COMMISSION OF THE EUROPEAN COMMUNITIES

SECRETARIAT-GENERAL

ACCUSÉ DE RÉCEPTION

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SIGNATURE

Brussels, 05 I 2005

SG-Greffe(2004)D/ 200093

PERMANENT REPRESENTATION
OF IRELAND TO THE
EUROPEAN UNION
Rue Froissart, 89-93
1040 BRUSSELS

Subject: Reasoned Opinion
Infringement No No 2000/4384

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 its failure to comply with Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment as amended by Irish PRB
RECEPTION
05 -01- 2005
RECEIVED

For the Secretary-General

p.o. [redacted]

Encl. C(2004) 5505

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22/12/2004

2000/4384

C(2004) 5505

REASONED OPINION

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PROVISIONS OF DIRECTIVE

1. Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment ("Directive 85/337/EEC") as amended by Council Directive 97/11/EC of 3 March 1997 ("Directive 97/11/EC"), hereinafter referred to as "the Impact Assessment Directive" sets out a framework for the environmental impact assessment of certain projects.

   Article 1(2) of the Impact Assessment Directive defines certain terms.

   "project" is defined to mean:
   "- *the execution of construction works or of other installations or schemes,*
   - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."

   "development consent" is defined to mean:
   "*the decision of the competent authority or authorities which entitles the developer to proceed with the project.*"

   Article 2(1) of the Impact Assessment Directive defines a basic duty to ensure the prior environmental impact assessment of environmentally significant projects.

   Article 4 of the Impact Assessment Directive defines the projects to be made the subject of an environmental impact assessment.

   Articles 5 to 10 of the Environmental Impact Assessment Directive set out requirements to be respected with regard the conduct of environmental impact assessments. These requirements *inter alia* include an obligation to consult the public concerned and to take information into account in the decision-making process.

   By virtue of Article 12 of Directive 85/337/EEC, the measures necessary to comply with this directive were due by 3 July 1988.

   Article 1(15) of Directive 97/11/EC replaces Annexes I, II and III of Directive 85/337/EEC with new Annexes I, II, III and IV.

   Article 3 of Directive 97/11/EC requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with it by 14 March 1999 at the latest, and to forthwith inform the Commission thereof.

   Article 3(2) of Directive 97/11/EC provides that, if a request for development consent is submitted to a competent authority before 14 March 1999, the

provisions of Directive 85/337/EEC prior to these amendments shall continue to apply.

BACKGROUND

2. On 21 December 2001, the Commission delivered a Reasoned Opinion to Ireland (ref.SG(2001)D/260569) to the effect that Ireland,
"by not adopting all measures necessary to ensure that peat extraction projects in Counties Kildare, Offaly, Longford, Meath, Westmeath and Laois likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location were made subject to an assessment with regard to their effects in accordance with Article 5 to 10 of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment either before or after modification by Directive 97/11/EC, has failed to comply with its obligations under the said Directive".

2.1 The aforementioned Reasoned Opinion related to several instances of environmentally significant peat extraction taking place in Ireland without any prior EIA. These were subsequently grouped under infringement A2000/4616. Of particular note was extensive unauthorised peat extraction from Moud's Bog, County Kildare, one of Ireland and Europe's most important surviving examples of active raised bog, and now a proposed special area of conservation (SAC) under Directive 92/43/EEC on the conservation of habitats and of wild flora and fauna. Ireland's subsequent responses of 11 December 2002, 18 February 2002 and 12 May 2003 *inter alia* confirm the importance of the site and efforts to try to halt industrial peat extraction there. However, it was not evident that unauthorised peat extraction carried out without prior EIA had been halted.

2.2 The Commission sent Ireland an additional letter of formal notice on 7 July 2004 (ref.SG(2004)D/202983). This additional letter of formal notice represented a grouping of several infringements and complaints under the reference of infringement procedure A2000/4384. The other infringement procedures that were subsumed were: A2000/4616 (referred to at paragraphs 2 and 2.1 above), A2001/4790 and A2002/4683. Registered complaints that were grouped under A2000/4384 were as follows: P2003/4298, P2003/5188, P2003/5217 and P2004/4045. Further complaints that were then undergoing registration were also mentioned in the additional letter of formal notice.

2.3 Infringement procedure A2000/4384 itself arose out of a complaint concerning a failure to ensure that a pig-rearing installation at Lisdowney, County Kilkenny constructed without development consent was submitted to a prior environmental impact assessment (EIA). It was the subject of a first letter of formal notice dated 24 October 2001 (ref.SG(2001)D/260437).

2.4 Infringement procedure A2001/4790 arose out of a complaint concerning quarry developments at Athlone, County Offaly, and infringement procedure A2002/4683 arose out of a quarry development at Moycullen, County Galway. Both were the subject of a first common letter of formal notice dated 18 October 2003 (ref.SG(2003)D/220761).

2.5 The aforementioned additional letter of formal notice addressed a number of breaches of the Impact Assessment Directive by Ireland arising out of:

- the possibility that the Irish legislation implementing the Impact Assessment Directive gives for screening projects for the possible need for EIA, for undertaking EIA and for granting development consent *after* a developer has already executed in whole or in part a project falling within the scope of the Directive;

- the systematic lack of timely and effective enforcement action against projects undertaken without or before development consent;

- the manifestly deficient EIA and related issues in the specific case of a wind-farm project located at Derrybrien, County Galway.

2.6 Having already received a two month extension of the period to respond, by letter dated 6 December 2004 (ref.SG(2004)A/12955), Ireland belatedly responded to the aforementioned additional letter of formal notice dated 7 July 2004. In its response, Ireland *inter alia*

- argued that its implementation of the Impact Assessment Directive was generally good and that the issues raised in the letter of formal notice were not central to good implementation;

- argued that the provision in Irish legislation for retention permission is not in conflict with Article 2 of the EIA Directive. The latter provision requires that EIA must be carried out before development consent is given. It does not provide that EIA must be carried out before a development is executed (as it would not be within the power of a Member State to guarantee that illegal and unauthorised development would never be carried out);

- pointed out that Ireland's domestic legislation, in particular the Planning and Development Act 2000, had as a fundamental principle that people proposing to carry out developments must get *prior* planning permission;

- pointed out that Ireland's domestic legislation set out severe penalties for failure to carry out development in accordance with planning permission. The maximum penalty on conviction on indictment is now €12.7 million and 2 years imprisonment. A court injunction could also be used to stop an unauthorised development. Planning authorities now charge for the cost of taking enforcement action and are entitled to retain fines imposed by Courts for planning offences to help finance more active planning control. Planning authorities can refuse to grant planning permission, subject to the consent of the High Court, to any developer who has seriously failed to comply with a previous permission. The period for taking enforcement action was extended from 5 to 7 years. Higher planning fees are charged to those applying for retention permission than to those seeking prior permission;

- pointed out that steps had been taken in recent years to ensure that planning authorities have sufficient resources available to them to carry out their functions under the Planning Act. This had included recruitment of more planners. Enforcement activity had been stepped up. The Department of the Environment, Heritage and Local Government will continue to keep the implementation of the enforcement provisions of the 2000 Act under review. Issues such as enforcement are regularly raised through the formal consultation mechanism established between the Department and the City and County Managers Association, i.e. the representative body of the managers of planning authorities, and the Department will continue to press planning authorities to improve their performance on planning enforcement;

- pointed out that the purpose of the enforcement provisions in the Planning Act is to ensure that breaches of the planning code are rectified – that is, that the persons remove the unauthorised development or seek planning permission to retain it. A prosecution should only be necessary where a developer refuses to comply with the law;

- pointed out that an application for, or even grant of retention permission, under Irish legislation was no longer a defence to enforcement action under the Planning and Development Act 2000;

- stated that the inclusion of a provision in Irish legislation for retention permission is viewed as a sensible "fall back" provision, to be invoked in exceptional circumstances. The vast majority of development proposals in Ireland are the subject of prior authorisation (as is required by law). While precise statistics are not available, recourse to retention permission would represent a very small proportion of overall planning applications;

- contended that retention permission is not a facility for avoiding EIA. Firstly, the types of project which generally require EIA are of such a nature that the possibility of such developments being carried out without coming to the attention of the planning enforcement regime is very slight. Secondly, where an application for retention permission is in respect of development requiring EIA, an EIA must be carried out on the same basis as would have applied had an application for planning permission been made prior to the commencement of development. Thirdly, developers who apply for permission before commencing development and developers who seek retention permission for unauthorised development must go through the same EIA procedures. Fourthly, if retention permission is granted by the local planning authority, a third party who objected to such retention to the authority have the right to appeal to the Planning Appeals Board (Bord Pleanala).

With the exception of the Derrybrien project, Ireland did not respond with information on any of the individual situations mentioned in the above-mentioned additional letter of formal notice of 7 July 2004. However, it did provide information on pollution abatement activities in the catchment of Lough Sheelin. It also referred to the provisions with regard to quarry registration mentioned in the additional letter of formal notice.

In its response, Ireland indicated that it would welcome an opportunity of further elaborating on its response at a meeting with Commission officials.

LAW

3. The Commission maintains its position that, in providing for the EIA of projects *after* they have been executed and in failing, in practice, to effectively enforce the requirement that projects potentially requiring EIA should be screened and/or made subject to EIA *before* they are executed, Ireland is in breach of its obligations under Articles 2 and 4 to 10 inclusive of the Impact Assessment Directive. The Commission also maintains its position that Ireland has failed to comply with the requirements of the Impact Assessment Directive in relation to a wind-farm project at Derrybrien, County Galway. Having regard to the clear infringements, the Commission considers that it would be inappropriate to defer the sending of the present Reasoned Opinion.

Provision in Irish legislation for development consent and environmental impact assessment (EIA) after the execution of a project has been completed or has commenced and related lack of effective enforcement of requirements to obtain a prior project consent

System of Impact Assessment Directive

3.1 Based on the principle of prevention, the Impact Assessment Directive explicitly provides in its Article 2(1) that, where required, an EIA should be undertaken *before* development consent is given. To be consistent with the system of the Impact Assessment Directive, it is also necessary that determinations as to whether or not individual projects require assessment (the exercise - sometimes referred to as screening – provided for in Article 4 of the Impact Assessment Directive) should be undertaken before project execution.

3.2 In its decision in Case C-201/02, *Delena Wells* (see also paragraph 3.22 below), the Court observed that Member States are obliged to remedy the failure to carry out an EIA and to make good any harm caused. In the light of this, it may be appropriate to require an impact assessment to be undertaken with regard to an illegal or unauthorised development in order to remedy the harm done and as part of a set of enforcement measures that deter the practice of illegal development. However, provision for post-execution impact assessment ought not to be used as a means of circumventing the normal application of the Impact Assessment Directive. In this regard, the evidence indicates that Ireland has largely assimilated its approach to applications for retention permission to its approach to applications for prior permission.

3.3 The Commission does not accept Ireland's contention that Article 2 of the Impact Assessment Directive only requires an EIA to be carried out before a development consent is given and that it does not require that an EIA must be carried out before a development is executed. First of all, the Commission would refer to the preventive purpose of the Impact Assessment Directive. This could be defeated if it were to be accepted that projects could first be executed and EIA only required as part of a subsequent process of regularisation. Secondly, it follows from provisions of the Impact Assessment Directive's, including the definitions of "project" and "development

consent", that the intent of the Impact Assessment Directive is to ensure that the physical execution of works should be preceded by development consent. The notion of "development consent" cannot therefore be reduced to a mere formality that does not need to bear any relationship to when a project is carried out.

3.4 In its above-mentioned response to the Commission's additional letter of formal notice, Ireland effectively argues that an EIA carried as part of a retention application fulfils the same requirements as an EIA carried out as part of a normal planning application. However, the Commission does not accept the suggestion that there is no material difference between the situation involved in a retention application and the situation involved in a normal planning application. In the former situation, a project will, in contrast to the latter situation, have already been executed in whole or in part and harm may have already resulted to the environment.

Irish Legislation and Enforcement Practice

3.5 Ireland's legislation transposing the Impact Assessment Directive – now to a significant extent consisting of the Planning and Development Act, 2000 and subsidiary regulations - integrates the Impact Assessment Directive's requirements into a development consent system that allows for development consent to be obtained for unauthorised development. Thus, it is possible for a developer to execute in whole or in part a project falling within the scope of the Impact Assessment Directive, and subsequently to make an application for a form of development consent known as "retention permission". Under the legislation, it is possible to treat EIA requirements – including screening requirements - as capable of being satisfied after the application for retention permission has been lodged. Ireland does not appear to dispute this.

3.6 In allowing for EIA for projects already executed in whole or in part, the Irish legislation is, in the Commission's view, non-compliant with the system of the Impact Assessment Directive as set out in Articles 2 to 10.

3.7 In its above-mentioned response to the Commission's additional letter of formal notice, Ireland provides information on the wider enforcement context in which provision for retention permission finds its place. However, for several reasons the Commission is not convinced that this information discloses a satisfactory situation.

3.8 First of all, Ireland has not evinced evidence that a *purpose* of its enforcement policy and practice includes the effective deterrence of the execution of projects before they are screened for EIA or granted development consent. As has already been noted, Ireland does not see any inherent conflict with the Impact Assessment Directive in allowing projects to be executed in whole or in part before they receive development consent. Furthermore, it has stated that the purpose of the enforcement provisions in the Planning Act 2000 is to ensure that breaches of the planning code are rectified – that is, that the persons remove the unauthorised development or seek planning permission to retain it. Thus, it appears that, where the person responsible for an illegal development puts forward an application for its retention, the objective of any previous enforcement action will be considered as satisfied.

3.9 Secondly, it has not evident that Ireland has an *appropriately coherent approach* to effective enforcement in relation to illegal development. The enforcement powers in domestic legislation are discretionary in character and it is a matter for each planning authority to determine what its individual approach is to be. The evidence adduced by the Commission to date in this infringement procedure shows widespread laxity across local authorities. The Commission would also observe that coherence between decision-makers on projects and authorities responsible for enforcement is not assured. Thus, whereas, on appeal, Ireland's Planning Appeals Board can overturn a local authority decision to give retention permission, the Board cannot itself enforce the decision to refuse permission: this is the role of the local authority which can choose to allow an illegal developer to submit a fresh retention application. Ireland has not presented evidence of a convincing effort at national level – such as the adoption of clear guidelines and performance criteria for local authorities and an effective supervisory mechanism – to ensure that local authorities take effective enforcement action in practice. On the contrary, representations by complainants on unsatisfactory local authority enforcement to the Department of the Environment, Heritage and Local Government – the ministry responsible for formulating environmental policy at national level – are invariably met with responses to the effect that the issues concerned lie outside the Department's area of responsibility. In 2003, an Office of Environmental Enforcement was created within Ireland's Environmental Protection Agency with the objective of promoting better implementation by local authorities of their environmental duties. However, its initial emphasis has been on improving waste enforcement efforts. There is no evidence that it has taken any effective action in relation to enforcement of planning legislation. Indeed, the Environmental Protection Agency has shown itself willing to grant an operating licence to an activity that has been *refused* planning permission, effectively facilitating illegal development. In its above-mentioned response to the Commission's additional letter of formal notice, Ireland mentions assistance provided to local authorities to recruit more planners. However, this was necessitated anyway by the general upsurge in planning applications in Ireland consequent on its recent economic boom. Ireland also mentions regular discussion of issues such as enforcement between the Department of the Environment, Heritage and Local Government and local authority managers. However, it is not evident that this has led to any significant developments in terms of a coherent enforcement policy and enforcement performance criteria.

3.10 Thirdly, the Commission has presented many examples of *non-existent or ineffective enforcement in practice* which Ireland has not disputed. The inadequacy of enforcement efforts has several inter-related dimensions. In the first place, there is a lack of *timely intervention*. There is inadequate monitoring of intensification of development, notably in the quarrying, peat extraction and pig production sectors. The possibility of bringing enforcement action expires after a number of years and, in practice, Irish enforcement authorities sometimes allow enforcement action to become statute-barred. Enforcement action is frequently protracted and does not involve steps to bring about an immediate cessation of unauthorised activity. Such protracted enforcement can have the potential effect of allowing extractive projects such as quarrying and peat extraction to be substantially executed without development consent. In the second place, enforcement action generally has very *limited aims and scope*: while in principle enforcement action can continue, in practice it is discontinued once an application for retention permission is submitted, thus encouraging expectations that, in practice,

unauthorised development will not attract any adverse consequences. This is reinforced by the failure to ever require any cessation of ongoing unauthorised activities such as quarrying or pig-rearing where these are detected. Even where a retention application is refused, enforcement action may still not result: it is open to a developer to submit a *further* retention application as the Standish Sawmill case mentioned at paragraph 3.18 below shows. In the third place, enforcement action is not aimed at *deterring* illegal development but at regularising it. It is true that applicants for retention permission now have to pay higher fees than those who seek prior permission. However, they do not have to meet the costs of complying with planning conditions in the period of unauthorised development and planning fees will typically represent a modest cost compared to the profits and advantages of illegal development. Ireland also refers to the possibility for planning authorities to refuse to grant planning permission, subject to the consent of the High Court, to any developer who has seriously failed to comply with a previous permission. However, it is not evident that any use has been made of this provision[1]. In the fourth place, no attempt is made to physically *make good the harm* resulting from the undertaking of projects without prior development consent or EIA, for example the scarring of important landscapes by illegal quarrying (see also Case C-201/02, mentioned at paragraphs 3.2 above and 3.22 below). In the fifth place, while Irish legislation provides for serious penalties, local authorities generally limit any enforcement action to the lower courts where the *penalties are very small*: this is a phenomenon that the Commission has already highlighted in the context of Case C-494/01, *Commission v Ireland* in relation to Ireland's implementation of Directive 75/442/EEC on waste. In its above-mentioned response to the Commission's additional letter of formal notice, Ireland refers to the possibility of high monetary penalties and imprisonment on indictment. However, it has adduced no evidence of resort to such penalties in practice. Ireland also refers to the possibility of injuncting illegal developments. Again, it has provided no evidence of the use of this possibility in practice – and certainly not in the cases that the Commission has brought to its notice. In the sixth place, local authorities sometimes not only fail to take any enforcement action: they can also themselves *make use of illegal developments*, in particular through the sourcing of material from unauthorised quarry developments for road and other projects.

3.11 While Ireland argues that, when set against the overall number of planning applications, retention applications are exceptional, the undertaking or significant intensification of projects without development consent would appear to be common for certain categories of activity coming within the scope of the Directive, such as quarries, peat extraction, waste operations and pig-rearing installations. Of their nature, developments undertaken without prior consent are more likely to be environmentally significant because they will not be subject to the specific conditions set in advance for regularly executed projects.

3.12 Apart from the environmental issues that arise, the Commission would draw attention to the adverse consequences of failure to correctly apply the Impact

[1] By way of illustration, on 14 October 1994 a retention permission was granted on appeal for a large-scale pig-rearing installation located at Ballyglasson, Edgeworthstown, County Longford (planning register reference number: 12485). On 5 July 2004, the responsible local authority, Longford County Council, in the course of considering a later planning application for further development at the pig-rearing installation, noted that the retention permission had not been complied with and that further unauthorised structures had been developed. Nonetheless, it proceeded to approve the new planning application.

Assessment Directive in terms of a "level playing field" for economic operators. Those who are allowed to execute projects without the requirements of the Impact Assessment Directive having been met in advance may secure an economic advantage over competitors who are in compliance with the Impact Assessment Directive.

Illustrations

3.13 Several non-exhaustive illustrations were provided in the aforementioned additional letter of formal notice. In its above-mentioned response to the additional letter of formal notice, Ireland does not provide any specific comments on the illustrations provided. Further illustrations continue to come to the Commission's notice. All these point to a systematic failure to comply with the Impact Assessment Directive over a protracted period.

3.14 As regards quarries, a letter from Ireland dated 18 February 2003 gave a very partial and incomplete account of the manner in which the local authority addressed the unauthorised development at Clonfanlough (infringement A2001/4790), failing to mention that the Irish Ombudsman's report for 2002 contains a highly critical account of the local authority's approach to the development. In particular, the Ombudsman noted the very long period of time during which the local authority kept an application for retention permission under consideration despite an EIA being deemed necessary and despite a failure a failure of the developer to provide information. During this period, the developer continued quarrying and no enforcement action was taken. Moreover, with reference to the quarry, the Ombudsman notes that *"the Council itself sourced material from it via the developer."* A subsequent complaint, P2004/4045 contends that there is a wider lack of effective enforcement against unlawful quarrying in County Offaly and the surrounding area. It refers to a major quarrying operation that has been carried out without development consent since 1996 within or adjacent to the proposed Slieve Bloom special area of conservation (SAC)[2]. The development is highly visible and has involved stripping of blanket bog, a habitat type earmarked for protection under Directive 92/43/EEC. Expeditious enforcement action was not taken and significant environmental damage has already occurred. Mention is also made of a lack of effective enforcement action for unauthorised sand and gravel pits at Aghancon despite extraction taking place over several years. A further complaint refers to the tolerance by Offaly County Council of an illegal quarry located at Ballyfarrell, Blueball, County Offaly for a period of over three years in an area sensitive for nature conservation. In 2002, the operator submitted an application for development consent and was advised that an EIS[3] was necessary. No EIS was submitted until 2004, but quarrying has been allowed to proceed without any effective enforcement action being taken during the intervening period. Infringement A2002/4683 also discloses a failure to take any expeditious enforcement action for quarrying in a sensitive location at Moycullen, County Galway. Complaint P2003/4298 refers to a failure to take enforcement action for another unauthorised quarry inside a proposed SAC on the River Blackwater in County Waterford. A complaint now registered under P2004/4502

[2] Kinsella's Quarry at Clash Row

[3] Environmental impact statement. This is the term applied in Ireland to the information that a developer must supply in an EIA procedure.

refers to three instances of unauthorised quarrying in the highly scenic Glencar Valley, which runs in an approximately east-west direction and which straddles the border between counties Sligo and Leitrim in the north west of Ireland[4]. It is understood that significant illegal quarrying has also occurred elsewhere in Ireland, for example in Counties Mayo, Clare and Roscommon.

3.15 In April 2004, the Irish Government announced new controls on quarries, including mandatory registration of all quarries by the end of April 2005. In so far as these controls may help better safeguard the environment from the negative effects of quarrying, they are welcome. However, it is not evident that they will, in themselves, address the circumvention of EIA requirements that results from weak enforcement and the use of retention permission. Ireland provides further details on this new registration system in its response to the Commission's additional letter of formal notice. However, the details provided do not indicate how the registration system will lead to the deterrence of illegal quarry development, except perhaps through the obtaining by local authorities of more information generally on quarry activities. The evidence adduced by the Commission shows that, even when informed of illegal activities, Irish local authorities fail to take effective enforcement action.

3.16 With regard to pig-rearing installations, there has been a major expansion of pig production in the catchment of Lough Sheelin. Much of the expansion in pig production has occurred without any prior development consent, developers often relying on the route of retention permission to secure approval for developments already undertaken. Lough Sheelin was once one of Ireland's most important wild brown trout fisheries and significant as such in European terms. However, the lake is now amongst Ireland's most polluted, largely because of a failure to properly manage the considerable amounts of pig-farm waste generated in the catchment. Despite this, there has been a failure to systematically require prior EIA for pig-rearing installations in accordance with the Directive in cases of both retention and normal planning permission. There has also been a failure to take any effective enforcement action. A recent complaint refers to a retention application (ref.04/176) for a major piggery at Greenan, Kilmacthomas, County Waterford in an area where the groundwater is vulnerable and where groundwater pollution has occurred. It is understood that no effective enforcement action has been taken. In its above-mentioned response to the Commission's additional letter of formal notice, Ireland makes reference to pollution-abatement activities within the Lough Sheelin catchment. However, it does not comment on the extent to which pig expansion has occurred in the catchment without prior permission. The Commission's information is that a very considerable number of pig-rearing installations in the Lough Sheelin catchment have been the subject of retention permissions in the period since 3 July 1988 when the Impact Assessment Directive first entered into force.

3.17 With regard to peat extraction, the Commission has already drawn attention to the lack of any effective enforcement action against several unauthorised peat extraction projects in the context of infringement A2000/4616. Moud's Bog exemplifies a failure to take any timely and effective enforcement action against

[4] According to the complainant, quarrying has now stopped at two sites, but only after the quarries had been in operation for some time and had left serious visual scars on the Valley, which is a popular tourist destination.

substantial unauthorised peat extraction. It has not been confirmed that unauthorised industrial peat extraction has actually been halted at the site. Complaint P2003/5217 draws attention to very extensive unauthorised peat extraction – affecting up to 150 hectares - that has taken place in recent years in the Nore Valley Bogs, a proposed natural heritage area (NHA). It is contended that, despite a clear requirement for prior development consent and EIA, there has been neither – nor any timely and effective enforcement action.

3.18 With regard to other developments, the Commission would refer to a proposed 6,000 seater convention centre (know as "Citywest") in the south County Dublin county council area. An application for development consent lodged in June 2003 was accompanied by an environmental impact statement (EIS). Site excavation commenced in September 2003 before any decision was made by the planning authority. While a decision to approve the development was under appeal to Ireland's Planning Appeals Board, substantial construction work was undertaken, including the entire steel frame, roof and much of the wall area. At Palmerstown Demesne, County Kildare, a planning application with EIS was lodged in 2002 for a business park, housing, golf course, hotel and conference centre development. However the construction of the golf course was virtually completed including substantial landscape regrading and greens, tees and fairways before the application was lodged and during the application decision process. No action has been take by the local authority to terminate unauthorised development. At Standish Sawmill, County Offaly, a substantial development including large scale industrial structures and chemical treatment of timber was developed without any prior development consent. Groundwater has been contaminated with arsenic and chromium. A retention application was lodged without an EIS and the development refused permission by An Bord Pleanala in July 2003. Offaly County Council failed to take enforcement action and allowed further development to proceed on the site and a further retention application to be lodged in January 2004 . On 3 December 2004, this application was approved by the local authority.

Derrybrien wind-farm project

3.19 On 16 October 2003, a major landslide and environmental disaster occurred at Derrybrien, County Galway. Upwards of half a million cubic metres of peat became dislodged from an area under development for a wind-farm, and moved an initial distance of approximately two kilometres, with further movement occurring between 22 and 30 October 2003, polluting the Owendalulleegh River. According to a statutory environmental authority, the Shannon Regional Fisheries Board, the peat silt displaced by the landslide resulted in the death of about 50,000 fish, and caused lasting damage to spawning beds.

3.20 February 2004 saw the publication of two reports on the disaster, one prepared on behalf of the wind-farm developer, Hibernian Wind-power Limited, a subsidiary of Ireland's state-owned power company, the Electricity Supply Board (ESB) (and, therefore, within the control of the Irish state), the other on behalf of the competent local authority, Galway County Council. Both reports concurred that construction work on the wind-farm – which is being developed on a hill-side with unstable peat deposits largely covered with a plantation conifer forest owned and managed by the state forestry company, Coillte Teo. – had triggered the disaster.

3.21 In 2003, the Commission registered a complaint under the reference P2003/5188 which contended that there had been and continued to be failures to comply with the Impact Assessment Directive in relation to the wind-farm project. The complaint expressed serious concerns about the risks to the local population presented by proposed resumption of work on the wind-farm.

3.22 The wind-farm is the largest terrestrial wind-energy development planned to date in Ireland, occupying a site of several hundred hectares. It is also one of the largest in Europe. The site is on the summit of Cashlaundrumlahan Mountain in the Slieve Aughty range in County Galway. It is blanketed by up to 5.5 metres of peat and has been largely covered with plantation forestry.

3.23 Development consent has been obtained in phases. Two development consent applications were lodged in 1997, each involving 23 wind turbines. These were accompanied by a common environmental impact study prepared by the developer. Development consent was granted in 1998. In 1999, a separate consent was obtained for a power-line connection to the site: there was no prior EIA of this. In 2000, development consent was sought for a third phase of 25 turbines. This was accompanied by a separate environmental impact study. The application was refused development consent in 2000 by the competent local authority, which at the time was concerned by over-development of the site. However, the third phase was approved on appeal to Ireland's Planning Appeals Board in 2001. In 2002, the developer applied for consent to modify the first two phases of the wind-farm project: the modification entailed enlarging the capacity and size of the individual turbines, which in turn involved more sizeable foundations. These changes were approved in 2002 without any new EIA. In October 2003, the planning permission for the original two phases expired and the developer sought an extension of time to execute the project. This was granted without any new EIA in November 2003. In the meantime, construction work started in or around July 2003. This involved construction of access roads and the first of the 71 turbine bases. Notwithstanding the environmental disaster, the developer announced an intention of resuming work on the wind-farm site in 2004, apparently without intending to submit the development to a fresh EIA. It may be noted that development of the wind-farm will also necessitate the removal of an extensive area of existing conifer forest. On 20 May 2003, Coillte Teo was given permission to clear 263 hectares of forest. Although this was substantially greater in extent that the threshold set in the Irish legislation for mandatory EIA of a deforestation project for purposes of conversion to another land-use, it appears that no EIA was undertaken for this. The Commission understands from complainants that, in the period since the Commission's above-mentioned letter of formal notice, work has continued on clear-felling of the trees on the site, drainage work and road works have been undertaken and turbines have been delivered to the site.

3.24 In its above-mentioned response to the Commission's additional letter of formal notice, Ireland argues that the Impact Assessment Directive was inapplicable to the first two phases on the basis that development consent for these was governed by Directive 85/337/EEC before its amendment by Directive 97/11/EC and that Directive 85/337/EEC in its original form made no express provision for assessment of wind-farm projects. Ireland also argues that "deforestation for the purposes of conversion to another type of land-use" was not a project category included in Directive 85/337/EEC before its amendment by Directive 97/11/EC. The Commission would make a number of observations.

3.25 First of all, even if it were to be accepted that wind-farms *per se* fell outside the scope of Directive 85/337/EEC before its amendment, there were several components of the first two phases of the Derrybrien project, including road construction, peat extraction and electrical power transmission, which clearly came within the scope of Directive 85/337/EEC before its amendment.

3.26 Secondly, the first two phases were subject to proposed significant modifications which came within the scope and post-dated the coming into effect of the amendments made by Directive 97/11/EC. In its above-mentioned response to the Commission's additional letter of formal notice, Ireland argues that the only modifications formally approved by development consent related to the third phase of the development. However, in letters dated 20 June 2002 (i.e. after the coming into effect of the amendments made by Directive 97/11/EC), the developer requested the local authority's agreement to change the turbine type for the first two phases, allowing for an increase in electricity generation of 25%. On 30 July 2002, the local authority gave its approval, without having required a fresh EIA. These modifications in themselves involved an increased impact on the unstable peatland terrain because the changes entailed use of larger turbines.

3.27 Thirdly, the development consent for the first two phases expired, requiring a fresh development consent, which was considered during a period when the environmental disaster occurred. In its above-mentioned response to the Commission's letter of formal notice, the Irish authorities argue that an extension of the period within which the first two phases could be executed did not amount to a new development consent. However, the definition of "development consent" in Article 1 of the Impact Assessment Directive is very clear. Without a formal decision of the local authority allowing an extension of planning permission, the developer was not entitled to proceed any further with the project. The application for an extension and its approval both occurred after the amendments made by Directive 97/11/EC took effect. Moreover, the grant of an extension was given *after* the environmental disaster at Derrybrien had occurred.

3.28 Fourthly, the Commission understands that the application for a felling licence to remove the forest at Derrybrien was made on 15 January 2003 and granted on 20 May 2003 (i.e. after the amendments made by Directive 97/11/EC took effect). It extends to 263 hectares which is above the threshold for mandatory EIA in the Irish legislation.

3.29 In its above-mentioned response to the Commission's letter of formal notice, Ireland does not explicitly argue that any or each of the studies undertaken for the Derrybrien wind-farm development were compliant with the Impact Assessment Directive. In particular, Ireland does not respond to the following observations contained in the above-mentioned additional letter of formal notice, namely that the studies were manifestly deficient in failing to provide any or any adequate information on the risks of a peat-slide associated with the project; that the developer's information was seriously lacking in this regard, and no environmental authority made up for its deficiency[5]; that the project as executed did not coincide

[5] The state expert body on geology, the Geological Survey of Ireland, is not a statutory consultee under Ireland's implementing legislation, disclosing a possible breach of Article 6 of the Directive. The Geological Survey did not participate in the development consent procedures for developments at Derrybrien. It is understood that it does not generally participate in development consent procedures.

with the development consent applications (notably, that significant quarrying of material for the development occurred on site which was not comprehended in the development consent applications and that, although the competent local authority was notified of the quarrying activity during the summer of 2003, it did not intervene). With regard to the content of the above-mentioned project impact studies, the Commission notes that a local association, Derrybrien Development Cooperative Society Limited, and local landowners affected by the peat-slide commissioned a detailed expert study by the University of East London[6], which was published in October 2004 and *inter alia* made available to the competent local authority, Galway County Council on 27 October 2004[7]. This expert study *inter alia* includes a review of the project impact studies and is generally critical of their quality. It observes: *"There is no mention of bog-slide potential within the consideration of either rocks and soil, or water; indeed there is no evidence that the developers have considered issues of stability at all, nor did the planning authority require a stability assessment, despite the evidently unstable nature of the ground in many areas of the site."* The Commission maintains its position that all of the afore-mentioned studies of the Derrybrien development were manifestly deficient in terms of the information provided by the developer concerning stability.

3.30 Ireland has failed to comply with the Impact Assessment Directive in relation to the absence of an EIA for the deforestation project.

3.31 According to the case-law of the Court of Justice, the competent authorities of a Member State are required to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and *WWF and Others*, [1999] ECR I-5613, point 70).

3.32 In its decision of 7 January 2004 in Case C-201/02, the Court further underlined this interpretation, stating that "*Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337* (point 65). *The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment* (point 66). *The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)*(point 67)."

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[6] "Wind Farms and Blanket Bog, The Bog Slide of 16th October 2003 at Derrybrien, County Galway, Ireland", Richard Lindsay, Olivia Bragg, University of East London, 2004

[7] Letter from [redacted] Director of Services, Galway County Council.

3.33 In failing to ensure that all aspects of the wind-farm development, including related developments such as the deforestation project, were and will be fully and correctly subject to the requirements of Articles 2 to 10 of the Impact Assessment Directive, it is apparent that Ireland is in breach of its obligations under the Impact Assessment Directive.

FOR THESE REASONS

THE COMMISSION OF THE EUROPEAN COMMUNITIES

after giving the Government of Ireland the opportunity to submit its observations letter dated 7 July 2004 (ref.SG(2004)D/202983) and having regard to Ireland's response dated 6 December 2004 (ref.SG(2004)A/12955) ,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

under the first paragraph of Article 226 of the Treaty establishing the European Community that Ireland
- by not adopting all measures necessary to ensure that projects falling within the scope of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment either before or after modification by Directive 97/11/EC are, before they are executed in whole or in part, firstly considered for the possible need for environmental impact assessment, and secondly, where likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location, made subject to an assessment with regard to their effects in accordance with Article 5 to 10 of the said Directive 85/337/EEC, has failed to comply with the obligations that it has under Articles 2, 4 and 5 to 10 of the said Directive 85/337/EEC, and
- by not adopting all measures necessary to ensure that the development consents given for and the execution of wind-farm developments and associated works at Derrybrien, County Galway were preceded by an assessment with regard to their effects in accordance with Article 5 to 10 of the said Directive 85/337/EEC, has failed to comply with the obligations that it has under Articles 2, 4 and 5 to 10 of the said Directive 85/337/EEC.

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, 22/12/2004

For the Commission

Stavros DIMAS
Member of the Commission

COMMISSION OF THE EUROPEAN COMMUNITIES

IN CONFORMITY WITH COMMISSION DECISION
For the Secretary - General,
[redacted]
Director for the Registry