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Implications of the New EIA Directive

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THE NEW DIRECTIVE

The EIA Directive (2011/92/EU) has been amended by Directive 2014/52/EU.

Why? Several reasons have been given, including:

> "to strengthen the quality of the environmental impact assessment procedure, align that procedure with the principles of smart regulation and enhance coherence and synergies with other Union legislation and policies, as well as strategies and policies developed by Member States in areas of national competence;"
>
> to ensure that "environmental protection is improved, resource efficiency increased and sustainable growth supported in the Union. To this end, the procedures it lays down should be simplified and harmonised"; and,
>
> "Over the last decade, environmental issues, such as resource efficiency and sustainability, biodiversity protection, climate change, and risks of accidents and disasters, have become more important in policy making. They should therefore also constitute important elements in assessment and decision-making processes."

With three years' notice, the deadline for transposition passed on 16 May 2017. Almost nothing has been done to transpose the amendments into Irish law.

The Department of Agriculture &c. has made changes to the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011, regarding a limited few of the projects that require assessment, namely:

> (a) restructuring of rural land holdings,
>
> (b) commencing to use uncultivated land or semi-natural areas for intensive agriculture, or
>
> (c) land drainage works on lands used for agriculture.

For the vast majority of projects, including in the transport sector, there two Circular Letters only. The first, PL 1/2017, is dated 15 May from the Department of Housing &c. to competent authorities nationwide and explains:

> "The Department is in the process of urgently drafting the required amendments to the Planning and Development Act 2000 as amended and the Planning and Development Regulations 2001-2015 to provide for the transposition of the Directive into the Irish planning code. … In advance of transposition of Directive 2014/52/EU into Irish law, it is a matter for each Competent Authority to apply this Circular Letter, taking such advices as the Competent Authority considers appropriate."

In particular, for applications made on or after 16 May 2017, competent authorities are "advised to consider applying the requirements of Directive 2014/52/EU by way of administrative provisions in advance of the transposition".

The second, PL 8/2017, is dated 6 September and focuses solely on the requirement to make information available electronically. A central portal is to be set up and managed by the Department of Housing, Planning and Local Government. It will be an additional tool to inform the public, in a timely manner, of all EIA applications made countrywide and

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offshore across all legislative codes, and to provide a URL link to the relevant competent authority(s) website where detailed information pertaining to the application will be contained

Transitional Provisions

The first circular highlights 32 amendments of note and emphasises the transitional provisions in the new Directive that makes clear what projects must comply with the "new rules". The "old rules" continue to apply where, before 16 May 2017:

> "An application for planning permission or other development consent with an Environmental Impact Statement has been submitted;
>
> An application for planning permission or other development consent has been submitted and the screening to determine whether EIA applies under Article 4(2) of Directive 2011/92/EU has commenced by this date;
>
> In the case of projects requiring assessment and a request has been made, providing the information specified in Annex IV in an adequate and appropriate form, for an opinion under Article 5(2) of Directive 2011/92/EU as to the information to be provided by the developer and to be contained in an Environmental Impact Statement (request for scoping opinion)."

If an application with an EIS was made before 16 May 2017, but a response to a request for information is made after that date, there is scope for real dispute about whether the new rules apply. Strictly, a developer should only escape the new rules where all the information required under Article 5(1) of the old Directive had been provided. Where further information has been required, there must be doubt whether that requirement has been met.

The protection for screening to continue under the old rules is limited only to the pending screening exercise. Where the pending screening concludes that assessment is required, the assessment must be done under the new rules.

The Assessment

The core obligation remains for Member States, under Article 2(1), to ensure that before development consent is given in respect of certain categories of project, an assessment is carried out of their effects on the environment. The assessment, an "environmental impact assessment", is now defined in Article 1(2)(g). It means a process consisting of:

> "(i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);
>
> (ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;

> (iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7;
>
> (iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and
>
> (v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a."

Absent such a definition in the earlier Directives, the Court of Justice of the European Union (CJEU) had explained the requirement for assessment when finding Ireland in breach of the Directive, *Case C-50/09 Commission v. Ireland*, as follows:

> "37. In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case.
>
> 38. That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive.
>
> 39. Admittedly, Article 8 of Directive 85/337 provides that the results of the consultations and the information gathered pursuant to Articles 5 to 7 must be taken into consideration in the development consent procedure.
>
> 40. However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 Commission v United Kingdom [2006] ECR I 3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors."

Article 3 elaborates on the core obligation. It used to provide that:

> "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 12, the direct and indirect effects of a project on the following factors:
>
> > (a) human beings, fauna and flora;
> >
> > (b) soil, water, air, climate and landscape;

> (c) material assets and the cultural heritage;
>
> (d) the interaction between the factors referred to in points (a), (b) and (c)."

The list of factors now goes further:

> "The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:
>
> (a) population and human health;
>
> (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
>
> (c) land, soil, water, air and climate;
>
> (d) material assets, cultural heritage and the landscape;
>
> (e) the interaction between the factors referred to in points (a) to (d).
>
> 2. The effects referred to in paragraph 1 on the factors set out therein shall include the expected effects deriving from the vulnerability of the project to risks of major accidents and/or disasters that are relevant to the project concerned." (New language underlined.)

The Circular properly describes these changes as "significant" and highlights new factors to include "population and human health" (replacing "human beings"), "biodiversity" with particular attention to species and habitats protected under the Habitats and Birds Directives (replacing "flora and fauna"), and "land". It should be noted that consideration of "climate" should include "climate change".

The one change not highlighted by the Circular is the insertion of the word "significant". It has often been assumed that because EIA is required only for "projects likely to have significant effects on the environment" that only significant effects must be assessed. Strictly, Article 2(1) was not so limited. Those projects were to be the subject of an "assessment with regard to their effects on the environment". The limitation "significant effects" was not repeated. Helpfully, it is now in Article 3(1) and reinforced at Article 5(1)(b) (where the content of the information to be given by the developer is set out).

This assessment can be, and in Ireland is, integrated into existing consent procedures, including the planning process.

Screening for EIA

Under Article 4 and Annex I and II, the Directive identifies those categories of project to which it applies. Those categories of project have not changed.

For example, with road transport projects, the categories of motorway, busway, service area, new 100m bridge, new 100m tunnel, four-lane road of 500m or more in an urban area etc. do not require any change.

Sub-article (1) provides that projects listed in Annex I of the Directive "shall be subject to an assessment". EIA is mandatory in respect of those projects. Sub-paragraph (2) provides that projects listed in Annex II are different. For those, Member States must determine whether EIA of the project is required through case-by-case examination or thresholds or criteria set by the Member State. EIA is required for such projects, only where thresholds are exceeded or case-by-case examination requires.

The "new rules" require the developer to provide certain information, in effect, to allow proper screening for EIA to be carried out. That information is listed in Annex IIA. The screening decision is to be made within 90 days of receipt of the required information. Whether the competent authority requires an EIA or not, the main reasons must be given, with reference to the selection criteria in Annex III.

The screening decision must "where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment". The Circular interprets this to mean "[i]f mitigation measures are influential to a screening determination, these must be stated by the Competent Authority in the screening determination".

The reference to the CJEU made by the High Court in *People Over Wind v. Coillte* [2017] IEHC 171 reveals the sensitivity around "mitigation measures" when screening to decide whether an assessment is required. There has been much debate, under the Habitats Directive, regarding the different kinds of "protective measure" within that regime. In cases like *C-521/12 Briels*, *C-387/15 Orleans* and *C-142/16 Commission v. Germany (Fish Ladder)*, a distinction has been made between "conservation measures", "preventive measures", "compensation measures" and mere wishful thinking. (The difference between mitigation and compensation is the subject of a reference from the Supreme Court in *Case C-164/17 Grace v. An Bord Pleanala*). For example, where the information does not address the effectiveness of the measure or, worse still, concedes that effectiveness can only be confirmed after years of monitoring, it certainly does not elminate reasonable scientific doubt under the Habitats Directive. The question remains about what level of confidence or certainty is required about the efficacy of mitigation relied upon to avoid screening for EIA. Unless the mitigation is proposed by the developer, well understood and intrinisic to the project, great caution must be taken.

The Annex III selection or screening criterion are expanded.

There is emphasis on consideration of the size and design of the "whole" project, an indirect reference to the salami-slicing cases and, perhaps, even the grid connection cases here. The requirement to consider cumulative effects (at screening) is limited to "existing and/or approved" projects. That is consistent with Irish judgments excusing any requirement to consider hypothetical or even desired projects. Of course, best practice has often included within the cumulative assessment more than just existing or approved projects. It has included other projects where the application for consent is pending or where policy identifies the project for delivery within the life of that development plan. It remains to be seen whether the phrase in the new Directive means that practice will dilute.

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In Ireland, where a project is "sub-threshold", these are the criterion applied to decide whether an EIA might still be required. The "new rules" introduce the prospect that no sub-threshold analysis would be required, i.e., that the thresholds would be the final word on whether an EIA is required. That is because Article 4(3) allows Member States to set "thresholds or criteria to determine when projects need not undergo either" screening or EIA. The State is not tempted by that convenience. The draft consultation paper makes clear that it is not proposed to transpose Article 4(3) at this stage.

The Directive does not engage with the "scope of project", "redline boundary", "cumulative effects" or "indirect effects" issues that have troubled the Irish Courts since the judgment in *O'Grianna v. An Bord Pleanála (No. 1)* [2014] IEHC 632.

Drawing the redline boundary around a transport corridor has often presented issues. The CJEU has twice criticised Spain, where boundary choice was made to avoid assessment: *Case C-227/01 Commission v Spain (Mediterranean Corridor)*, where a single long distance rail construction project was split into smaller "local" projects, with the result that no environmental assessment was carried out, and *Case C-142/07 Ecologistas (Madrid ring road)*, where a single project for the upgrade of the Madrid ring road that was split into 15 projects, with the result that the section in question (and the project as a whole) was not subject to environmental assessment.

Thankfully, the Irish Courts have been more pragmatic. For example, in *Sloan v An Bord Pleanála* [2003] 2 ILRM 61, consent for a 3km section of roadway known as the Dundalk Western By Pass Northern Link Road was challenged. The road "effectively takes on further the existing Rosslare- Larne Motorway Scheme (Euro route EO1) from Balbriggan to link with the existing national road from Dundalk to Newry just north of the Ballymascanlon Roundabout." In substance, the complaint was that no decision could be made on the 3km stretch of roadway without, at the same time considering the entire of Euro route E01 from Larne to Rosslare. The complaint was dismissed. The Court went so far as to say it would have been unlawful to even consider the parts of the route extending into Northern Ireland as that might have disenfranchised thousands of residents. Bottom line, the Court was satisfied the 3km would not prejudice the main alternatives for progressing the route north.

In Ireland, there remains debate about whether functionally interdependent elements of a project comprise a "single project" (the argument did not succeed in *O'Grianna v. An Bord Pleanála (re Appeal Certificate)* [2015] IEHC 248, *O'Grianna v. An Bord Pleanála (No. 2)* [2017] IEHC 7 or *North Kerry Wind Turbine Awareness Group v. An Bord Pleanála* [2017] IEHC 126, but has found some favour in practice and in *Daly v. Kilronan Windfarm Ltd.* [2017] IEHC 308) or merely information that must be assessed (as characterised in *An Taisce v. An Bord Pleanála (Edenderry Power)* [2015] IEHC 633, *Sweetman v. An Bord Pleanála (Bellacorrick-Castlebar Uprate)* [2016] IEHC 310, *North East Pylon Pressure Campaign Ltd. & anor v. An Bord Pleanála (North South Interconnector)* [2017] IEHC 338 and, most recently, *Alen-Buckley v. An Bord Pleanála*, unreported, High Court. 26 September 2017).

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It is not difficult to see how borrow pits, haul routes, compounds, sites for surplus spoil or waste, replanting obligation sites or the balance of a longer routes would require attention. Helpfully, where the alignment of the interdependent project that requires attention is not final, the Irish High Court has allowed developer's to satisfy the information burden by proposing alternative alignments (see *Alen-Buckley*, where information about two grid connection routes was assessed).

The Environmental Impact Assessment Report

Where EIA is required, the onus is on the developer seeking development consent to submit specified information at the outset of the process - in Ireland, historically, called the Environmental Impact Statement or EIS, but now the Environmental Impact Assessment Report or EIAR (Article 5 and Annex IV).

The Department of Environment &c. Guidelines on EIA from 2013 use the same phrase, EIAR, to describe the written report of the assessment done by the competent authority (and in the template model form of decision) and care should be taken when referring to both.

The circulars do not even attempt to summarise the suite of changes made to Article 5 and Annex IV, save to briefly highlight new references to demolition works, reasonable alternatives, current knowledge and methods of assessment and preparation by competent experts. The new provisions are worth considering in full, given how important they are to whether a valid EIAR has been submitted.

It was always possible for the developer to request a scoping opinion from the competent authority about the information to be produced. Ireland is free to make this a mandatory requirement, but the Circular states that it remains, for now at least, a voluntary step in the process. The status of the scoping opinion has been enhanced. First, where a request for scoping opinion was made before 16 May 2017, that means the "old rules" will apply. Second, where an opinion is issued, the EIAR must be "based on that opinion". Before, the scoping opinion could, in effect, be ignored.

The circulars properly make clear that Article 5(1) outlines only the minimum information to be provided. The real detail is, as before, within Annex IV.

Alternatives

The "old rules" required the developer to provide: "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" (Article 5(3)(d)).

The meaning of that phrase is the subject of three (of eleven) questions referred to the CJEU by the High Court in *Holohan v. An Bord Pleanala* [2017] IEHC 268.

There, a road authority identified the alternative favoured by objectors, namely a bridge to "span" the road above the flood plain. But that proposal was rejected at an early stage essentially on cost grounds, without any information being provided as to its environmental impact, and before the proposal was modelled in any detailed way by reference to particular dimensions. The complaint in the case was that the consideration given to the alternative was inadequate. It was argued that because it was rejected at an early stage, the spanning option was not a "main alternative" within the meaning of the Directive. Assuming the "span" option was a "main alternative", there was complaint about how much environmental assessment must be done of that option before it is dismissed. The Court found at least four possible interpretations of Article 5(3)(d):

> "(a) That the developer must provide an environmental impact statement or an analysis akin to an EIS, in outline form, for each of the alternative developments.
>
> (b) That the EIS should contain sufficient information as to the environmental impact of each alternative as to enable a comparison to be made between the environmental desirability of the different alternatives. [The objector] submits in effect that the assessment of "alternatives" implies an inherently comparative process, and a proportionality requirement, such that it must be evident from the information provided by the developer as to whether the non-environmental benefit of the preferred option (for example a cost saving) is disproportionate to the environmental disbenefit of choosing that option rather than a more environmentally friendly alternative. Such a proportionality analysis cannot be conducted unless the EIS contains sufficient information regarding the environmental benefits of the alternatives to enable this assessment to be carried out.
>
> (c) That it must be made explicit in the EIS as to how the environmental effects of the alternatives were taken into account. On such an interpretation, the developer would not have to provide a fully comparative study, but the EIS would have to be sufficiently explicit to allow participants in the process, and indeed the court, to be satisfied as to how precisely the "environmental effects" were taken into account. [The Board] submits that the rejection of alternatives was clearly based on the EIS which itself contains ecological information (s. 5.3.0) drawing on the Constraints and Route Options Study – although the latter document does not analyse the spanning option at all. It seems to me that it is not possible to say that the EIS clarifies exactly how the environmental effects of the spanning option were taken into account.
>
> (d) The final interpretation, which was in effect that advocated by [the Board], was that the competent authority must itself be satisfied that the developer has taken into account the environmental effects of the alternatives, but the manner in which he or she has done so need not be specified in the EIS. Such an approach would appear to involve a very low level of assurance that the directive had been complied with and would provide little by way of transparency for the court in its examination of the lawfulness of the decision."

Against this background, the Court has referred three questions:

> "(e) whether an option that the developer considered and discussed in the environmental impact assessment, and/or that was argued for by some of the stakeholders, and/or that was considered by the competent authority, amounts to a "*main alternative*" within the meaning of art. 5(3)(d) of [the EIA Directive], even if it was rejected by the developer at an early stage;

> (f) whether [the EIA Directive], has the effect that an environmental impact assessment should contain sufficient information as to the environmental impact of each alternative as to enable a comparison to be made between the environmental desirability of the different alternatives; and/or that it must be made explicit in the environmental impact statement as to how the environmental effects of the alternatives were taken into account;
>
> (g) whether the requirement in art. 5(3)(d) of [the EIA Directive], that the reasons for the developer's choice must be made by "taking into account the environmental effects", applies only to the chosen option or also to the main alternatives studied, so as to require the analysis of those options to address their environmental effects".

Whatever the outcome in *Holohan*, Article 5(1)(d) now changes the position. It requires:

> "a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment".

There is little doubt that part of the obligation is more onerous. There is greater scope for objectors and the competent authority to complain that the alternatives studied were not "reasonable".

There remains scope for argument about the relevance of environmental effects. Under the "new rules", the language used limits those effects to "the effects of the project", not the effects of the alternatives rejected. Annex IV goes further. It used to merely repeat Article 5(3)(d). Now it provides:

> "A description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects."

The requirement for a "comparison of the environmental effects" is new and solves the third question in *Holohan*. Plainly, the environmental effects of the chosen option must be compared with the environmental effects of all of the the "reasonable alternatives" studied.

Data

Article 5(3)(c) used to require "the data required to identify and assess the main effects which the project is likely to have on the environment". Under the "new rules", the EIAR must "include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment." That must be read to extend beyond mere data. Also, the developer must "with a view to avoiding duplication of assessments, take into account the available results of other relevant assessments under Union or national legislation, in preparing the environmental impact assessment report".

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When faced with an argument that the appropriate assessment of a road project had complied with the Habitats Directive, in *Holohan v. An Bord Pleanala* [2017] IEHC, Mr Justice Humphreys paused to consider whether the EIA Directive might require more. The focus was alleged "unlawful omissions" from the information in the Natura Impact Statement, in particular:

> "A rigorously scientific baseline study of the impact on protected species, including the underlying data as to precise times, places and methodology, which was missing from [the report prepared by the road authority's ecologist]".

The Court was troubled by the rigour of the data (framed in queries about how the Board dealt with complaints about that data):

> "The broader issue remains as to the scientific rigour of the ecology data. The board, in its conclusions on ecology (pp. 5 to 6 of its decision), accepted the ecology reports on the basis of their being based on "*a series of site visits over a number of years, coupled with expertise on local ecological conditions*" as well as the bat survey. It was therefore "*not necessary to request any further field surveys*". The board considered that the NIS was "*an authoritative report*" that clearly identified the impacts on European sites. The board decision overall, and in particular its discussion under the heading of appropriate assessment, is heavy on unreasoned assertions (which [counsel for the Board] calls "*findings*") and very short on reasoning. For example, "[t]he scope and methodology of the Natura impact statement was considered acceptable" (p. 9 of the board's decision). The only reason that could be implied for this is that the NIS is considered "*definitive*". Why it is definitive is not stated, but can maybe be implied from the earlier reference to it having been based on site visits and expertise. [Counsel for the Board]'s thorough, detailed and exhaustive submissions can perhaps be seen as adding a whole further layer of interpretation and comment upon the very Spartan reasoning of the board. The role for such a re-programming of the decision challenged appears to be open to debate in judicial review. There was nothing stopping the board from giving at least some of these reasons in its decision. It is notable that Finlay Geoghegan J. specifically refers in Kelly to the court on judicial review having to be satisfied that the AA was correctly conducted "on the basis of reasons stated in the decision".

The Court has referred eleven questions to the CJEU, including three about whether the NIS must identify the entire extent of the habitats and species for which the European site is listed, whether the impact on all species (not just protected species) that contribute to the protected habitat must be identified and discussed in the NIS, whether inside or outside the European site. The fourth question raised asks whether the EIA Directive requires an EIS (now EIAR) to address "whether the proposed development will significantly impact on the species identified in the statement".

There is real tension between the requirement for precision sufficient to make an informed decision when granting that consent and a developer preference to preserve flexibility for a contractor to add value post-consent. In *Holohan*, that tension is highlighed by the uncertain location of the construction compound and haul routes, which prompted the High Court to refer a question to the CJEU, albeit in the context of the Habitats Directive, where reasonable scientific doubt must be eliminated. The Court

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has asked whether details of the construction phase (such as the compound location and haul routes) can be left to post-consent decision.

Expertise

As bluntly put by the Circular, the EIAR "must be prepared by "competent experts". The competency of experts will be a matter for the Competent Authority." This arises from Article 5(3)(a). It provides:

> "In order to ensure the completeness and quality of the environmental impact assessment report:
>
> > (a) the developer shall ensure that the environmental impact assessment report is prepared by competent experts;
> >
> > (b) the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report; and
> >
> > (c) where necessary, the competent authority shall seek from the developer supplementary information, in accordance with Annex IV, which is directly relevant to reaching the reasoned conclusion on the significant effects of the project on the environment."

The recitals to the Directive make clear that sufficient expertise "in the relevant field of the project concerned, is required for the purpose of its examination by the competent authorities in order to ensure that the information provided by the developer is complete and of a high level of quality".

The EPA Draft Guidelines suggest the following sensible approach:

> "In the meantime, it may be taken that the requirement for expertise on behalf of the developer and the CA is related to the significance, complexity and range of effects that an EIAR needs to assess. This will be reflected by an appropriate combination of experience, expertise and knowledge. It should be characterised by an appropriate knowledge of the latest and most appropriate scientific methodology and assessment procedures and by correct interpretation of data.
>
> Competence includes an understanding of the legal context of the decision-making process and may often require a range of experts to cover the full range of the complexity of an environmental factor such as biodiversity, where the expertise of many disciplines may intersect."

Annex IV

The full range of changes made to Annex IV are beyond the scope of this paper, but some are worth highlighting. The entire Annex has been substantially enhanced.

The description of the physical characteristics of the whole project must include "where relevant, requisite demolition works". Of course, in Ireland, demolition works used to be exempted development and where the subject of successful complaint to the CJEU in *Case C-50/09 Commission v. Ireland*. That was remedied by the Planning and Development Regulations 2008, which amended the class 50 exemption to exclude anything that requires EIA. That was understood to relate to site clearance works, in preparation for development. Where used in the "new rules", it appears, where relevant, to incude the end-of-life of the project.

The description of the main characteristics of the operational phase must now include "energy demand and energy used" and the "natural resources (including water, land, soil and biodiversity) used".

Now, in addition to a description of residues and emissions, there must be an estimate of "quantities and types of waste produced during the construction and operation phases".

The new language on alternatives is discussed above.

Although the baseline description was always a necessary feature to any proper assessment, it is now expressly required, in the following terms:

> "A description of the relevant aspects of the current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the project as far as natural changes from the baseline scenario can be assessed with reasonable effort on the basis of the availability of environmental information and scientific knowledge."

Note the express requirement to provide an outline of the likely evolution of a measured baseline, using reasonable effort to consider natural changes in the "do nothing" scenario.

The range of likely significant effects is promoted from a footnote. Ass before, it should cover: "the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project."

There are new requirements to describe effects resulting from:

> "(d) the risks to human health, cultural heritage or the environment (for example due to accidents or disasters);
>
> (e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;
>
> (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;
>
> (g) the technologies and the substances used."

As before, where difficultes, including technical difficulties or lack of knowledge, are encountered, these must be disclosed. The main uncertainties must now be disclosed too.

As before, measures to prevent, reduce and offset are to be described. Now, importantly, the proposed monitoring arrangements (post-project analysis) must also be given. This will provide feedback relevant to enforcement and to improve the quality of future assessments.

The renewed focus on major accident hazards is repeated. The EIAR must include:

> "A description of the expected significant adverse effects of the project on the environment deriving from the vulnerability of the project to risks of major accidents and/or disasters which are relevant to the project concerned. Relevant information available and obtained through risk assessments pursuant to Union legislation such as Directive 2012/18/EU of the European Parliament and of the Council or Council Directive 2009/71/Euratom or relevant assessments carried out pursuant to national legislation may be used for this purpose provided that the requirements of this Directive are met. W here appropriate, this description should include measures envisaged to prevent or mitigate the significant adverse effects of such events on the environment and details of the preparedness for and proposed response to such emergencies."

Participation

Articles 6 and 7 of the Directive set out the public consultation process through which relevant authorities and the public generally are to be informed of the application for development consent, allowed access to relevant information including the EIS/EIAR and afforded an opportunity to make submissions or observations. The changes are limited.

Member States must ensure that relevant information is "electronically accessible to the public, through at least a central portal or easily accessible points of access".

As before, reasonable time frames are required to allow the public concerned to particiapte effectively. Article 6(7) helpfully explains that the time periods for consulting the public concerned should not be less than 30 days. In Ireland, the five-week period for submissions to the planning authority or six-week period for submissions to the Board on strategic infrastructure consent applications pass that minimum threshold. (This was, perhaps, the main reason for the Department of Agriculture &c. to amend the regulations for certain rural projects, as 28 days only had been allowed.) For other countries, this will require amendment, e.g., Malta, Latvia, Poland and Slovakia allowed only 3 weeks for participation. (It would do no harm to recall that often times these changes to European law are directed at delinquent Member States, other than Ireland. In the case of the "new rules", there is much that Ireland has already done to lead in this field.)

The "new rules" do not attempt to resolve the difficult questions arising in Ireland about whether the public should have a role in preliminary issues, such as access to strategic infrastructure consent (*Callaghan v. An Bord Pleanala* [2015] IEHC 357, where the Court of

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Appeal considered a narrow Irish law "fair procedures" ground [2016] IECA 398 that is under appeal the Supreme Court), applications for leave to apply for substitute consent (*Sweetman v. An Bord Pleanala (Ballysax)*, judgment awaited) or other procedures where the role of the public is limited (e.g., section 5 declarations or extensions of duration). It is worth noting, for example that the "new rules" on screening and scoping do not require public participation. That is consistent with early CJEU case-law deciding that the Directive applied after an application for development consent had been lodged (*Case C-431/92 Commission v. Germany*, the so-called "pipeline case"). However, more recent cases can be read to stretch the scope, so that the public concerned have a right to complain that a screening decision was wrong to decide that EIA was not required (*Case C-570/13 Gruber*). It is possible to reconcile these by distinguishing between the participation rights (under Article 6) and the access to justice rights (under Article 11).

That same distinction arises, albeit indirectly, in a recent reference made by the Supreme Court (*Klohn v. An Bord Pleanala* [2017] IESC 11) about whether a litigant is entitled to protection from prohibitive costs where his challenge was to a decision that was made before the relevant Directive (in that case the Public Participation Directive (2003/35/EC)). The question referred is:

> "Can the "not prohibitively expensive" provisions of Art. 10a of the Public Participation Directive potentially have any application in a case such as the instant case where the development consent challenged in the proceedings was granted prior to the latest date for transposition of that directive and where the proceedings challenging the relevant development consent were also commenced prior to that date? If so have the "not prohibitively expensive" provisions of the Public Participation Directive potential application to all costs incurred in the proceedings or only to costs incurred after the latest date for transposition?"

The Board's position has been that Mr Klohn cannot claim protection under the access to justice rights (of Article 11) where he never had any relevant participation rights (under Article 6). If those rights can be distinguished, so that you can have one without the other, Mr Klohn may be entitled to some protection. The case is not likely to conclude before the end of 2018.

The Decision

Article 8 provides that the information gathered pursuant to Articles 5, 6 and 7 "shall be duly taken into account in the development consent procedure" (it used to be "shall be taken into consideration").

The decision maker must inform the public of its decision and, under Article 9 make certain information available to the public including the content of its decision (Article 9(1)(a)) and the main reasons and considerations on which it is based (Article 9(1)(b)). Those reasons must now include "information about the public participation process … the summary of the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how those results have been incorporated or otherwise addressed, in particular the comments received from the affected Member State referred to in Article 7".

There is scope for debate about whether this requires the competent authority to respond directly to objection, whether in the decision proper or the report underpinning it.

Importantly, article 8a now elaborates that the decision to grant development consent must incorporate at least:

> "(a) the reasoned conclusion referred to in Article 1(2)(g)(iv);
>
> (b) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures."

The requirement for a reasoned conclusion is well known to Irish law and is the subject of a pending appeal to the Supreme Court in *Connelly v. An Bord Pleanala* [2017] IESCDET 57. That appeal is likely to resolve questions about the standard according to which reasons are judged (from the perspective of an informed participant or disinterested bystander), the extent to which the reasons can be understood or derived from incorporated documents (including an inspector's report that was not "unfailingingly positive") and the parts of the decision proper that are relevant (where the High Court ignored the parts where the Board had explained the reasons for departing from its inspector's recommendation).

With specific reference to mitigation, Article 8a(4) now goes further:

> "In accordance with the requirements referred to in paragraph 1(b), Member States shall ensure that the features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment are implemented by the developer, and shall determine the procedures regarding the monitoring of significant adverse effects on the environment.
>
> The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the project and the significance of its effects on the environment.
>
> Existing monitoring arrangements resulting from Union legislation other than this Directive and from national legislation may be used if appropriate, with a view to avoiding duplication of monitoring."

Whereas before the EIA process terminated with a better-informed consent and was blind post-consent, it now requires feedback from post-consent monitoring and includes a new express requirement for enforcement. Specifically, Article 10a requires Member States to impose "effective, proportionate and dissuasive" penalties for infringements the laws made to give effect to the Directive. Whether summary prosecution in the District Court would satisfy that requirement must be open to doubt.

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Conflicts

It should not arise much in practice, but Article 9a requires the competent authority or authorities to perform the duties under the Directive "in an objective manner" and to "not find themselves in a situation giving rise to a conflict of interest". In particular, where the competent authority is the developer, there must be, at least, an "appropriate separation between conflicting functions when performing the duties arising from this Directive". Those circumstances are better avoided. Those interested in State-sponsored fish-farming, in projects where the State secures a return or royalty from the project seeking consent or self-screening for EIA will take note.

Access to Justice

Under Article 11 the public must, among other things, have access to a review procedure before a national court at a cost which is not prohibitive. The new Directive makes no changes.

Conclusion

Perhaps the only certainty is that the "new rules" will provide fresh and fertile grounds for legal challenge.

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