



COMMISSION OF THE EUROPEAN COMMUNITIES

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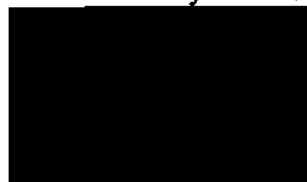
**PERMANENT REPRESENTATION
OF IRELAND TO THE
EUROPEAN UNION
Rue Froissart, 89-93**

1040 BRUSSELS

**Subject: Reasoned Opinion
Infringement Nos 2000/4616 and 2000/4777**

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 fulfill obligations under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC

For the Secretary-General



Encl. C(2001)4256



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20. XII. 2001
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REASONED OPINION

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PROVISIONS OF DIRECTIVES

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 Directive 85/337/EEC defines certain terms used in the directive.

'project' is stated 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;

'developer' is stated to mean:

the applicant for authorization for a private project or the public authority which initiates a project;

'development consent' is stated to mean:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

Article 2 (1) of Directive 85/337/EEC provides that

"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4".

Directive 97/11/EC replaces the previous text of Article 2 (1) with the following:

"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4".

Article 2 (2) of Directive 85/337/EEC provides that

"The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive."

Article 3 of Directive 85/337/EEC provides that:

"The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- *human beings, fauna and flora,*
- *soil, water, air, climate and the landscape,*
- *the inter-action between the factors mentioned in the first and second indents,*
- *material assets and the cultural heritage. "*

Directive 97/11/EC replaces the previous text of Article 3 with the following:

"The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- *human beings, fauna and flora;*
- *soil, water, air, climate and the landscape;*
- *material assets and the cultural heritage;*
- *the interaction between the factors mentioned in the first, second and third indents. "*

Article 4 of Directive 85/337/EEC provides that:

"1. Subject to Article 2 (3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require. To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10. "

Annex II of Directive 85/337/EEC lists "extraction of peat" at point 2(a).

Directive 97/11/EC replaces the previous text of Article 4 with the following:

"1. Subject to Article 2 (3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2 (3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public. "

Annex II as amended by Directive 97/11/EC *inter alia* lists "peat extraction" at point 2(a).

Article 5 of Directive 85/337/EEC provides that:

- "1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:
- (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;
 - (b) the Member States consider that a developer may reasonably be required to compile this information having regard *inter alia* to current knowledge and methods of assessment.
2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:
- a description of the project comprising information on the site, design and size of the project,
 - a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,
 - the data required to identify and assess the main effects which the project is likely to have on the environment,
 - a non-technical summary of the information mentioned in indents 1 to 3.
3. Where they consider it necessary, Member States shall ensure that any authorities with relevant information in their possession make this information available to the developer. "

Directive 97/11/EC replaces the previous text of Article 5 with the following:

- "1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:
- (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;
 - (b) the Member States consider that a developer may reasonably be required to compile this information having regard *inter alia* to current knowledge and methods of assessment.
2. Member States shall take the necessary measures to ensure that, if the developer so requests before submitting an application for development consent, the competent authority shall give an opinion on the information to be supplied by the developer in accordance with paragraph 1. The competent authority shall consult the developer and authorities referred to in Article 6 (1) before it gives its opinion. The fact that the authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the developer to submit further information. Member States may require the competent authorities to give such an opinion,

irrespective of whether the developer so requests.

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

- a description of the project comprising information on the site, design and size of the project,
- a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,
- the data required to identify and assess the main effects which the project is likely to have on the environment,
- an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,
- a non-technical summary of the information mentioned in the previous indents.

4. Member States shall, if necessary, ensure that any authorities holding relevant information, with particular reference to Article 3, shall make this information available to the developer. "

Article 6 of Directive 85/337/EEC provides that:

"1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or in each case when the request for consent is made. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. Member States shall ensure that:

- any request for development consent and any information gathered pursuant to Article 5 are made available to the public,
- the public concerned is given the opportunity to express an opinion before the project is initiated.

3. The detailed arrangements for such information and consultation shall be determined by the Member States, which may in particular, depending on the particular characteristics of the projects or sites concerned:

- determine the public concerned,
- specify the places where the information can be consulted,
- specify the way in which the public may be informed, for example by bill-posting within a certain radius, publication in local newspapers, organization of exhibitions with plans, drawings, tables, graphs, models,
- determine the manner in which the public is to be consulted, for example, by written submissions, by public enquiry,
- fix appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period. "

Directive 97/11/EC replaces the previous text of Article 6 with the following:

"1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To this end, Member States shall designate the authorities to be consulted, either in general terms

or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.

Article 6 (2) shall be replaced by the following:

'2. Member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.'

Article 8 of Directive 85/337/EEC provides that:

"Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure"

Directive 97/11/EC replaces the previous text of Article 8 with the following:

"The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure."

Article 9 of Directive 85/337/EEC provides that:

"When a decision has been taken, the competent authority or authorities shall inform the public concerned of:

- the content of the decision and any conditions attached thereto,*
- the reasons and considerations on which the decision is based where the Member States' legislation so provides.*

The detailed arrangements for such information shall be determined by the Member State.

If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question."

Directive 97/11/EC replaces the previous text of Article 9 with the following:

"1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

- the content of the decision and any conditions attached thereto,*
- the main reasons and considerations on which the decision is based,*
- a description, where necessary, of the main measures to avoid, reduce and, if possible offset the major adverse effects.*

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1."

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.

Irrespective of the modifications made by Directive 97/11/EC, the Impact Assessment Directive foresees the impact assessment of certain peat extraction projects.

BACKGROUND

2. As part of the general background to the present Infringement Procedure, it is worth recalling that Ireland's implementation of the Impact Assessment Directive in relation to peat extraction projects has been controversial, and is the subject of a decision of the European Court of Justice of 21 September 1999 in Case C-392/96, Commission v Ireland. It is also worth recalling that, as a project category, peat extraction is of particular environmental importance in Ireland because Ireland hosts many of the best surviving examples of rare and endangered peatland habitats in the Community.

2.1. In 2000, the Commission registered a complaint against Ireland under P2000/4616 which claimed that Mouds Bog, a proposed Natural Heritage Area (Code 000395)¹, has, since 1993, been the subject of industrial peat extraction, which has been extended by stages. By 1998, the 50 hectare threshold for environmental impact assessment (EIA) in the Irish transposing legislation for the Directive was exceeded. Kildare County Council was requested to require an EIA but failed to act. The area brought under development has reached 130 hectares.

2.2 In the framework of the handling of this complaint, the Commission addressed a letter for information to the Irish authorities on 29 August 2000 (D(0)432590).

2.3 In the absence of any response from Ireland to the letter mentioned in the last paragraph, the Commission addressed a Letter of Formal Notice to Ireland on 5 April 2001 (SG(2001)D/287491) in respect of the failure to carry out an environmental impact assessment on peat extraction at Moud's Bog.

2.4 On 18 April 2001, the Irish authorities responded to the Letter of Formal Notice mentioned in the last paragraph (ref.DGENV 804183A). They stated that the local authority, Kildare County Council, had requested that a planning application, accompanied by an Environmental Impact Assessment, be submitted in relation to the continued use of the lands for the extraction of peat. Failure to submit a planning application would leave the developer open to prosecution under Ireland's Planning Acts. They further stated that the Commission would be advised of progress in due course. However, since then the Commission has had no confirmation from the local authority that an EIA has been carried out. The complainant has indicated that no

¹ Proposed Natural Heritage Areas are areas confirmed to have national nature conservation importance under a Community co-financed scientific survey

EIA was undertaken and that there has been no enforcement action against the developer.

2.5 In 2000, the Commission registered a complaint against Ireland under P2000/4777 which claimed that Bord na Mona (the Irish semi-state peat extraction company) is obtaining integrated pollution control (IPC) licences from the Irish Environmental Protection Agency² for peat extraction in respect of areas greater than 50 hectares without any EIAs for the purposes of the Directive. A table was attached giving details of these licences. They concerned Boora Works, Leabeg, Tullamore, Co. Offaly (licence issued 18 May 2000); Derrygreennagh Works, Rochfordbridge, Mullingar, County Westmeath (licence issued 26 April 2000); Blackwater Works, Blackwater, Shannonbridge, Athlone, County Westmeath (licence issued 26 April 2000); Derrygreennagh Works, Rochfordbridge, Mullingar, County Westmeath (licence issued 28 April 2000); Mountdillon Works, Lanesboro, County Longford (licence issued 9 May 2000); Oweninny Group, Oweninny Works, Bellacorrick, Ballina, County Meath (licence issued 18 May 2000); Ballivor Works, Ballivor, Navan, County Meath (licence issued 28 April 2000); Boora Works, Leabeg, Tullamore, County Offaly (licence issued 29 April 2000).

2.6 The complainant also had a particular concern for Killamuck Bog, Abbeylax, Co. Laois. He contended that, several months previously, Bord na Mona undertook drainage work on the Bog, which covers over 200 hectares and is situated near the heritage town of Abbeylax, where it is considered a valuable amenity. An IPC licence was granted on 29 February 2000 without any prior EIA. In July 2000, Bord na Mona sought to commence removing material from the surface of the bog. The development on Killamuck Bog was also the subject of Complaints P2000/4891 and P2000/5060. According to complainants, Bord na Mona had argued that drainage works in preparation for peat extraction are outside the scope of the Directive, and that the Irish authorities were treating drainage works as outside the scope of the Directive³.

2.7 In the framework of the handling of Complaint P2000/4777, the Commission addressed a letter to the Irish authorities on 13 October 2000 (D(0)433043), enclosing the table mentioned in the previous paragraph. It sought general comments on the claims made, including background information on the developments concerned, details of the extent of the area affected by peat extraction work (including drains) since 1988 at the locations mentioned (in particular, Killamuck, Abbeylax), and an explanation of why no EIA has apparently been required, having regard to the claims of the complainant. The time set for responding to this letter was two months.

2.8 In the absence of any response from Ireland to the letter mentioned in the last paragraph, the Commission addressed a Letter of Formal Notice to Ireland on 5 April 2001 (SG(2001)D/287491) in respect of the failure to carry out an environmental

² According to the complainant, since 10 June 1999, pursuant to the Environmental Protection Agency Act, 1992, the extraction of peat involving an area exceeding 50 hectares requires an IPC licence.

³ Letter dated 3 October 2000 from [redacted] Planning, Laois County Council to [redacted] Irish Peatland Conservation Council states that land drainage works are exempt from development consent, and that there is no direct information that Bord Na Mona intends to extract peat from Killamuck Bog.

impact assessment on peat extraction in the areas mentioned in Complaint P2000/4891.

2.9 To date, Ireland has not responded to either the Commission's request for information concerning P2000/4891 or the Letter of Formal Notice referred to in the last paragraph.

Law

3. Under the European Communities (Environmental Impact Assessment) Regulations, 1999, S.I.No.349 of 1989, Ireland provided for the EIA of peat extraction which would involve a new or extended area of 50 hectares. There was no provision for EIA below this threshold.

3.1 In its decision of 21 September 1999 in Case C-392/96, Commission v Ireland, the European Court of Justice ruled at paragraph 72:

"It follows that, by setting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive, thresholds which take account only of the size of projects, to the exclusion of their nature and location, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive"

3.2. At paragraph 78 of its judgement, the Court noted:

"Ireland has not denied that no project for the extraction of peat, covered by point 2(a) of Annex II to the Directive, has been the subject of an impact assessment, although small-scale peat extraction has been mechanised, industrialised and considerably intensified, resulting in the unremitting loss of areas of bog of nature conservation importance".

3.3 At paragraph 82 of its judgement, the Court ruled:

"It follows from all of the foregoing that, by setting thresholds for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive without also ensuring that the objective of the legislation will not be circumvented by the splitting of projects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive".

3.4 The continued non-conformity of the Irish legislation in relation to the peat extraction aspect of the judgment in Case C-392/96 is the subject of Infringement Procedure A1989/0425.

3.5. As currently informed, the Commission considers that Ireland has failed to comply with its obligations under the Impact Assessment Directive in as much as it has failed to ensure that the peat extraction projects mentioned in paragraphs 2.1, 2.5 and 2.6 above were subject to prior EIA. It is not clear from the facts whether the development consent applications for individual projects brought them within the scope of Directive 85/337/EEC before or after its amendment by Directive 97/11/EC. However, irrespective of the date of the consent applications, the essential relevant legal duties under the Impact Assessment Directive remain the same.

3.6 It would appear that, in all cases, the peat extraction involved a new or extended area of 50 hectares and should have required an EIA under the terms of Ireland's transposing legislation.

3.7 In as much as Ireland may argue that the peat extraction in relation to all of these projects fell outside the scope of the Irish implementing legislation, the Commission would contend that, in the light of the decision in Case C-392/96, Commission v Ireland, all the projects mentioned should have required an EIA.

3.8 In the first place, as the Court has indicated, the objective of the Directive should not be circumvented by project-splitting. If, in the cases of the projects mentioned, the threshold in the Irish legislation was exceeded by cumulation, the Irish authorities should have ensured that this did not have the result that no EIA was undertaken.

3.9 In the second place, the evidence indicates that, in the case of Moud's Bog, County Kildare and Kilnamuck Bog, Abbeylax, the locations were sensitive (Moud's Bog being a proposed NHA and Kilnamuck Bog being an amenity for a heritage town), and that an EIA was justified even if the Irish threshold had not been exceeded.

3.10 As regards the suggestion that drainage works preparatory to peat extraction are not covered by the terms of the Directive, the Commission would reject this. As is clear from the Commission's descriptions of peat extraction in its pleadings before the Court in Case C-392/96, preliminary drainage works are an integral part of the execution of a peat extraction project. In the Commission's view, treating such drainage works as outside the scope of the Directive would be contrary to and seriously undermine the scheme and purpose of the Directive in relation to peat extraction.

3.11 In so far as Ireland may argue that the competent Irish authority has accepted the need for and requested an EIA in the case of Moud's Bog, the Commission would observe that, notwithstanding this, no EIA has been carried out and no enforcement action has been taken in respect of the developer.

FOR THESE REASONS

THE COMMISSION OF THE EUROPEAN COMMUNITIES

after giving Ireland the opportunity to submit its observations by letter dated 5 April 2001 (ref. SG(2001)D/287491) and after taking account of information provided by the Irish authorities in letter dated 18 April 2001 (ref.DGENV 804183A)

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 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

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, **20. XII. 2001**

For the Commission

Margot WALLSTROM
Member of the Commission

IN CONFORMITY WITH COMMISSION
DECISION

