

Developments in Appropriate Assessment

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Friends of the Irish Environment v An Bord Pleanála – High Court (Simons J.)

- Planning permission granted for a liquefied natural gas regasification terminal on 31 March 2008
- Permission granted was for 10 years
 - This was the period within which the permission must be carried out
 - The 10 year period was not a limitation on the operation of the facility
- No development works were commenced within the 10 year period
- September 2017, the developer applied to alter the terms of the development under section 146B of the 2000 Act
 - Alteration was to the condition which provided that the development be carried out within 10 years

Friends of the Irish Environment v An Bord Pleanála – High Court (Simons J.)

- The application site does not lie within any Natura 2000 site
- It is however adjacent to two European Sites – Lower River Shannon SAC and River Shannon and River Fergus Estuaries SPA
- When the Board made its decision in March 2008, national law did not properly transpose the Habitats Directive
 - Appropriate Assessment was assimilated into the environmental impact assessment carried out under the EIA Directive
 - Condemned in *Commission v Ireland Case C-418/04*
- Board decision did not make any reference to Habitats Directive

Friends of the Irish Environment v An Bord Pleanala – High Court (Simons J.)

- Principal question before Irish High Court was:
 - Whether a decision to extend the duration of a planning permission engages the Habitats Directive?
- The application to extend the duration of the planning permission did not involve any physical change to the project as permitted
- This was an issue which had been previously litigated (see *Merriman v Fingal County council* [2017] IEHC 695)
 - High Court had ruled that the Habitats Directive did not apply to a decision to grant an extension of the duration of a planning permission

Case C-411/17 Inter Environnement Wallonie

- In intervening period the AG had delivered an Opinion in *Case C-411/17 Inter Environnement Wallonie*
 - Extension of duration of development consent, is in principle, subject to the Habitats Directive
- Facts and legal issues arising in Case C-411/17 were sufficiently different from those arising in the Friends proceedings
- High Court considered that the question of the applicability of Habitats Directive to an extension of duration of a permission was not acte clair

Case C-411/17 Inter Environnement Wallonie

- In 2003, Belgian legislature decided to cease production of electricity from nuclear energy
 - No new nuclear power stations were to be built
 - Power stations in operation were to be gradually taken out of service after they had been in operation for 40 years
- Two nuclear power station were required to cease electricity production in 2015
- Legislation was amended in June 2015
 - Allowed electricity production to be carried out for a further period of 10 years
- Proceedings instituted seeking annulment of amended legislation
 - Purported to authorise an extension of the activity without EIA and public participation

Case C-411/17 Inter Environnement Wallonie

- The AG Opinion
 - Invited the CJEU to depart from previous case law in respect of EIA Directive
 - The mere renewal of an existing permit to operate a project cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site be classified as a 'project' for purpose of EIA Directive (Brussels Airport Case C275/09 and Pro-Braine Case C121/11)
 - Considered that a “broader interpretation of the definition of 'project' would be more consistent with the purpose of the EIA Directive and the Aarhus Convention” (para 109 of AG opinion)
 - With regard to Habitats Directive
 - Habitats Directive doesn't define 'project'
 - Definition of 'project' in EIA Directive is relevant in determining concept of 'project' for Habitats Directive
 - If the CJEU concurs with the AG view that an extension is to be regarded as a 'project' for the purpose of the EIA Directive, a 'project' also exists for purpose of Habitats Directive

Case C-411/17 Inter Environnement Wallonie

- The AG Opinion

- With regard to Habitats Directive

- However, even if no project exists under the EIA Directive that does not preclude the application of article 6(3) of the Habitats Directive
 - Definition of 'project' in EIA Directive does not definitively delimit the concept of 'project' under article 6(3) of Habitats Directive
 - Crucial factor is whether the activity concerned is likely to have a significant effect on a European Site
 - Risk that protected areas might be affected by a serious accident in one of the power stations and operation of cooling systems might have an affect on fish which are protected
 - Extension of period of industrial production of electivity by a nuclear power station is a project within article 6(3) of Habitats Directive even if such an extension is not a project under EIA Directive

Reference to the CJEU – Case C-254/19

- 6 questions referred
- Not all questions answered
- The Court didn't answer questions 4 to 6

First and second questions referred

- Does a decision to extend the duration of a permission trigger article 6(3) of Habitats Directive and is the answer affected by any of the following considerations
 - The original consent was granted pursuant to national law which did not transpose the Habitats Directive properly
 - The consent made no reference to the Habitats Directive nor did it contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works
 - The consent ceased to have legal effect on expiry of the period which it had set for those works and
 - The works have not commenced

First and second questions referred

- Does a decision extending the period set in the original consent relate to a “project” within meaning of article 6(3) of Habitats Directive
 - Concept of ‘project’ within meaning of EIA Directive can be taken into account
 - If an activity is covered by the EIA Directive it must a fortiori be covered by Habitats Directive
 - If an activity is regarded as a ‘project’ within meaning of EIA Directive it may constitute a ‘project’ within meaning of Habitats Directive

First and second questions referred

- Does a decision extending the period set in the original consent relate to a “project” within meaning of article 6(3) of Habitats Directive
 - Definition of ‘project’ in context of wording of article 1(2)(a) of EIA Directive refers to work or interventions involving alterations to the physical aspect of the site
 - The decision to extend a period originally set for construction of the LNG terminal, for which works have not commenced, meets such criteria so comes within the definition of ‘project’ within meaning of EIA Directive
 - Such a decision must also be regarded as relating to a ‘project’ within meaning of article 6(3) of Habitats Directive

First and second questions referred

- Does a decision extending the period set in the original consent relate to a “project” within meaning of article 6(3) of Habitats Directive
 - If, having regard in particular to the regularity or nature of those activities or the conditions under which they are carried out, certain activities must be regarded as constituting a single operation they can be considered to be one and the same project for purpose of article 6(3) and exempted from a new assessment procedure under that provision
 - Consent at issue relates to the same project as that originally authorised
 - But that in itself does not mean that it is not subject to article 6(3)
 - Purpose of the consent is not to renew consent for a recurrent activity in the course of operation – it is consent to allow the execution of a project which was not commenced and which has lapsed

First and second questions referred

- Does a decision extending the period set in the original consent relate to a “project” within meaning of article 6(3) of Habitats Directive
 - Consent relates to a ‘project’ subject to article 6(3) irrespective of whether that provision had to be complied with when the original consent was granted

First and second questions referred

- Does the consent constitute an ‘agreement’ of that project under article 6(3)
 - Definition of ‘development consent’ in EIA Directive is relevant in defining ‘agreement’ in article 6(3)
 - ‘development consent’ is ‘the decision of the competent authority or authorities which entitles the developer to proceed with the project
 - Original consent had lapsed and work could no longer be carried out under it
 - Original consent had lapsed and was therefore not altered by the consent at issue in these proceedings

First and second questions referred

- Does the consent constitute an 'agreement' of that project under article 6(3)
 - Consent replaced the original consent
 - Fact that project could have proceeded under original consent is irrelevant
 - Consent does constitute a new consent under EIA Directive and consequently also an 'agreement' under article 6(3)

First and second questions referred

“In the light of the foregoing considerations, the answer to the first and second questions referred is that a decision extending the 10-year period originally set for carrying out a project for the construction of a liquefied natural gas regasification terminal is to be regarded as an agreement of a project under Article 6(3) of the Habitats Directive where the original consent for that project, having lapsed, ceased to have legal effect on expiry of the period which it had set for those works and the latter have not been undertaken.” (para 48)

Third question referred

- If the answer to the first question is ‘yes’, what considerations is the competent authority required to have regard to in carrying out a stage 1 screening for such a consent
 - Is the competent authority required to take into account changes to the works / use as originally permitted?
 - Is the competent authority required to take into account changes in the ‘environmental background’
 - Is the competent authority required to take into account changes in ‘scientific knowledge’?
 - Is the competent authority required to assess the effects of the entire project?

Third question referred

- Account should be taken of any assessments carried out for earlier consents – avoids the same project being subject to several environmental assessments
- But by doing so cant rule out the risk that the consent will have significant effects on the Natura 2000 site unless the other assessments
 - Contain complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works; and
 - Provided that there are no changes in the relevant environmental and scientific data, and
 - no changes to the project and
 - no other plans and projects to be taken into account

Third question referred

- In this case
 - The original consent was not preceded by an assessment under article 6(3)
 - Therefore it cant be ruled out that
 - Such a project might have a significant effect on the Natura 2000 sites, and
 - That such considerations are such as to require a consent to be preceded by an appropriate assessment
 - Such an assessment cant be a simple update of the assessment that may have been carried out previously – it must consist of a full assessment of the implications of the entire project

Third question referred

“It is for the competent authority to assess whether a decision extending the period originally set for carrying out a project..the original consent for which has lapsed, must be preceded by an appropriate assessment....and if so, whether that assessment must relate to the entire project or part thereof, taking into account, inter alia, previous assessments that may have been carried out and changes in the relevant environmental and scientific data as well as any changes to the project and existence of other plans or projects....A previous assessment of that project, carried out before the original consent for the project was granted, cannot rule out that risk unless it contains full, precise and definitive conclusions capable of removing all scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects.” (para 59)

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