP (the phrase cited is italicised):

> "Many of the key elements of this Plan underpin these common, and interlinked, objectives.
>
> > *Decisively tackle structural infrastructure deficits* that continue to impact on competitiveness, regional development and general quality of life and to meet the demands of the increasing population"

Again, it is quite clear from the context that this is part of a general statement of the general objectives for which funding under the NDP will be made available.

In the light of the foregoing, it is incontrovertible that the NDP is properly characterised as a financial or budget plan, it being inextricably linked with the budgetary policy for the State. It would appear, therefore, that the NDP falls squarely within the exemption accorded to financial or budget plans and programmes under Article 3(8) of the SEA Directive. Moreover, the Commission itself has recognised the breadth of the exemption in this regard: see paragraph 3.63 of the Commission's Guidance document, which states that:

> "Budgetary plans and programmes would include the annual budgets of authorities at national, regional or local level. Financial plans and programmes could include ones which describe how some project or activity should be financed, or how grants or subsidies should be distributed."

Moreover, that the NDP is a budgetary or financial plan has been confirmed, as a finding of fact, in the recent judgment of the High Court of Ireland (Smyth J.) in the case of *Kavanagh .v. The Government of Ireland & Ors. (Unreported)* at p. 55. 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.

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.

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

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 SEA Directive. In response to the Commission's contentions in its Additional Letter, Ireland makes three points, which will be addressed in turn below. However, by way of preliminary comment, 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)."

Turning to its three rebuttal points, Ireland respectfully submits, 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.

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.

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 (the national Planning Appeals Board) 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.

The point made above is borne out by the examples which the Commission itself cites at page 3 of its Additional Letter. 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.

Lansdowne Road Stadium

As Ireland has already explained in its previous response of 27th September, 2007, An Bord Pleanála's reference to the NDP was only in the context of funding for the proposed sports stadium. The fact that the reference to the NDP was only in relation to funding simply serves to confirm the point made above to the effect that the NDP is excluded from the terms of the SEA Directive on the basis that it is a financial or budget plan or programme. Moreover, the commitment on behalf of the Irish Government to provide funding for the redevelopment at Lansdowne Road was made in January, 2004, that is about three years in advance of Government approval and launch of the NDP. The NDP, in that respect, merely repeats a decision which had been made previously.

Waste Incinerator Project in County Meath

In relation to the waste incinerator project in County Meath, An Bord Pleanála gave nine reasons and considerations for granting permission for the project including the Meath County Development Plan, 2007. The NDP was referred to only in respect of its provisions concerning waste management. These provisions are general; they are not project specific and do not descend to any level of detail about any site. It was the Meath County Development Plan, 2007 which set the framework for development consent, within the meaning of Article

3(2)(a) of the Directive. By virtue of s.4 of the Waste Management (Amendment) Act, 2001, the County Development Plan was deemed to include the objectives contained in the Regional Waste Management Plan. Given the detailed directions in the County Development Plan regarding waste management (at pp. 175-180), that was evidently the case.

New Airport Terminal at Dublin Airport

In relation to the new airport terminal and ancillary works at Dublin Airport, while it is true that An Bord Pleanála did mention the NDP as one of ten reasons and considerations for granting, in part, planning permission for a passenger terminal and development, it expressly stated that the NDP, along with the National Spatial Strategy (2002 to 2020), and Transport 21 (2006 to 2015) were heeded only because they provide for expansion of infrastructural capacity and for investment priority. The decision then goes on to mention the plans which set the framework for development consent in that instance, namely the Fingal County Development Plan (2005 to 2011) and the Dublin Airport Local Area Plan (2006). In that respect, it is clear from the list of specific policies regarding Dublin Airport outlined in the Fingal County Development Plan (2005 to 2011) (pp. 105-106), that it served that purpose.

N6 Road Project and Quarry Development at Horseleap

As regards the N6 road project (Ballinasloe to Athlone Dual Carriageway, County Galway), and the quarry development at Horseleap, no reference to the NDP was made in the respective An Bord Pleanála decisions. The N6 road project was, according to An Bord Pleanála, approved specifically having regard to the provisions of the development plan for County Roscommon. While the An Bord Pleanála Inspector's Report did allude to the NDP, this was no more than four passing references in a 114 page document.

Permission was granted for the quarry development at Horseleap contrary to the recommendation of the Inspector. In the Inspector's Report, there is only one brief mention of the NDP; in this mention the NDP is simply referred to as being mentioned in the document *'Quarries and Ancillary Activities, Guidelines for Planning Authorities'*, and as generally containing a series of major infrastructure projects which will create a corresponding demand for aggregates. Again, Ireland draws attention to the fact that it is the County Offaly Development Plan, 2003-2009 referred to in the Inspector's Report, and addressing the availability of sand and gravel deposits available to facilitate the needs of industry and employment in the County, which sets the framework for development consent in that instance. In particular, section 2 of the County Offaly Development Plan, 2003-2009, dealing with development strategies and policies, addresses issues of mining and quarrying and sets out, in some detail, the County's policies in that regard, balancing the needs of the building industry against those of protection of the environment (at sections 2.8 and 2.10.4).

Section 143 of the Planning and Development Act, 2000

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.

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 **Appendix I.**

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.

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".

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'".

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.

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.

II. Other Plans and Programmes excluded from SEA

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

The Commission alleges that Ireland failed to carry out SEA on what it (the Commission) describes as "*an important forestry plan", i.e.* the Management Protocol for Forestry in Hen Harrier pSPAs, (the "Hen Harrier Protocol").

Background to the Hen Harrier Protocol
The National Parks and Wildlife Service proposes to designate six Special Protection Areas for the Hen Harrier, comprising a total of 169,000 hectares of land. In March 2007, the Hen Harrier Protocol resulted from the discussions of the Hen Harrier Working Group, comprising of the National Parks and Wildlife Service, the Forest Service, landowners, and forestry interest groups.

Briefly, the Hen Harrier Protocol provides that:

- No afforestation will be permitted in pSPAHHs where the land is designated as "*heath and/or bog*" (the relevant National Parks and

Wildlife Service spatial data has been incorporated into the Integrated Forestry Information System (IFORIS) to enable the Forest Service and forestry companies to identify such areas);

- Each pSPAHH must contain a minimum of 55% suitable habitat, being: 1st and 2nd rotation pre-thicket forest + Heath & Bog + Rough Grassland + Open Space; and

- Afforestation on "rough grassland/pasture" will be permitted within the 6 pSPAHHs to a maximum of 9,060 hectares over the next 15 years. The maximum level of afforestation has been allocated within each pSPAHH.

The Hen Harrier Protocol is not subject to the SEA Directive for the following reasons.

First, the Protocol does not come within the definition of "plans and programmes" under Article 2(a) of the SEA Directive. In particular, the preparation of the Protocol was entirely voluntary, and, accordingly, does not fulfil the criteria under Article 2(a) of the Directive of being "required" by legislative, regulatory or administrative provisions. It is not, therefore, the equivalent of a development plan or a local area plan under the national town and country planning legislation, the preparation of both of which is mandatory.

Secondly, by its very nature the potential impact of forestry development on hen harriers is more appropriately dealt with by way of an assessment carried out in respect of *individual* afforestation projects, rather than on a global basis. Under national law, namely the EC (Environmental Impact Assessment) (Amendment) Regulations, 2001 (S.I. No. 538 of 2001),[1] a "Forest Consent System" had been introduced. Under this system, Ministerial approval must be obtained in respect of afforestation projects. Provision is made for the screening of applications for approval for the purposes of environmental impact assessment "EIA"). All applications for approval to afforest an area in excess of 50 hectares are subject to a mandatory Environmental Impact Assessment (EIA). Furthermore, all applications for approval to afforest land below the 50 hectare EIA threshold, whether or not the proposed development is located within a designated area (including pSPAHHs), are specifically screened to assess their potential environmental impact and a decision is taken in relation to whether or not an EIA is required in advance of any approval. **Appendix II** outlines the EIA assessment process applied to all applications for approval to afforest. It is submitted that the carrying out of an EIA in the context of individual afforestation projects constitutes a more suitable form of assessment, by analogy with Article 4 of the SEA Directive, and the need to avoid duplication.

[1] As amended by the European Communities (Environmental Impact Assessment) (Forestry Consent System) (Amendment) Regulations 2006 (S.I. No. 168 of 2006).

For the reasons set out above, the Hen Harrier Protocol is not within the definition of "Plans and Programmes" under Article 2(a) of the SEA Directive. However, even if it were this would not avail the Commission having regard to the provisions of Directive 92/43 EEC (as amended) (the Habitats Directive)."

Finally, the Commission makes a number of general criticisms of Ireland's afforestation programme. These criticisms are not factually correct and are rejected by Ireland. The criticisms are not however relevant to the issues of the alleged infringement and therefore Ireland does not believe it appropriate to address them in this document. Ireland remains prepared to respond to these criticisms in the appropriate context or if it becomes necessary to do so.

III Conformity of Ireland's transposition of the Directive

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'). In response to the wide-ranging criticisms that the Commission has made, Ireland attempts to address those criticisms under the same headings used by the Commission in its Additional Letter, and uses sub-headings where separate complaints can be discerned. Ireland has carefully considered each of the concerns raised by the Commission, and, where indicated below, it is prepared to consider making certain amendments to the implementing regulations. This is strictly without prejudice to Ireland's contention that the existing regulations properly implement the SEA Directive, and any amendment is, therefore, unnecessary.

(1) Plans and Programmes: Article 3(2) of the SEA Directive

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."

(a) No express provision for programmes (as distinct from plans)

The Commission contends 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 SEA Directive in that all relevant policy documents are subject to SEA.

The Commission makes 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.

Ireland refers to the publication by the Department of the Environment, Heritage and Local Government of detailed Guidelines for Regional and Local Authorities on the implementation of the SEA Directive (**Appendix III**). 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. This should meet the concerns raised by the Commission.

Strictly without prejudice to the foregoing, Ireland has given due consideration to this complaint regarding the alleged exclusion of "programmes" from the national transposing legislation, and can inform the Commission that a technical amendment to the text of the Regulations is being considered which would expressly cover "programmes". Ireland believes that this will alleviate the Commission's concerns.

(b) The exclusion of so-called "Government Building Programmes"

The Commission has referred to a number of Government building programmes that are excluded from the provisions and scope of S.I. No. 436 of 2004. This, however, 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 SEA 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.

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 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.

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). 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 excluded from the SEA Directive on this basis also.

(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

The Commission further contends that Ireland has failed to correctly transpose Article 2(a) of the SEA 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 to what are described in the Additional Letter as "statutory planning schemes".

In that regard, 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.

The Commission also states that S.I. No.436 does not cover changes or amendments to regional planning guidelines, nor to statutory planning schemes (Ireland understands this latter complaint to refer to Strategic Development Zone Planning Schemes). Ireland can inform the Commission that amendments to the Regulations are being considered which will provide that both regional planning guidelines and statutory planning schemes are subject to SEA. Ireland believes that this will alleviate the Commission's concerns.

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.

(d) County retail strategies, landscape character assessment guidelines, wind-farm guidelines, national heritage plans and local heritage plans

The Commission requests Ireland to clarify whether S.I. No. 435 of 2004 and S.I. No. 436 of 2004 cover exercises such as county retail strategies, landscape character assessment guidelines, wind-farm guidelines, national heritage plans and local heritage plans. Ireland can inform the Commission that with regard to, firstly, county retail strategies, such strategies merely identify likely future shopping patterns and requirements. Essentially, retail strategies constitute a study and cannot be construed as plans or programmes subject to the SEA process. Recommendations detailed in a retail strategy have no standing, other than that of a reference study, until they are incorporated into a development plan. That development plan is, in any event, subject to the SEA process, pursuant to the Regulations.

Second, the position in respect of landscape character assessment guidelines, wind farm guidelines and other guidelines is as follows. Such guidelines do not come within the definition of a plan or programme under Article 2(a) of the SEA Directive. A guideline is conceptually different from a plan or programme in that it consists merely of general advice as to the *technique* to applied in the exercise of certain statutory functions. Guidelines do not refer to specific areas or to specific development projects. A plan or programme, conversely, descends to a greater level of detail.

While planning authorities are required, under s.28 of the Planning and Development Act, 2000 to have regard to such guidelines in carrying out their functions under that Act — including the preparation of draft development plans, local area plans and the determination of planning applications — the guidelines themselves do not set the framework for development consents. They simply give general direction to planning authorities on planning policy and best practice in relation to the preparation of development plans. Ireland submits that such guidelines, which simply aid and advise bodies who are drawing up plans, neither fall within the meaning of either "plans" or "programmes" for the purposes of

Article 2(a), nor "set the framework for future development consent of projects" as required by Article 3(2)(a), of the SEA Directive.

Third, as regards heritage plans, Ireland points out that the principal statutory controls governing the national heritage are the National Monuments Acts 1930 to 2004. Additional controls are applied in respect of "protected structures" under statutory development plans made under the Planning and Development Act, 2000. The National Heritage Plan 2002 is a non-statutory policy document and was prepared in advance of the coming into force and effect of the SEA Directive. Moreover, in order for any policy stated therein to have legal effect it would have to be incorporated into the relevant development plan, and it would only be at that stage that SEA would arise.

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

Article 3(3) of the SEA 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."

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 in a number of aspects, which are addressed in turn below.

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

The national regulations set a threshold based on population (10,000 people). The Commission questions whether Article 3(3) of the SEA Directive has 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 strategic environmental assessment is too high.

With respect, the complaint made by the Commission in this regard does not appear to give any recognition 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 SEA 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 needs be taken. Making such a screening decision is fully in compliance with the SEA Directive.

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*".

(b) Plan-splitting

Ireland is satisfied that, in practice, there can be no question of plan-splitting, as the relevant Schedules of S.I.s No. 435 and 436 of 2004 require that consideration be given not only to the degree to which the plan influences other plans, including those in a hierarchy, but also to the cumulative nature of the effects of the plan(s). Notwithstanding, Ireland can inform the Commission that it is prepared to consider a technical amendment to the Regulations to address this issue of plan-splitting.

(c) Subsequent amendments and re-zonings of land

The Commission suggests that S.I. No. 436 appears 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 an SEA. In its view, it appears 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 escape the Directive's requirements, even where such an amendment is likely to have significant environmental effects. The practice of re-zonings of land introduced late in a plan-adoption process is referred to.

Ireland is considering introducing amending legislation to adopt such modifications and variations of plans, and re-zonings of land in order to provide for screening to determine whether or not an SEA would be required in those circumstances.

(d) Other programmes corresponding to Annex II of the SEA Directive

The Commission in its additional letter of formal notice states "*as regards the criteria of Annex II of the Directive referred to in Article 3(5), in particular those criterion set out in Annex II.I, second indent,*[2] *Ireland makes no reference to other*

[2] The second indent of Annex II.I states "the degree to which the plan or programme influences other plans or programmes, including those in a hierarchy".

programmes in the schedule of S.I. No. 436 of 2004 that corresponds to Annex II".

In response, Ireland emphasises that the relevant Schedule of S.I. No. 436 of 2004 states, "the degree to which the plan influences other plans, including those in a hierarchy". This wording is identical to the relevant wording of Annex II of the Directive apart from the omission of "programmes". As previously stated, "programmes" do not exist within the Irish planning system; hence the absence of a reference to 'programmes' in S.I. 436. As indicated earlier at Part II.1.(a) above, Ireland is considering the making of an amendment to the Regulations, so as to make formal provision to include "programmes" within the scope of the transposing Regulations.

In any event, insofar as the "*relationship between development plans and local area plans, on the one hand, and infrastructure or pollution control programmes, on the other*", are concerned, these inter-relationships are, as already stated, specifically provided for in the statutory Guidance document, which specifically requires that a plan's "relationship (both vertical and horizontal) with other plans/programmes" be considered in the SEA process. Thus, any infrastructure or pollution control programmes are considered fully within the relevant plan, which is subject to the SEA process. Without prejudice to the foregoing, Ireland is, as indicated earlier, considering making a technical amendment to the Regulations to require consideration of a plan's relationship with other plans/programmes.

(3) Environmental report: Article 5(1) to (3) of the SEA Directive

In the context of the obligation to prepare an environmental report, the Commission complains that S.I. No. 436 is deficient in transposing Annex I because it contains no reference to other programmes explicitly mentioned in Annex 1(a). Ireland repeats the points made earlier.

(4) Consultation with Environmental Authorities: Article 5(4) and 6 of the SEA Directive

(a) Designation of authorities to be consulted

Article 6(3) of the SEA Directive states that "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." Notwithstanding the broad discretion conferred on a Member State in this regard, the Commission has engaged in a detailed criticism both of the identity of the authorities to be consulted, and the provisions made in respect of public consultation.

With respect, the Commission's criticism is unfounded. Ireland has acted well within the discretion afforded to it under the SEA Directive, and the Commission has not made out any case for criticising Ireland's measures. For the sake of completeness, Ireland proposes to address in detail each of the specific

complaints advanced by the Commission, but does so strictly without prejudice to its contention that the SEA Directive confers a very wide discretion on Member States in this regard.

Contrary to the contention of the Commission that " *it does not appear that Ireland has formally designated any authorities as it is required to do under Article 6(3) of the Directive",* it is, in fact, the case that three distinct and specialised environmental authorities have been formally designated under both S.I. No. 435 and S.I. No. 436 of 2004:

- the Environmental Protection Agency (EPA), which is the statutory authority dealing with such matters as waste, water quality and integrated pollution prevention and control;
- the Minister for Environment, Heritage and Local Government, who has responsibility for Ireland's extensive built and natural heritage functions; and
- the Minister for Communications, Marine and Natural Resources (now the Minister for Agriculture, Food and Forestry arising from a transfer of Ministerial functions), who has responsibility for the marine environment. A copy of the Sea Fisheries, Foreshore and Dumping at Sea (Transfer of Departmental Administration and Ministerial Functions) Order 2007 (S.I. No. 707 of 2007) is attached as **Appendix IV.**

(b) Scope of consultation

The Commission's allegation that *"the Irish legislation would appear to be unduly narrow in terms of the extent of consultation of environmental authorities that it envisages"* does not, with respect, stand up to scrutiny. Ireland refers to Article 9(5) of S.I. No.435 of 2004, where it is expressly provided that the EPA must be consulted by a regional or planning authority in respect of Articles 3, 5, 6 and 7 of the Directive. The Minister for the Environment, Heritage and Local Government must be consulted in relation to the same Articles where the plan might have significant effects in relation to architectural or archaeological heritage or nature conservation. The Minister for Agriculture, Food and Forestry must be consulted where the plan might have significant effects on fisheries or the marine environment. Ireland is fully satisfied that the three authorities designated more than meet the requirements of the Directive.

To the specific criticisms outlined by the Commission, Ireland responds as follows.

(j) Consultation with Minister for Agriculture, Food and Forestry
First, as regards the Minister for Agriculture, Food and Forestry, Ireland rejects the Commission's contention that *"it is not evident that provision has been made for consultation of the latter Ministry for the purposes of Articles 5(4) and 6(3)"*, or indeed any other provisions of the Directive. As stated above, the Minister for Agriculture, Food and Forestry must be consulted where the plan might have significant effects on fisheries or the marine environment.

(ii) Consultation with the Minister for the Environment, Heritage and Local Government

Secondly, the Commission makes reference to the fact that the Minister for the Environment, Heritage and Local Government is only consulted in relation to certain environmental issues, namely, architectural or archaeological heritage or to nature conservation, whilst there is no provision for consulting the Minister in relation to other areas within the Minister's remit such as waste or drinking water treatment. The reason for this is that Ireland's EPA, a body under the aegis of the Minister for the Environment, Heritage and Local Government, was established with a particular remit and expertise in these areas. The EPA is the appropriate national expert authority in relation to waste and drinking water and has been formally designated for this purpose under the Directive.

The Commission has failed to consider the three designated environmental authorities holistically. Between them, these three specialised authorities provide information and advice across a broad range of environmental issues and concerns. It is unreasonable to consider the designated role of one authority in isolation from the other authorities.

(iii) Consultation with other bodies

Thirdly, the Commission also makes reference to the fact that some other bodies, such as the Heritage Council and the various Regional Fisheries Boards are not designated authorities for consultation purposes. With respect, the Commission fails to appreciate that the bodies referred to operate under the aegis of the two designated Ministries. Again, Ireland reiterates that the Directive leaves it open to Member States to decide what bodies shall be designated authorities under the provisions of the Directive. Without prejudice to this contention, Ireland would ask the Commission to note that, as a matter of practice, such bodies are regularly consulted by the appropriate Ministries and a close working relationship and information exchange system operates between such bodies and the Ministries.

(iv) Consultation with local authorities

Fourthly, in relation to the concern that there is no provision for consultation with appropriate local authorities, Ireland reminds the Commission that the Directive provides for Member States to decide on appropriate designated environmental authorities. Notwithstanding that, the statutory Guidelines state that "planning authorities should consult adjacent planning authorities as appropriate". Thus, actual custom and practice in Ireland is that local authorities do consult with neighbouring authorities as part of the SEA process. In any event, any local authority is fully entitled to participate in the robust public consultation process provided for under Ireland's transposing legislation. Ireland is, however, prepared to consider an amendment to the Regulations in this regard.

In summary, therefore, it is Ireland's position that its transposing provisions in national legislation governing consultations are not restrictive and are neither contrary to the requirements of Article 6(3) nor, by extension, Article 5(4) of the Directive. Notwithstanding this Ireland is prepared to consider making a number

of technical amendments — identified above — to address some of the concerns of the Commission.

(5) Public consultation: Article 6 of the SEA Directive

The Commission alleges that the Irish transposing legislation falls short of fulfilling the requirements of Article 6(2) of the Directive, which states that the public be given an early and effective opportunity 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. It is further alleged that the Irish legislation allows for the possibility that the relevant documents will only be made available at remote locations and during restricted hours.

It ought to be recalled that the Directive gives no specific direction as how Article 6(2) shall be implemented. On the contrary, Article 6(5) of the Directive makes plain that "[t]he detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States".

In that regard, Article 6(2) has been transposed by Ireland by the terms of Article 13 of S.I. No.435 of 2004, which provides that:

> "(1) A competent authority shall
> [...]
> (*b*) publish notice, in accordance with sub-article (2), of the preparation of the draft plan or programme, or modification to a plan or programme, and associated environmental report in at least one newspaper with a sufficiently large circulation in the area covered by the plan or programme, or modification to a plan or programme.
> (2) A notice under sub-article (1)(*b*) shall state that—
> (*a*) a copy of the draft plan or programme, or modification to a plan or programme, and associated environmental report may be inspected 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 (and the copy shall be kept available for inspection accordingly), and
> (*b*) a written submission or observation with respect to the draft plan or programme, or modification to a plan or programme, and associated environmental report made to the competent authority within the period referred to in paragraph (*a*), or such period as may be specified in law in respect of the draft plan or programme, or modification to a plan or programme, will be taken into consideration before the finalisation of the plan or programme, or modification to a plan or programme."

It is Ireland's case that these legislative provisions codifying the detailed arrangements allowing the public an early and effective opportunity to express its opinion met the Directive's objectives, in particular bearing in mind the discretion afforded to Member State in that regard pursuant to Article 6(5). In practice, such plans and programmes are advertised by public notice in newspapers and for the relevant documentation to be made available for public inspection at the

public offices of the body concerned during normal working hours. In many regional and planning authorities, relevant documentation is in fact made available not only at their head offices but through local offices and the local library network.

Ireland draws a parallel between the discretion accorded to the Member States in respect of their duties concerning public consultation under this directive, and the discretion accorded to the Member States as regards public participation under the EIA Directive. This issue was addressed recently by the Court of Justice in Case C-216/05 *Commission v. Ireland* [2006] ECR I-10787, where the court held that a Member State enjoyed a discretion to impose a participation fee in respect of planning applications subject to the EIA Directive, notwithstanding the fact that there was no express provision under the directive for the charging of any such fee. In particular, Advocate General Stix-Hackl emphasised that the discretion enjoyed by a Member State under a directive is subject to the general principles of Community law, and in particular of effectiveness and equivalence. The detailed procedural and substantive rules laid down in national law must not render it virtually impossible or excessively difficult to implement the Community rules, and national law must be applied in a manner which is not discriminatory as compared to corresponding proceedings or procedures which concern purely domestic law.

Ireland submits that, in the present case, there is nothing about the implementation and application of Article 6(2) of the SEA Directive in national law that makes it virtually impossible or excessively difficult to implement the relevant Community rules and to allow the public an early and effective opportunity to express their opinion on the draft plan or programme and accompanying environmental report.

In particular, despite the Commission's detailed allegations, the SEA Directive makes no provision for posting of documents or for internet publication. Notwithstanding that, the 2007 Guidelines on development plans, paras 5.20 - 5.28, specifically recommend that planning authorities make full use of IT, including the Internet, in encouraging public involvement in the consultation process.

It should also be noted that the statutory SEA Guidelines require regional and planning authorities to "take a pro-active approach to engaging the public in the SEA process, for example by dedicating part of their websites to SEA information". As a result, it is normal practice for the relevant documentation to be made available to the public via the website of the body concerned, thus providing 24 hour public access.

To sum up, therefore, contrary to the Commission's accusation, Ireland submits that its transposing legislation provides an early and effective opportunity for the public to express an opinion, and is well within the discretion afforded to Member States in this regard. Strictly without prejudice to this submission, Ireland can

inform the Commission that consideration is being given to an amendment to the Regulations to require internet publication.

The other criticism raised by the Commission concerns Article 6(4) of the Directive, which requires that 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 the SEA Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned. Without providing any details, the Commission simply states that "the provisions of Article 6(4) are not transposed into Irish law."

In this regard, Ireland makes the preliminary remark that it is not possible to respond fully to this complaint, given that it has not been properly particularised by the Commission; should the Commission attempt to pursue this complaint and provide further particulars, Ireland reserves the right to respond in more detail in due course. Notwithstanding this objection, Ireland makes the following comment as regards the identification of the public affected or likely to be affected by, or having an interest in, the decision-making subject to the SEA Directive. Although Article 6(4), read together with Article 6(2) of the SEA Directive affords Member States discretion to identify (and hence limit) the section of the public to be given a right to express and opinion, Ireland applies no such restriction: any person or body can make a submission, irrespective of whether they are to be affected. There is, therefore, no need to formally identify one section of the public. Ireland submits that in those circumstances, where there is no restriction on the identity of persons or bodies which can make submissions, the national transposing Regulations are in no way inconsistent with the provisions of the SEA Directive.

Conclusion

Ireland maintains that, contrary to the Commission's complaints, it has fulfilled its obligations under Articles 2 to 10 inclusive, and 13 of the Directive. Notwithstanding this and without prejudice to some of Ireland's submissions, a number of legislative amendments are being considered, as outlined above, which Ireland believes will meet specific concerns identified by the Commission. Ireland would welcome the opportunity of discussing any of its submissions or proposed amendments with the Commission, and remains, at all times, willing to co-operate in respect of the matters addressed in this response.

Yours sincerely

[redacted]

[redacted]

Deputy Permanent Representative

APPENDIX I (Forwarded as separate documents)

Glencar Explorations plc v Mayo County Council (No. 2) [2002] 1 I.R. 84

McEvoy v. Meath County Council [2003] 1 I.R. 208

Aer Rianta CPT v Commissioner for Aviation Regulation [2003] IEHC 168

APPENDIX II

ASSESSMENT TO DETERMINE EIA REQUIREMENT FOR AFFORESTATION PROPOSAL

NAME OF APPLICANT: _____ **CONTRACT NUMBER:**_____

	Project Description	**Yes**	**No**	**N/A**	**Text Area**
1	The description and characteristics of this afforestation project outlined in the Form 1 for EIA determination has been examined?				
	Existing land use	**Yes**	**No**		
2	The existing land use outlined in the Form 1 for EIA determination has been examined?				
	Cumulative effect and extent of the project	**Yes**	**No**		
3	Is the total area of this application 50 ha or greater? (net digitised area)				
4	Does this application, together with existing afforestation of 3 years or less within a 500 metre radius, constitute an area greater than 50 ha?				
5	What is the approximate % of forest cover at present in the applications townland(s) ?				
	0% - 25%				
	26% - 50%				
	51% - 75%				
	Greater than 76%				
6	What is the approximate % of forest cover at present within 5 km?				
	0% - 25%				
	26% - 50%				
	51% - 75%				
	Greater than 76%				
7	Is the amount and type of forest cover in this locality known to be a significant issue? Is so describe in the Inspectors comments box below.				Length of free text?
	Water	**Yes**	**No**		
8	Is the site within an area designated as potentially acid sensitive by the Forest Service?				
9	Is the site within an area designated as sensitive to fisheries?				
10	Has the site been identified on the project description as being located within the catchment of a Local Authority designated water scheme?				
11	Comments from EPA, Fisheries Board, Local Authority and/or other statutory bodies were required, received and examined?				
12	Will adherence of this proposal to the Forestry and Water Quality Guidelines (and any additional conditions to approval that are identified at this time) be sufficient to prevent any potential significant impact to aquatic zones/watercourses at this time?				
	Archaeology	**Yes**	**No**		
13	**Does the area contain an archaeological site or feature with intensive public usage?**				
14	**Does the area contain or adjoin a listed archaeological site or monument, archaeological area, zones of archaeological amenity or World Heritage Sites?**				
	Following referral to the Forest Service Archaeologist and National Monuments Service (DoEHLG), in evaluating the scale and significance of any potential impact, the following was recommended:				
15	- Adherence to the normal standards of the Forestry and Archaeology Guidelines				
16	- Specific conditions regarding buffer zones etc				

17	**- Archaeological Monitoring during ground preparation or drainage works**				
18	- Archaeological Assessment				
19	- EIA				
20	- Refusal in part				
21	- Refusal				
	Landscape	**Yes**	**No**		
22	Is this site within a prime scenic area in the County Development Plan or within an area listed in the Inventory of Outstanding Landscapes or in a Landscape Conservation Area?				
23	Is this site in any other High Amenity Landscape?				

24	Is the forest design submitted (as shown on the Certified species and Biodiversity/Operational map) sufficient to prevent any significant impact on the landscape from this application and does the design comply with the Forestry and Landscape guidelines (and any additional conditions to approval that are identified at this time)?				Length of free text?
25	Were comments from the Local Authority required, received and examined?				
	Designated Habitats ***Nature reserves and national parks, special protection areas designated pursuant to Directive 79/409/EEC and 92/43/EEC, SACs etc.(NB: Afforestation can not be recommended without explicit approval of NPWS)***	**Yes**	**No**		
26	Is this proposed area within a European or national designation, including SACs, SPAs, NHAs, Nature Reserves and National Parks?				
27	Is this proposed area within 3km upstream of a European or national designation?				
	Following referral to the Forest Service Ecologist and/or NPWS, in evaluating the scale and significance of any potential impact, the following was recommended:				
28	- Adherence to Forest Service Guidelines				
29	- Supplementary operational conditions				
30	- Ecological Monitoring				
31	- Ecological Survey and Report				
32	- EIA				
33	- Refusal in part				
34	- Refusal				
	Non Designated Habitats	**Yes**	**No**		
35	Should this application be referred to the Forest Service Ecologist?				
	Social	**Yes**	**No**		
36	Does the proposed area impact on a 'Way-Marked Way'?				
37	Does the proposed area impact on an area commonly used by the general public for recreation?				
38	Does the proposed area impact on a densely populated area?				
	Accidents	**Yes**	**No**		
39	Is there significant risks of accidents, having regard in particular to substances or technologies used? If so, describe in Inspectors comments box below.				Length of free text?

	Transfrontier	**Yes**	**No**		
40	Is the proposed application within 3km upstream of the border with Northern Ireland?				
41	Is the proposed application within 500m of the border with Northern Ireland?				
42	Will the proposed project be likely to have a significant transfrontier impact? If so, describe in Inspectors comments box below.				Length of free text?
	Public Participation and NGO participation	**Yes**	**No**		
43	Comments and issues from the general public and non-governmental bodies were received and examined?				

	Any significant potential effects identified above must be considered having regard in particular to: • **the extent of the impact (geographical area and size of the affected population)** • **the transfrontier nature of the impact** • **the magnitude and complexity of the impact** • **the probability of the impact** • **the duration, frequency and reversibility of the impact**		
	Recommendation:	**Yes**	**No**
	No EIA: On the basis of this examination I do not recommend that this application be subject to the EIA process.		
	EIA: On the basis of this examination I recommend that this application be subject to the EIA process.		
	Inspectors comments:	Length of free text?	

NAME OF DEPARTMENT INSPECTOR: _____ **DISTRICT NO.:**_____
SIGNATURE: _____

APPENDIX III (Forwarded as a separate document)

Assessment of the Effects of Certain Plans and Programmes on the Environment

Guidelines for Regional Authorities and Planning Authorities

APPENDIX IV (Forwarded as a separate document)

Sea Fisheries, Foreshore and Dumping at Sea (Transfer of Departmental Administration and Ministerial Functions) Order 2007 (S.I. No. 707 of 2007)