



COMMISSION OF THE EUROPEAN COMMUNITIES

SECRETARIAT-GENERAL

Brussels,

- 9 -07- 2004

SG-Greffe(2004)D/

202983

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

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SIGNATURE

Subject: Additional letter of formal notice
Infringement No 2000/4384

The Secretariat-General should be obliged if you would forward to the Minister for Foreign Affairs the enclosed letter from the Commission.

For the Secretary-General

Encl. C(2004) 2433



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Brussels, 07/07/2004

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Your Excellency,


I would again draw your attention to Ireland's implementation of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC (hereinafter referred to as "the Directive") following the first letters of formal notice sent to you on 24 October 2001 (ref.SG(2001)D/260437) and on 18 October 2003 (ref.SG(2002)D/220761) and a reasoned opinion notified to Ireland on 21 December 2001 (ref.SG(2001)D/260569).

Grouping of certain existing infringements and complaints under A2000/4384

The present letter bears the reference of infringement procedure A2000/4384. At the outset, the Commission wishes to point out that several other infringements and complaints have, for convenience, been grouped under this existing reference. The other infringement procedures that have been subsumed are: A2000/4616, A2001/4790 and A2002/4683. Registered complaints that are grouped under this procedure are as follows: P2003/4298, P2003/5188, P2003/5217 and P2004/4045. These complaints are described in more detail in later sections of the present letter. Further complaints that are undergoing registration are also mentioned.

For the sake of completeness, the following correspondence that has taken place to date within the framework of the above-mentioned infringement procedures may be noted.

The letter of formal notice dated 24 October 2001 related to complaint P2000/4384 which concerned 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). In its response dated 25 October 2002, Ireland set out reasons as to why no EIA had been required.


Minister for Foreign Affairs
St. Stephen's Green 80
DUBLIN 2
Ireland

The letter of formal notice dated 18 October 2003 related to two separate complaints, P2001/4790, which concerned quarry developments at Athlone, County Offaly, and P2002/4683, which concerned a quarry development at Moycullen, County Galway. On 18 February 2003, Ireland responded with regard to complaint P2001/4790 *inter alia* confirming that there had been unauthorised quarry development at Clonfanlough Hill, Athlone. On 13 January 2003, Ireland responded with regard to complaint P2002/4683, *inter alia* confirming that there had been unauthorised quarry development at Moycullen, County Galway.

The reasoned opinion dated 21 December 2001 related to several instances of environmentally significant peat extraction taking place in Ireland without any prior EIA. These have since been 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.

Overview of issues addressed in the present letter of formal notice

Having further considered the matters arising from the aforementioned infringements and complaints, the Commission is concerned that aspects of Irish legislation and administrative practice give rise to non-respect for the Directive.

The present letter of formal notice is intended to address the following separate failures to comply with the Directive:

- the fact that the Irish legislation implementing the Directive allows for the possible need for EIA to be considered, EIA to be undertaken, and development consent to be obtained, once 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 development consent;
- the manifestly deficient EIA and related issues in the specific case of a wind-farm located at Derrybrien, County Galway.

In as much as the first two failures are inter-related, they are treated together in the next section of the present letter of formal notice. Issues concerning Derrybrien are dealt with separately in the succeeding section.

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

Based on the principle of prevention, the 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 Directive, it is also necessary that determinations as to whether or not individual projects require assessment (the procedure known as screening) should be undertaken before project execution.

Ireland's legislation transposing the Directive – now largely consisting of the Planning and Development Act, 2000 and subsidiary regulations - integrates the 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 Directive, and subsequently to make an application for a form of development consent known as "retention permission". Under the legislation, it appears possible to treat EIA requirements – including screening requirements - as capable of being satisfied after the application for retention permission has been lodged.

In allowing for EIA for projects already executed in whole or in part, the Irish legislation would appear, therefore, to be non-compliant with the system of the Directive as set out in Articles 2 to 10.

Under Irish legislation, it is possible for a local authority to take legal action against a developer who undertakes an unauthorised development. In principle, such legal action can continue even where an application for retention permission has been submitted. However, in practice, it appears that weak enforcement practice serves to further undermine the system of the Directive. For example, it appears that enforcement action is often in practice discontinued once an application for retention permission is submitted, thus encouraging expectations that, in practice, unauthorised development will not attract any adverse consequences. In addition, it appears that 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 addition, no attempt is made to 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 Case C-201/02, mentioned below). It also appears that, under the Irish legislation, the possibility of bringing enforcement action expires after a number of years and that, in practice, Irish enforcement authorities sometimes choose to allow enforcement action to become statute-barred.

The undertaking or significant intensification of projects without development consent would appear to be not uncommon 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.

Several non-exhaustive illustrations can be provided.

As regards quarries, Ireland's response of 18 February 2003 gives 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 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)¹. 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 awaiting registration 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 EIS² 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 under registration 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 Ireland³. It is understood that significant illegal quarrying has also occurred elsewhere in Ireland, for example in Counties Clare and Roscommon.

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.

¹ Kinsella's Quarry at Clash Row

² Environmental impact statement. This is the term applied in Ireland to the information that a developer must supply in an EIA procedure.

³ 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.

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 under registration refers to a retention application (ref.04/176) for a major piggery at Greenan, Kilmacthomas 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.

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 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.

Derrybrien wind-farm project

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 Owendalulleagh 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.

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), 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.

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 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.

The wind-farm is one of the largest terrestrial wind-energy projects planned in Ireland or Europe, occupying a site of several hundred hectares. 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. 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 on the third phase in the summer of 2003. 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 than 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.

In so far as Ireland may argue that all three phases of the wind-farm project were subject to an EIA in compliance with the Directive, the Commission would observe that it appears that the EIAs were manifestly deficient in failing to provide any or any adequate information on the geophysical risks associated with the project. The developer's information was seriously lacking in this regard, and no environmental authority made up for its deficiency⁴. Furthermore, key modifications of the project were not assessed, and it also appears that the project as executed did not coincide with the development consent applications. Notably, significant quarrying of material for the development occurred on site which was not comprehended in the development consent applications. The competent local authority was notified of the quarrying activity during the summer of 2003 but did not intervene.

In so far as Ireland may argue that the 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, the Commission would make a number of observations. First of all, 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. These modifications in themselves involved an increased impact on the unstable peatland terrain and warranted an EIA. Secondly, the development consent for the first two

⁴ 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.

phases expired, requiring a fresh development consent, which was considered during a period when the environmental disaster occurred. These new circumstances again warranted an EIA. Thirdly, there are arguments, based on the broad formulation of certain project categories as well as on the wide interpretation of the notion of "project" confirmed by the Court of Justice, for considering that Directive 85/337/EEC in its original form included wind-farms. However, 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 and peat extraction, which clearly came within the scope of Directive.

It also appears that Ireland has failed to comply with the Directive in relation to the absence of an EIA for the deforestation project.

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).

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).*"

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 Directive, it is apparent that Ireland is in breach of its obligations under the Directive.

The Commission of the European Communities consequently takes the view, further to its letters of formal notice of 24 October 2001 (ref.SG(2001)D/260437) and 18 October 2003 (ref.SG(2002)D/220761) and its reasoned opinion of 21 December 2001 (ref.SG(2001)D/260569), that Ireland has, by reason of the failures referred to in the present letter of formal notice in relation to retention permissions, lack of effective enforcement and the Derrybrien wind-farm, failed to fulfil its obligations under Articles 2 to 10 of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

The Commission invites your Government, in accordance with Article 226 of the Treaty establishing the European Community, to submit its observations on the foregoing within two months of receipt of this additional letter of formal notice.

After examining these observations, or if no observations have been submitted within the prescribed time-limit, the Commission may, if appropriate, issue a Reasoned Opinion as provided for in the same Article.

Yours faithfully,

For the Commission

Margot WALLSTRÖM

Member of the Commission

