



‘In sowing the wind, how Ireland could reap the whirlwind’ – a case against Irish wind development(s)

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On 1 July 2010, Ireland gave an ambitious pledge to convert a significant share of electricity generation from conventional to onshore wind generation. This pledge was designed to support a legal obligation to reach a 16 per cent share in renewable energy consumption by 2020. More recently, buoyed by the apparent success of the initial policy, the Irish Government indicated its intention to explore the potential for a wind generated electricity export market. However, problems are evident that threaten these ambitions as Ireland’s wind policy and most of its commercial wind developments (namely those constructed before 2011) are open to legal challenge for having breached EU law. Although the case law that supports this proposition will be considered solely in relation to the threat it poses to Ireland’s wind policy and developments, the jurisprudence has broad-ranging implications for renewable energy across the EU, and for environmental lawyers and policy-makers in all 28 of the EU’s Member States.

Keywords: Energy Law; Environmental Law; Planning Law; Wind Energy; SEA Directive; EIA Directive; Birds Directive; Habitats Directive; Renewable Energy Directive; Aarhus Convention

On 1 July 2010, Ireland gave an ambitious pledge as part of its obligations under the Renewable Energy Directive.¹ This pledge was to convert 40 per cent of Irish electricity to renewable generation, primarily from onshore wind. The 40 per cent pledge was itself designed to further Ireland’s attainment of a legally binding target,² to achieve a 16 per cent share in renewable energy consumption by 2020.³ Details of how this market transformation was to be achieved were contained in Ireland’s National Renewable Energy Action Plan (NREAP),⁴ which also pledged to explore the possibility of developing Ireland’s renewable energy resources for export.⁵ However, despite these

¹Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L 140/16 (the ‘Renewable Energy Directive’).

²This was to act as the electricity sector’s contribution to meeting the 16 per cent target. See further EirGrid Group, ‘EirGrid Group Annual Renewable Report 2013. Towards a Smart Sustainable Energy Future’ (EirGrid, 28 November 2013) www.eirgrid.com/media/EirGridAnnualRenewableReport2013.pdf accessed 9 December 2013, 12.

³Decision No 406/2009/ EC on the effort of Member States to reduce their greenhouse gas emissions to meet the Community’s greenhouse gas emission reduction commitments up to 2020, OJ 2009 L 140/136 (the ‘Climate Action Decision’) Annex II.

⁴Department of Communications, Energy & Natural Resources, ‘National Renewable Energy Action Plan. Ireland. Submitted under Art 4 of Directive 2009/28/EC’ (DCENR, 1 July 2010) www.dcenr.gov.ie/NR/rdonlyres/03DBA6CF-AD04-4ED3-B443-B9F63DF7FC07/0/IrelandNREAPv11Oct2010.pdf accessed 9 December 2013.

⁵Department of Communications, Energy & Natural Resources, n 4 above. Note: specific detail on Ireland’s plan to export renewable energy was not given in the NREAP in 2009, however, the following statement

ambitions current analyses indicate that Ireland will fail to meet both targets.⁶ Moreover, the wind policy itself (as outlined in Ireland's NREAP) and most of Ireland's wind developments are open to legal challenge (with potential penalties including removal).

This article will consider the topic as follows: the first part will place the subject in context by providing a very brief overview of wind development in Ireland and the ambitions that it seeks to fulfil; the second part will demonstrate why the Irish wind policy as outlined in the NREAP, and consequently other renewable energy policies across Europe, were developed in breach of international and EU law and the possible implications of this conclusion for Ireland's wind policy.⁷ The third part will build on this foundation to consider the EU laws breached in permitting specific wind developments, along with the direct consequences of these breaches. The article will conclude by analysing the overall consequences and possible implications for Ireland's successful attainment of its renewable energy ambitions.

Ireland's wind market in context

Ireland's wind market has mainly evolved in response to global and regional developments. Globally, pursuant to the Kyoto Protocol,⁸ Ireland became legally obliged to promote the research, promotion and use of renewable forms of energy in 2005⁹ and to maintain its greenhouse gases (GHGs)¹⁰ at a level of 13 per cent above an agreed baseline between 2008 and 2012.¹¹ In 2006 these obligations were made doubly enforceable on Ireland under EU and international law through the enactment of Decision 2006/944/EC.¹² Regionally, the EU has also been active in seeking to

was made: 'We are working to create the economic, infrastructural and planning conditions conducive to the sustainable development of all of Ireland's renewable energy resources, which offer the potential for Ireland to become a significant exporter of renewable energy over the coming decades. The Government will continue to work with the European Commission and other Member States to realise Europe's ambitions for renewable energy.'

⁶Note: in 2012 Ireland's renewable energy stood at seven per cent (nine per cent away from 2020's 16 per cent target). See further EirGrid, n 2 above, 12.

⁷Note: it is beyond the scope of this article to consider the broader implications of the line of reasoning that Ireland's NREAP was finalised in breach of the Strategic Environmental Assessment Directive (the 'SEA Directive') for (i) renewable energy development generally in the EU and (ii) renewable energy development in each of the other 20 Member States whose NREAPs also indicate that they may have failed to fulfil the requirements of the SEA Directive. However, the line of reasoning that is applied to the Irish case study in this article can equally be applied to other Member States. See n 54 below.

⁸Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 (the 'Kyoto Protocol').

⁹Article 2, the Kyoto Protocol, n 8 above.

¹⁰In this article the term GHGs can be taken to refer to the six gases included in Annex A to the Kyoto Protocol, ie carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride.

¹¹The target was to reduce its GHG below a particular base year. For the EU-15 (the countries that were Member States of the EU at the time the Kyoto Protocol was negotiated) the base year for carbon dioxide, methane and nitrous oxide was 1990. For hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride (fluorinated gases) 12 Member States (including Ireland) selected 1995 as the base year whereas Austria, France and Italy chose 1990. Note that on 9 October 2013, the Irish Environmental Protection Agency (EPA) confirmed that Ireland had successfully met its Kyoto target to keep its GHGs at 13 per cent above its 1990 levels at the Royal Irish Academy in Dublin.

¹²Commission Decision 2006/944/EC of 14 December 2006 determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC, OJ 2006 L 358/87. See further Anne-Sophie Tabau and Sandrine Maljean-Dubois, 'Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union' (2010) 21(3) *European Journal of International Law* 749–763.

promote increased renewable energy and reduced emissions. In 2001, the EU enacted the Renewable Electricity Directive,¹³ which established a political EU-wide target of 12 per cent renewable electricity consumption by 2010, with Member States allocated additional individual political targets. For Ireland this was to reach a 13.2 per cent share of renewable electricity consumption by 2010. In 2012 a published report indicated that Ireland had attained a 14.8 per cent share in renewable electricity consumption (mainly through an increased use of wind generated electricity).¹⁴

The EU followed its Renewable Electricity Directive with a climate and energy legislative package in 2009. This legislative package contains four primary pieces of law,¹⁵ the two most important of which are the Climate Action Decision¹⁶ and the Renewable Energy Directive.¹⁷ These place an overall obligation on the EU to attain GHG reductions of 20 per cent (below a baseline of 1990),¹⁸ and renewable energy increases of 20 per cent by 2020.¹⁹ They also include an aspirational target of increasing energy efficiency by 20 per cent by 2020.²⁰ Together the three targets are often referred to as the 20-20-20 targets. Supporting these overarching regional targets, the package provides specific goals for individual Member States. For Ireland, these are to attain a 16 per cent renewable energy share by 2020²¹ and a 20 per cent reduction in GHGs by 2020,²² in addition to meeting certain interim bench-marking targets. Pursuant to Article 4 of the Renewable Energy Directive, Member States are further obliged to submit an NREAP detailing how they intend to reach their renewable energy targets. In the NREAP that Ireland submitted, the government pledged that 40 per cent of Irish electricity would be produced from renewable energy, and primarily onshore wind.²³

As well as providing Member States with individual targets, the Renewable Energy Directive provides Member States with a certain degree of flexibility as to how to achieve their specific renewable energy goals. Accordingly a Member State (meeting its target) can make a statistical transfer of renewable energy to another Member State (in a procedure referred to as statistical trading).²⁴ Joint projects may be

¹³Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market OJ 2001 L 283/33 (the 'Renewable Electricity Directive').

¹⁴Sustainable Energy Authority of Ireland, 'Energy in Ireland 1990–2011 2012 Report' (SEAI, November 2012) www.seai.ie/Publications/Statistics_Publications/Energy_in_Ireland/Energy_in_Ireland_1990_-_2011.pdf accessed 9 December 2013.

¹⁵This legislative package consists of the following four pieces of legislation: (1) Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ 2009 L 140/63; (2) Directive 2009/31/EC on the geological storage of carbon dioxide, OJ 2009 L 140/114; (3) the Renewable Energy Directive, n 1 above; and (4) the Climate Action Decision, n 3 above.

¹⁶The Climate Action Decision, n 3 above.

¹⁷The Renewable Energy Directive, n 1 above.

¹⁸The Climate Action Decision, n 3 above, Art 3.

¹⁹The Renewable Energy Directive, n 3 above, Art 3.

²⁰The Renewable Energy Directive, n 1 above, recital 17, and the Climate Action Decision, n 3 above, Art 4. This aspirational target has since been strengthened by the enactment of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ 2012 L 315/1.

²¹The Renewable Energy Directive, n 1 above, annex.

²²The Climate Action Decision, n 3 above, annex II.

²³Department of Communications, Energy & Natural Resources, 'National Renewable Energy Action Plan. Ireland', n 4 above.

²⁴The Renewable Energy Directive, n 1 above, Art 6.

established between Member States and private operators to produce electricity, or heating and cooling, from renewable energy.²⁵ In its NREAP Ireland indicated that it was open to participation in joint projects with other Member States and was working to develop its market to enable Ireland to become a significant exporter of renewable energy over the coming decades.²⁶

However, legal and practical problems have become evident, which could thwart both Ireland's long-term plan to become a significant electricity exporter, and its attainment of its national renewable energy, electricity (and emission reduction) targets. These stem from the fact that both Ireland's existing wind policy and most of its constructed wind developments were completed in breach of either: the Strategic Environmental Assessment Directive (SEA Directive),²⁷ the Environmental Impact Assessment (EIA Directive),²⁸ the Birds Directive²⁹ or the Habitats Directive.³⁰ As a result, the policy itself and many individual wind developments are vulnerable to legal challenges or enforcement proceedings seeking their removal. Accordingly, this topic will be approached as follows: the second part will provide an analysis of the law, which demonstrates that the Irish wind policy was developed in breach of the SEA Directive³¹ (along with the direct consequences of such a finding). The third part will consider the case law, which demonstrates that the majority of Ireland's wind developments were constructed in breach of either the EIA³² or Birds³³ and Habitats³⁴ Directives, along with its consequences for existing, evolving and future wind developments in Ireland. Finally, the fourth part will examine the overall implications that stem from this analysis for Ireland's successful attainment of its renewable energy ambitions.

²⁵Note: similar joint projects may also be established between Member States and third countries. See the Renewable Energy Directive, n 1 above.

²⁶Department of Communications, Energy & Natural Resources, n 4 above. Note: on 24 January 2013 the Irish Minister for Communications, Energy & Natural Resources, Pat Rabbitte, and the UK Secretary for Energy and Climate Change, Ed Davey, signed a Memorandum of Understanding agreeing to consider how Irish renewable energy resources could be developed to their mutual advantage. In so doing both parties agreed to consider a number of matters including the costs and benefits of renewable energy trading for the UK and Ireland and the potential for joint projects with electricity flow to the UK market and statistical trading. However, newspaper reports on 13 April 2014 indicated that the onshore wind aspect of the plan would not be going ahead because agreement could not be reached between the two governments to fit within the 2020 timeframe. See Peter Smyth, 'Deal for 2,300 turbines to supply UK energy by 2020 called off' *Irish Times* (13 April 2014) www.irishtimes.com/business/sectors/energy-and-resources/deal-for-2-300-turbines-to-supply-uk-energy-by-2020-called-off-1.1760645 accessed 7 July 2014.

²⁷Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ 2001 L 197/30 (the 'SEA Directive').

²⁸The consolidated version of which is Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ 2011 L 26/1 (the 'EIA Directive').

²⁹Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ 2010 L 20/7 (the 'Birds Directive').

³⁰Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206/7 (as last amended by Directive 2006/105/EC, OJ 2006 L 363/368 (the 'Habitats Directive').

³¹The SEA Directive, n 27 above.

³²The EIA Directive, n 28 above.

³³The Birds Directive, n 29 above.

³⁴The Habitats Directive, n 30 above.

Ireland's wind policy in breach of international and EU law

From the Aarhus convention³⁵ to the SEA directive³⁶

On 15 October 2010, Pat Swords (an engineer and environmental activist in Dublin) lodged a communication with the Aarhus Convention Compliance Committee (ACCC), which alleged a number of breaches of the Aarhus Convention in the preparation and finalisation of Ireland's wind policy (the 'Swords complaint').³⁷ The Aarhus Convention entered into force on 30 October 2001 as the first legally binding instrument at supranational level to guarantee access to information, public participation in decision-making and justice in environmental matters. Compliance with the Convention is reviewed by a nine-member-strong ACCC, which may consider submissions, referrals and communications (including those from members of the public) on the compliance and interpretation of the Aarhus Convention and issue recommendations. The Aarhus Convention became part of the EU's legal order in 2005.³⁸

Although Ireland was not a party to the Treaty at the time the communication was lodged,³⁹ the EU was bound by it, and the decision that followed was significant. In the first instance, it was found that a central omission had been made in the formalisation of Ireland's plan to develop a wind-generated electricity market (as outlined in the Irish NREAP).⁴⁰ Public participation at an adequate level did not occur to support the decision. The two-week-long public consultation that had taken place was found to be inadequate to fulfil the obligations of the Aarhus Convention.⁴¹

The case also pointed to further deficiencies in the finalisation of Ireland's NREAP under EU law. The NREAP was not subjected to an environmental assessment (as is required for 'plans' that fall within the definition stipulated by the SEA Directive).⁴² If the NREAP is such a 'plan' as is proposed in this article, the two-week-long

³⁵Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447; 38 ILM 517 (1999) (the 'Aarhus Convention').

³⁶The SEA Directive, n 27 above.

³⁷See generally www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html accessed 9 December 2013.

³⁸Council Decision of 17 December 2005 on the conclusion on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ 2005 L 124/1.

³⁹As noted by Dr Áine Ryall, Ireland was the last EU Member State to ratify the Treaty on 20 June 2012. See Áine Ryall, 'Beyond Aarhus Ratification: What Lies Ahead for Environmental Law?' (2013) 20 *Irish Planning and Environmental Law* 1, 19–28.

⁴⁰Compliance Committee, Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union (adopted on 29 June 2012) www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece_mp_pp_c.1_2012_12_eng.pdf accessed 8 December 2013 (the 'Swords decision').

⁴¹Note: in its review on the effectiveness of the SEA procedures in Ireland, which was published in 2012, the Irish Environmental Protection Agency noted that most environmental assessments in Ireland have a four-week consultation period; a possible reason for the short public consultation period for the NREAP was that the level of detail included in the plan took a long time to draft and with a deadline for submission of 30 June 2010, extensive time was not available to allow for public consultation. See generally Environmental Protection Agency, 'Review of Effectiveness of SEA in Ireland' (EPA, 10 December 2012) www.epa.ie/pubs/advice/ea/reviewofeffectivenessofseainireland-mainreport.html#.U7qRgyjb6f4 accessed 7 July 2014.

⁴²Note: the SEA Directive is transposed into Irish law by the Planning and Development (Environmental Assessment of Certain Plans and Programmes) Regulations 2004, SI 435 of 2004; Planning and Development (Strategic Environmental Assessment) Regulations 2004, SI 436 of 2004; the European Communities (Environmental Assessment of Certain Plans and Programmes (Amendment)) Regulations 2011, SI 200 of 2011 and the Planning and Development (Strategic Environmental Assessment) (Amendment) Regulations 2011, SI 201 of 2011.

public consultation that took place could not be considered to have discharged the EU's public participation requirement, for Member States to provide:

an early and effective opportunity [to allow the public the opportunity] ... to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.⁴³

Accordingly, the facts of the Swords case and the key findings of the ACCC that are relevant to this line of reasoning will be analysed below.

The initial communication (lodged by Pat Swords) made three complaints against the EU. The first two were found not to fall within the realm of the Aarhus Convention. The third was that Ireland had implemented a massively expensive renewable energy programme (predominantly focused on onshore wind energy), without fulfilling its legal obligations to first engage in public consultation along with a cost/benefit analysis with alternative options considered, as required by the SEA Directive (a directive that gives effect to certain provisions of the Aarhus Convention, and thereby ensures the integration of environmental considerations into the preparation of plans and programmes throughout the EU).⁴⁴ In addressing this complaint, the ACCC assessed the compatibility of the decision-making process that led to the adoption of Ireland's NREAP, with the relevant provisions of the Aarhus Convention, to find that the EU had breached Article 3 (general provisions) and Article 7 (public participation in plans, programmes and policies relating to the environment) for failing to provide an appropriate framework within which to ensure and enforce public participation in respect of NREAPs.

Ireland's NREAP was found to fall within the Aarhus Convention's description of plan or programme relating to the environment.⁴⁵ In this regard, the ACCC noted that the EU had established a legal framework to ensure public participation in the development of NREAPs, but found this to be inadequate. In considering this framework the ACCC took account of the relevant recitals and articles of the Renewable Energy Directive and the NREAP template itself. It recognised that Recital 90 of the Renewable Energy Directive requires the implementation of the Directive to reflect, where relevant, the provisions of the Aarhus Convention. It noted the wording of Article 4, which requires Member States to adopt NREAPs using the template and fulfilling the stipulations outlined by the Commission in Decision 2009/548/EC,⁴⁶ and the text of the NREAP template itself, which requires Member States to indicate how regional and/or local authorities and/or cities as well as stakeholders were involved in the preparation of the plan, and to explain the public participation carried out for the preparation of the plan.⁴⁷

It noted that evidence had been provided that maintained that both a targeted consultation and a two-week-long consultation with the wider public had been undertaken to fulfil the requirements of Article 7. Citing an earlier decision taken against Lithuania,⁴⁸ this timeframe was found to be unreasonable for 'the public to prepare and

⁴³The SEA Directive, n 27 above, Art 6(2).

⁴⁴See n 37 above.

⁴⁵The Aarhus Convention, n 35 above, Art 7.

⁴⁶Commission Decision of 30 June 2009 establishing a template for National Renewable Energy Action Plans under Directive 2009/28/EC of the European Parliament and of the Council, OJ 2009 L 182/33.

⁴⁷The Swords decision, n 40 above, para 23.

⁴⁸Compliance Committee, Findings and recommendations with regard to communication ACCC/C/2006/16 by Association Kazokiskes Community (Lithuania) concerning decision-making on the establishment of a

participate efficiently' taking into account the complexity of the plan. This analysis is informative. Even though the public participation procedures used could be argued to be compliant with Decision 2009/548/EC, were the Irish NREAP found to be subject to the requirements of the SEA Directive (as will be discussed shortly) the two-week-long public consultation period could not be considered adequate to meet its requirement, to allow the public 'an effective opportunity to express their opinions [on a complex 165-page NREAP] in good time'.⁴⁹ The applicability of the SEA Directive to the Irish NREAP will be considered further below.

Ireland's wind policy (as outlined in its NREAP) in breach of EU law

The Swords decision⁵⁰ was a seminal one, but not just for its determination on the EU's non-compliance with Articles 3(1) and 7 of the Aarhus Convention.⁵¹ A second, more serious general breach had been alleged, with consequences for numerous NREAPs across Europe. In his initial complaint Pat Swords had alleged that Ireland had breached the SEA Directive⁵² for failing to ensure that a comprehensive assessment of the plan, and the potential alternatives open to Ireland to fulfil its renewable energy obligations had been undertaken. Although legal reasoning to support the allegation was not made in the course of the proceedings, the question will soon be the subject of judicial review proceedings before the Irish High Court.⁵³ The following analysis outlines why Ireland's NREAP (and most likely numerous other NREAPs)⁵⁴ should have undergone such an assessment, and why the NREAP was in breach of the provisions of the SEA Directive.

The objective of the SEA Directive is:

to provide ... a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that ... an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.⁵⁵

Accordingly, pursuant to this Directive, plans and programmes that are subject to preparation or adoption by an authority at national, regional or local level, and are

landfill in Kazokiskas (adopted on 7 March 2008) www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf accessed 8 September 2013.

⁴⁹Case C-474/10, *Department of the Environment for Northern Ireland v Seaport (NI) Ltd* [2011] ECR I-10227.

⁵⁰The Swords decision, n 40 above.

⁵¹The Aarhus Convention, n 35 above.

⁵²The SEA Directive, n 27 above.

⁵³*Pat Swords v Department of Communications, Energy & Natural Resources*, High Court Record No 2013/4122P.

⁵⁴Note: it is outside the scope of this article to conduct a full study on the public consultation measures that took place in each of the 28 Member States prior to the finalisation of their individual NREAPs; however, an analysis of the 28 NREAPs that were submitted to the Commission and specifically the answers given in response to part 5.4 of the NREAP template – 'Please explain the public consultation carried out for preparation of this Action Plan' – reveals that of the 28 Member States it is likely that just eight Member States (Estonia, France, Greece, Malta, Portugal, Romania, Slovenia, Sweden and Britain) may have given the public 'an early and effective opportunity [to allow the public the opportunity] ... to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure' as is required by the SEA Directive.

⁵⁵The SEA Directive, n 27 above.

required by legislative, regulatory or administrative provisions, fall within the ambit of the Directive. Article 3 prescribes which plans and programmes must undergo an environmental assessment. Article 3.2(a) states that this includes all plans and programmes that set the framework for the future development consent of listed projects, including wind farms projects or infrastructure. Article 3.2(b) extends this to all plans and programmes that set the framework for the future development consent of listed projects, which in view of their likely effect on sites have been determined to require an assessment under Article 6 or 7 of the Habitats Directive.⁵⁶ However, as was noted by Advocate General (AG) Kokott in *Inter-Environnement*⁵⁷ an obligation under Article 3.2(b) would typically be limited to plans that carry a degree of precision, rather than those from mere preliminary administrative reflection or to a specific project relating to certain areas of conservation.⁵⁸

On 10 February 2010 (a number of months preceding the due date for submission of the NREAPs) the Irish Department of Communications, Energy and Natural Resources sent an email to the European Commission questioning whether an environmental assessment would be required for the Irish NREAP. The reply came a week after Ireland's NREAP was due for submission.⁵⁹ In this, the Directorates-General for Energy and the Environment stated that 'whether or not an NREAP requires a SEA depends on the specific content of the plan' and where a Member State had decided not to include mandatory measures within its NREAP, an SEA would not be required. Additionally, it was stressed that when implementing NREAP through more specific plans setting the framework for the future development consent of plans, SEAs would have to be carried out.⁶⁰

In a letter dated 19 April 2011, the Department of Environment, Heritage and the Local Community laid out its reasons for not submitting the Irish NREAP to the SEA process: the NREAP itself did not determine new policy, as policy on renewable energy had developed from factors such as the Irish Government's White Paper, the 2009 Carbon Budget, the Alternative Energy Programme and the Irish Renewable Energy Feed-in Tariff. Furthermore, the Department affirmed that strategies such as (i) Grid 25, the framework within which EirGrid (the Irish electricity transmission system operator) planned to build a more cost-effective and efficient transmission system to cater for increasing amounts of renewable generation and (ii) the draft Off-shore Renewable Development Plan had been the subject of the SEA process.⁶¹ Legal problems can be identified with this reasoning, which was based on what was arguably an overly narrow reading of the seminal decision of the Court of Justice of the European Union (CJEU) in *Inter-Environnement*.⁶² Consequently, despite the decision of the Irish Government (as supported by the European Commission) it is submitted that Ireland's NREAP should have been required to comply with Article 3.2(a) of the SEA Directive.

⁵⁶The Habitats Directive, n 30 above.

⁵⁷Joined Cases C-105/09 and C-110/09, *Terre wallonne ASBL and Inter-Environnement Wallonie ASBL v Région wallonne* [2010] ECR I-05611 (*'Inter-Environnement'*).

⁵⁸*Inter-Environnement*, n 57 above, Opinion of AG Kokott, para 91.

⁵⁹See n 37 (Annex II attachment: Letter from the Irish Administration to the European Commission of 10 January 2012).

⁶⁰*Ibid.*

⁶¹*Ibid.*

⁶²*Inter-Environnement*, n 57 above.

In *Inter-Environnement*⁶³ the Court determined that an action plan (falling within the definition of plans and programmes outlined by the SEA Directive) that was required by the Nitrate Directive⁶⁴ to protect waters from pollution from agricultural sources fell within the scope of Article 3.2(a) and so would be required to go through the SEA process. In coming to this conclusion the CJEU based its reasoning on three key factors. First, the action plan concerned contained mandatory measures that Member States were required to implement and monitor.⁶⁵ Secondly, action plans required pursuant to the Nitrates Directive are excluded from the public participation requirements of the Public Participation Directive, on the grounds that they are instead required to comply with the public participation requirements of the SEA Directive. Accordingly, it would be inconsistent for such action plans to fall within the scope of the SEA provisions on public participation but not those requiring an environmental assessment.⁶⁶ Finally, the fact that such action plans were adopted by legislation did not exclude them from the scope of the SEA Directive (as long as they contained mandatory measures that Member States were required to implement and monitor).⁶⁷

As it had determined that the action plan was obliged to undergo an environmental assessment, the CJEU did not consider whether it would also have been caught by Article 3.2(b) or Article 3.3. In their consideration of whether the action plan in question fell within Article 3.2(a) and set the framework for the future development consent of listed projects,⁶⁸ both the CJEU and AG Kokott placed a large degree of emphasis on the precision and enforceability of the measures it included. The Opinion of the AG did so on the basis that through including the phrase ‘setting the framework for the future development consent of listed projects’, the legislature’s primary concern was the degree to which the plan or programme set the framework for projects and other activities, either with regard to location, nature, size and operating conditions or by allocating resources and stated: ‘Rules on those aspects *may*⁶⁹ be classified as being of a legislative nature.’⁷⁰ In this context, AG Kokott stressed (in particular) that the effect of the action plan was important.⁷¹

Nevertheless, AG Kokott also advocated taking a broad approach to the interpretation of Article 3 of the SEA Directive. In particular, she opined that all preparatory measures, which could result in the implementation of projects with significant effects on the environment, should be assessed in order to take these effects into account.⁷² The following example was provided to place this statement in context:

An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road-construction project. For this reason, it should be

⁶³*Ibid.*

⁶⁴Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ 1991 L 375/1 (the ‘Nitrates Directive’).

⁶⁵*Inter-Environnement*, n 57 above, para 36.

⁶⁶*Ibid* paras 38–40.

⁶⁷*Ibid* para 35.

⁶⁸Emphasis added.

⁶⁹Emphasis added.

⁷⁰*Inter-Environnement*, n 57 above, Opinion of AG Kokott, para 43.

⁷¹*Ibid* paras 80–82.

⁷²*Ibid* para 35.

considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included.⁷³

One reading of the case (in light of this passage) is that the AG's Opinion advocates a wider interpretation of the Directive than that of the Court. However, an alternative interpretation is that, in delivering this judgment, the Court applied the SEA Directive specifically to the facts of the case presented, but did not intend this judgment to exclude all non-legislative measures from the ambit of Article 3. On such a reading, the Irish NREAP (and potentially many others) should have been required to undergo an environmental assessment as a plan containing mandatory measures that were required by the Renewable Energy Directive, and set the framework for the future consent of wind development projects. This interpretation is supported by the following deductions.

In addition to requiring Member States to reach allocated overarching national renewable energy targets, the Renewable Energy Directive set interim indicative targets to be met in the four two-year periods between 2010 and 2020. NREAPs were required by Member States by 30 June 2010 to provide detail on how both the overarching and interim targets were to be met. Article 4(4) of the Renewable Energy Directive requires Member States whose share of renewable energy falls below the indicative trajectory to submit an amended plan to the Commission the following year. Article 4(5) states that the Commission may make a recommendation to a Member State in relation to an NREAP or an amended NREAP.

This article does not preclude the Member State from taking measures to ensure renewable energy is developed appropriately, and in fact authors such as Hans van Steen (currently the Head of Unit of the Directorate-General for Energy in the European Commission) commented that it would appear that a Member State failing to meet its interim targets, while also failing in some other way to fulfil the requirements of the Renewable Energy Directive, could well be at risk of an infringement proceeding.⁷⁴ This could be taken to demonstrate the NREAPs such as Ireland's contain mandatory measures that Member States are obliged to implement and monitor under EU law.

Moreover, based on a teleological reading⁷⁵ of the SEA Directive (along with the interpretation provided by AG Kokott), one of the primary objectives of the SEA Directive is to ensure that all preparatory measures, which could result in the implementation of projects with significant effects on the environment, should be assessed in order to take these effects into account. As such, Ireland's NREAP should have been made the subject of an environmental assessment, if it could be found to 'set the framework for the future development consent of listed projects'. Annex II.1 indent one of the SEA Directive lists 'nature, size and allocation of resources' as criteria that governments should use in determining whether a plan or programme establishes a framework for projects and other activities.⁷⁶ For its part, the Irish NREAP provides detail on the size and nature of the Irish renewable energy plan, particularly providing detail as to

⁷³*Ibid* para 33.

⁷⁴Paul Hodson, in Christopher Jones and Hans van Steen (eds), *EU Energy Law Volume III – Book One Renewable Energy Law and Policy in the European Union* (1st edn, Heverlee: Claey's & Casteels 2010), 65.

⁷⁵A teleological approach to EU law is the interpretive approach generally advocated by the CJEU; with a directive this requires specific articles to be interpreted in light of the overall spirit, wording and purpose of the directive.

⁷⁶The SEA Directive, n 27 above.

how the Irish legislative obligations are to be met by the development of a substantial amount of onshore wind. It also outlines the policies and financial support mechanisms either in place or to be developed to promote renewable energy development.

Following this line of reasoning, the Irish NREAP could easily be considered a preparatory measure (subject to approval from the Commission) that would result in the implementation of wind projects with significant effects on the environment.⁷⁷ Fundamentally it constitutes the sole comprehensive plan required by law, which outlines Ireland's renewable energy plan up until 2020. As both policy documents and financial plans or programmes are excluded from the ambit of the SEA Directive, Ireland's NREAP is the only official document systematically detailing Ireland's plan to develop wind energy that could have been made subject to Article 3 of the SEA Directive. It is submitted here that given this fact, it should have been the subject of an assessment that considered the environmental implications of the plan, and the alternative options open to the government to fulfil their renewable energy obligations.

Furthermore, this environmental report along with the draft plan should have been made available to both the public and the authorities concerned to give them:

... "an early and effective opportunity" to express their opinions on the draft plan or programme concerned and on the accompanying environmental report. In order that due account may be taken of those opinions by the authority envisaging the adoption of such a plan or programme, Article 6(2) makes clear, first, that such opinions must be received before the adoption of that plan or that programme and, secondly, that the authorities to be consulted and the public affected or likely to be affected must be given sufficient time to evaluate the envisaged plan or programme and the environmental report upon it and to express their opinions in that regard.⁷⁸

If this interpretation of *Inter-Environnement*⁷⁹ is accepted, then the Swords decision⁸⁰ highlighted a central omission in the preparation of Ireland's NREAP. The proposed plan should have undergone an environmental assessment and fulfilled the public participation obligations in line with the requirements of the SEA Directive.⁸¹ As a result, if challenged, Ireland could be obliged to suspend or annul its NREAP (or certain aspects of it) until a replacement NREAP (which has undergone an environmental assessment) could be put in place as was required by the CJEU in comparable circumstances in *Inter-Environnement Wallonie* (2012).⁸²

⁷⁷Note: in the two Irish cases to look at the meaning of the phrase 'set the framework for the future development consent of listed projects' a large degree of emphasis has been placed on whether a development plan sets a framework against which individual planning permissions for specific projects are to be granted. See *Kavanagh v Ireland* [2007] IEHC 296; *Ballinasloe Chamber of Commerce Ltd v Ballinasloe Town Council* [2012] IEHC 273. In addition, in a recent case in the UK to consider the meaning of the phrase, *Buckinghamshire County Council and Others v Secretary of State for Transport* [2014] UKSC 3, Lord Reed (with whom the court was in unanimous agreement) referred to paragraph 3.23 of the Commission's guidance paper on the matter, which referred to such a plan as one that 'contains criteria or conditions which guide the way the consenting authority decides an application for development consent. Such criteria could place limits on the type of activity or development which is to be permitted in a given area; or they could contain conditions which must be met by the applicant if permission is to be granted; or they could be designed to preserve certain characteristics of the area concerned (such as the mixture of land uses which promotes the economic vitality of the area)'.

⁷⁸*Department of the Environment for Northern Ireland v Seaport (NI) Ltd*, n 49 above.

⁷⁹*Inter-Environnement*, n 57 above.

⁸⁰The Swords decision, n 40 above.

⁸¹The SEA Directive, n 27 above.

⁸²Case C-41/11, *Inter-Environnement Wallonie ASBL v Region Wallonne*, 28 February 2012 (not yet published).

DIRECT POTENTIAL CONSEQUENCES

Inter Environnement Wallonie (2012)⁸³ provides some insight into the potential consequences of a CJEU judgment that a plan or programme should have been submitted to an environmental assessment process but was not. Here the CJEU upheld a previous ruling it had made in *Wells*⁸⁴ to find that where a plan or programme had been enacted to fulfil the requirements of an EU directive, but was in breach of the obligation to carry out an environmental assessment, the national court was under an obligation to annul or suspend the plan or programme.⁸⁵ In its judgment it was stressed that the fundamental objective of the SEA Directive would be disregarded if national courts did not adopt appropriate measures for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment.⁸⁶

Notwithstanding this, the CJEU provided the referring court with an exceptional authorisation to maintain certain effects of the contested plan or programme in place, subject to the following stipulated conditions being fulfilled:

- the contested plan or programme correctly transposed the directive it was enacted to transpose;
- the annulment of the contested plan or programme and the adoption and entry into force of a new plan or programme would not enable the adverse environmental effects of the first annulled decision to be avoided;
- the annulment of the first plan or programme would result in a legal vacuum that would be harmful to the environment;
- the effects of the contested plan or programme would only be maintained as long as was strictly necessary to remedy the irregularity.⁸⁷

This case makes it clear that, at the very least, were Ireland's NREAP found to have fallen foul of the requirements of the SEA Directive, the Irish Government would be obliged to replace it with a new proposed plan, which was subject to the requirements of the SEA Directive. It is unclear whether aspects of the NREAP would be permitted to be maintained, pending the implementation of new plan. It is likely, however, that the practical result would be protracted delays and increased uncertainty for proposed projects, yet to be commenced. Overall, what the Swords decision⁸⁸ demonstrates (particularly when considered in the broader context of EU law) is the lack of stability underlying Ireland's overall wind policy up until 2020, the lack of analysis supporting the decision to promote onshore wind and the risk inherent in investing in such a legally unstable market. This unstable foundation merely adds to the risk and legal uncertainty, which were already present in the wind development market, resulting from poor permitting procedures that have left many Irish wind developments vulnerable to either

⁸³*Inter-Environnement Wallonie* (2012), n 82 above.

⁸⁴Case C-201/02, *Wells* [2004] ECR I-723, para 65.

⁸⁵*Ibid* para 47.

⁸⁶*Ibid.*

⁸⁷Tobias Lock, 'Are there exceptions to a Member State's duty to comply with the requirements of a Directive?: *Inter-Environnement Wallonie*' (2013) 50 *Common Market Law Review* 1, 217-230.

⁸⁸The Swords decision, n 40 above.

legal challenge or enforcement proceedings for breaches of either the EIA,⁸⁹ or the Birds⁹⁰ and Habitats⁹¹ Directives.

Ireland's wind developments in breach of EU law

The problems that permeate wind development in Ireland are twofold. First, Ireland's wind policy is open to legal challenge seeking its suspension or annulment under EU law. Secondly, many of its existing and emerging commercial wind developments are vulnerable to challenges (seeking the revocation of their development consents/their removal/compensation)⁹² for having been constructed in breach of either the EIA,⁹³ or the Birds⁹⁴ and Habitats⁹⁵ Directives. As these directives are different, this section will first consider the cases that drew attention to the Irish planning practices (used to permit wind developments) that breached the EIA Directive, and the direct consequences that followed. Next, there will be an analysis of the case law that condemned Ireland's implementation and application of the Birds and Habitats Directives along with its substantial repercussions for existing, proposed and future wind developments.

Ireland's wind developments in breach of the EIA Directive

On 3 July 2008 the CJEU delivered a seminal judgment⁹⁶ on wind development in Ireland ('the Derrybrien wind decision').⁹⁷ The case concerned both Ireland's application and implementation of the EIA Directive⁹⁸ generally, and specifically the permitting procedures applied to the 'largest terrestrial wind-energy development in Ireland and one of the largest in Europe', the Derrybrien wind farm.⁹⁹ In the course of the proceedings, the following flaws in Irish issuing of commercial wind farm permits, and Irish planning and development law were identified. Ireland had failed to 'scope' proposed works, as was required by the EIA Directive. In other words, Ireland had failed to

⁸⁹The EIA Directive, n 28 above.

⁹⁰The Birds Directive, n 29 above.

⁹¹The Habitats Directive, n 30 above.

⁹²Three claims have previously appeared before the Irish High Court, which alleged breaches of the EIA Directive in wind farm development: *Keane v An Bord Pleanála* [2012] IEHC 324; *Usk and District Residents Association Limited v An Bord Pleanála and Others* [2009] IEHC 346; and *Derrybrien Co-operative Society Limited v Saorgus Energy Ltd and Others* [2005] IEHC 485. However, each of these cases concerned either the factual content of the EIAs in question, or the remit of responsibilities required from the government entities in question. Interestingly, however, on 17 June 2014, Mr Justice Michael Peart granted permission, on an ex-parte basis, to a couple (Klaus Balz and Hanna Heuback, of Bear No Gaoithe, Inchigeelagh, Co Cork) to bring a challenge seeking the judicial review of a decision by An Bord Pleanála to grant planning permission to Cleanrath Windfarm Ltd to construct 11 turbines up to heights of 126 m and other structures including an 85 m-high meteorological mast at Cleanrath, Co Cork as having breached both (i) the EIA Directive for failing to carry out an EIA within the meaning of the Directive and (ii) the Birds and Habitats Directives for having failed to carry out an appropriate assessment, as required under the Habitats Directive on nearby sites such as the Gearagh special area of conservation and the Mullaghanish to Musheramore special protection areas. The hearing was scheduled for 1 July 2014, rescheduled for 19 November and then adjourned with no further details available. See *Balz and Another v Bord Pleanála* High Court Record No 2013/450.

⁹³The EIA Directive, n 28 above.

⁹⁴The Birds Directive, n 29 above.

⁹⁵The Habitats Directive, n 30 above.

⁹⁶See Sharon Turner, 'Immovable Object Meets Irresistible Force?' (2009) 2 Review of European Administrative Law 1, 99–112.

⁹⁷Case C-215/06, *Commission v Ireland* [2006] ECR I-10787 (the 'Derrybrien wind decision').

⁹⁸The EIA Directive, n 28 above.

⁹⁹The Derrybrien wind decision, n 97 above, para 87.

ensure that steps were taken to ascertain whether proposed works were likely to have significant effects on the environment, and if so obliged to proceed through an EIA before development consents were granted.¹⁰⁰ The Irish practice of retention planning was found to have entirely negated the effectiveness of the EIA Directive by allowing developers to apply for planning permission after the project had been constructed.¹⁰¹ The Irish enforcement regime (which granted discretionary powers to the Irish authorities to prevent and stop unauthorised development, and allowed the regularisation of unauthorised developments as long as enforcement proceedings had not been commenced) was found to be inadequate.¹⁰²

In considering the permitting procedures applied to the Derrybrien wind farm further deficiencies in the Irish planning procedures became apparent. The Irish authorities had based their decision on whether different aspects of the Derrybrien wind farm works were subject to the requirements of the EIA Directive, on a simple determination as to whether the works in question were minor or major aspects of wind farm construction.¹⁰³ Where the works were considered minor, no further consideration was given to the individual characteristics of the construction involved or whether the works ‘were likely to have significant effects on the environment by virtue inter alia, of their nature, size or location’.¹⁰⁴ Furthermore, at the time when the Derrybrien wind decision was handed down, it was accepted practice in Ireland for a developer to submit the sole Environmental Impact Statement (EIS) conducted, along with his/her consent application, to fully satisfy the requirements of the EIA Directive. No requirement was placed on the planning authority to conduct its own assessment of the potential environmental impacts of the proposed development/works. This practice was criticised in the Derrybrien wind decision¹⁰⁵ and later condemned as being in breach of the EIA Directive in a further finding against Ireland in Case C-50/09, *Commission v Ireland (Demolition Works)* (2011).¹⁰⁶

Direct consequences

Following each of these decisions, the Irish Government became subject to a legal duty to take all general or particular measures, within its sphere of competence, to remedy each identified failure to ensure that adequate EIAs (as provided for by the EIA Directive) were undertaken.¹⁰⁷ In this instance, it was a dual duty. First, to prevent similar issues arising in the future, the government was obliged to enact legislation to remedy the failings that had been identified, and all relevant parties were obliged to interpret existing laws and rules in line with the judgments that had been handed down. Secondly, the government was obliged to consider whether (or what) action needed to be taken against existing wind developments (which had been constructed

¹⁰⁰ *Ibid* para 1. Note a similar procedure also referred to as ‘scoping’ applies to the process to ascertain whether works are subject to the requirements of the Birds and Habitats Directives.

¹⁰¹ The Derrybrien Wind decision, n 97 above, paras 74 and 76.

¹⁰² *Ibid* paras 74 and 76.

¹⁰³ *Ibid* para 68.

¹⁰⁴ The EIA Directive, n 28 above.

¹⁰⁵ The Derrybrien wind decision, n 97 above, para 109.

¹⁰⁶ Case C-50/09, *Commission v Ireland* [2011] ECR I-00873 (the ‘demolition works decision’).

¹⁰⁷ European Commission, ‘Environmental Impact Assessment of Projects Rulings of the Court of Justice’ (Commission, 14 March 2013) http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf accessed 9 December 2013, 10.

in breach of the EIA Directive) to make good any harm caused by each failure to carry out an EIA.¹⁰⁸

EU case law provides some guidance as to the action that should have followed these judgments. Case law indicates that it is for the Member State in question to determine whether a consent already granted can be revoked or suspended in order to subject the project in question to an assessment of its environmental effects.¹⁰⁹ In an oft-quoted paragraph from the Derrybrien wind decision, the CJEU has stressed that:

[w]hile Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.¹¹⁰

Although Ireland took action to prevent future breaches of the EIA Directive taking place after the Derrybrien wind and demolition works decisions,¹¹¹ there is no publicly available record of any consideration having been given to whether the development consents that had already been granted prior to 3 July 2008 (the date Derrybrien wind was decided) should have been revoked or suspended ‘as having offered the persons concerned the opportunity to circumvent the Community rules’. While it is acknowledged that it would have been at best impractical and at worst illegal (under Irish planning law)¹¹² to seek to revoke consents from developments that were constructed or largely constructed on 3 July 2008, works that were consented to but not yet commenced on this date were in a different category. Accordingly, those that fell within the remit of the EIA Directive should have been required to undergo an EIA following the judgment. However, this was not the case.

This omission has left these developments (in addition to all those constructed prior to July 2008, and all developments up until 2011, which were consented to based solely on developer-conducted EISs) open to legal challenge from an individual seeking either: (i) the revocation or suspension of a consent already granted; or (ii) monetary compensation. The case of *Wells*¹¹³ has long since removed the argument for rejecting such claims for breaching the principle of ‘inverse’ direct effect.¹¹⁴ Thus, a challenge of this nature could be pitted against one of two parties. It could be taken as a claim of state

¹⁰⁸*Wells*, n 84 above, para 66.

¹⁰⁹On the subject of ‘inverse direct effect’, which this proposition gives rise to, see n 76 and Robert McCracken, ‘EIA, SEA and AA, present position: where are we now?’ (2010) 12 *Journal of Environmental and Planning Law* 1515–1532.

¹¹⁰The Derrybrien wind decision, n 97 above, para 57.

¹¹¹For example: following the Derrybrien wind decision, a Circular was sent to each of Ireland’s local planning authorities. The Circular informed the local authorities of the Court’s decision; prohibited the further grant of retention planning; instructed the local authorities to issue a formal notice to the effect that any retention planning consent granted after the date of the judgment was now invalid; and outlined the remedial measures that were proposed to implement the Court’s decision. These measures were later taken through the enactment of the Planning and Development (Amendment) Act 2010. Furthermore, during the course of the proceedings that led to the demolition works decision, a new s 171A was inserted into the Planning and Development Acts to provide a definition of an EIA, and assistance in interpreting the new provisions was provided through the publication of the Department of the Environment’s ‘Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment’ in March 2013.

¹¹²In this regard see s 160(6)(a) of the Irish Planning and Development Act, as amended (Number 30 of 2000) (‘the seven-year safety rule’).

¹¹³*Wells*, n 84 above.

¹¹⁴*Ibid*; McCracken, n 109 above.

liability against the planning authority (as an emanation of the state),¹¹⁵ which consented to the wind development in question. Alternatively, it could be taken against the developer, where this party was a state or semi-state company.

For wind developers, the situation under EU law is precarious. Despite the fact that the CJEU has consistently found consent suspension or revocation to be a matter for the domestic legal order of each Member State (based on the principles of equivalence and effectiveness), such an order cannot be ruled out. Depending on the circumstances of the case (and most likely the stage of construction of the development)¹¹⁶ if a claimant fulfilled the three conditions required for a claim for state liability, a strong case could be made for the suspension of previously granted consents and the restoration of the land concerned, as a penalty equivalent to that provided for under Irish planning law for unauthorised developments.¹¹⁷

Furthermore, even if consent suspension or revocation were not ordered, state or semi-state developers or planning authorities could be obliged to provide compensation¹¹⁸ where an individual claimant (who had suffered damage from a development constructed in breach of the EIA Directive) could satisfy the three conditions for state liability. Moreover, this compensation could even include the value of material assets:

in circumstances where exposure to noise ... has significant effects on individuals, in the sense that a home affected by that noise is rendered less capable of function and the individual's environment, quality of life and health are affected, a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment.¹¹⁹

This particular passage should be of particular concern to wind developers, as a frequent complaint of homeowners in the vicinity of wind turbines is that their right to the quiet enjoyment of their homes has been affected by the noise and shadow flicker caused by the rotating turbines.¹²⁰ A similar challenge, successfully taken against Irish wind developments, could drain developer resources and act as a further restraint on future investment in wind.

The position of wind developments (in breach of the EIA Directive) is far less exposed under Irish law. The general rule under Irish planning law is that enforcement proceedings can only be taken by the relevant planning authorities against developments where they are considered to be unauthorised, a definition that excludes development that was granted a planning permission *that has not been revoked*¹²¹ where the development was carried out in compliance with the permission

¹¹⁵See further Case C-188/89, *Foster v British Gas* [1990] ECR I-03313.

¹¹⁶Note: depending on the circumstances of a claim for state liability, a respondent could seek to invoke the use of 'the seven-year safety rule' as provided for by s 160(6)(a) of the Irish Planning and Development Act, as amended (Number 30 of 2000) if this would be applicable to the situation under Irish law; however, there is no guarantee that such an argument would be accepted as compatible with the case law of the CJEU. See the seven-year safety rule, n 112 above.

¹¹⁷The Planning and Development Act 2000 (as amended) (Number 30 of 2000), ss 154 and 160 (on unauthorised developments).

¹¹⁸Case C-420/11, *Jutta Leth v Republik Österreich and Land Niederösterreich*, 14 March 2013 (not yet published).

¹¹⁹*Jutta Leth*, n 118 above, para 35.

¹²⁰In this regard see International Agency Wind Task 28 'Social Acceptance of Wind Energy Projects' (IEA, May 2012) www.ieawind.org/index_page_postings/June%207%20posts/task%2028%20final%20report%202012.pdf accessed 9 December 2013; Gerald O'Connor, 'Wind turbines in the Midlands' *Irish Times* (19 March 2013), 15.

¹²¹Emphasis added.

granted.¹²² Accordingly, if the Irish planning authorities wish to bring enforcement proceedings against such a development under the general enforcement provisions of the Planning and Development Act,¹²³ the original planning permission would have to be revoked. Section 160 of the Planning and Development Act 2000, as amended,¹²⁴ provides additional comfort to affected developers. It provides that enforcement action cannot be taken through the courts against certain developments (including wind developments authorised in breach of the EIA Directive) following the expiry of seven years from their commencement¹²⁵ (the ‘seven-year safety rule’).

Irish planning law does, however, superficially comply with the EU law requirement to nullify the unlawful consequences of its breaches of EU law, through its introduction of the concept of ‘substitute consent’.¹²⁶ As part of this construct, developers can apply or be served notice requiring them to submit a ‘remedial environmental impact assessment’ and (if successful in their application) obtain permission to retain previously authorised developments (constructed in breach of either the EIA, or Birds and Habitats Directives). However, as the enforcement penalties for failure to comply with the relevant sections apply solely to failure to comply with a served notice,¹²⁷ little incentive exists for a developer (who has become aware that the development in question was improperly permitted) to make a voluntary application. Unsurprisingly, to date just one application has been made for substitute consent and this was made for Derrybrien wind farm, on foot of a notice served in October 2011.¹²⁸

As demonstrated, Irish wind developments face legal uncertainty. Under EU law, all developments constructed in breach of the EIA Directive¹²⁹ are open to a legal claim seeking either consent revocation or compensation. Under Irish law they are also exposed until they benefit from the seven-year safety rule.¹³⁰ Until then, they are open to enforcement proceedings where the following two conditions are fulfilled: the Irish planning authorities serve them a notice requiring them to submit a remedial environmental impact assessment; and they do not complete the process satisfactorily. While action in this regard has been low to date, there is no guarantee that this will continue to be the case. Wind developments constructed in breach of the Birds and Habitats Directives face similar uncertainties, following the ruling of the CJEU in the wild birds decision¹³¹ as will be discussed below.

¹²²The Planning and Development Act, n 117 above, s 2.

¹²³The Planning and Development Act, n 117 above.

¹²⁴*Ibid.*

¹²⁵As provided for by s 160(6)(a) of the Irish Planning and Development Act, as amended (Number 30 of 2000). Note: s 46 of the Planning and Development Act 2000, as amended (n 117), does give the planning authorities the power in exceptional circumstances to serve a notice on a developer (other than one of an unauthorised development) requiring the removal or alteration of a particular structure or the discontinuance of its use.

¹²⁶The Planning and Development Act, n 117 above, ss 177B and 177C.

¹²⁷*Ibid* s 177O.

¹²⁸Case number SJ0001: Co Galway (05316). Note: an additional Letter of Formal Notice was sent to Ireland in respect of the Derrybrien wind case in March 2010. See further Friends of the Irish Environment, ‘Ongoing EU Environmental Cases Against Ireland October 2012’ (Friends of the Irish Environment, October 2012) www.friendsoftheirishenvironment.net/cmsfiles/files/library/ongoing_eu_infringments.pdf accessed 31 August 2013.

¹²⁹The EIA Directive, n 28 above.

¹³⁰The seven-year safety rule, n 112 above.

¹³¹Case C-418/04, *Commission v Ireland* [1997] ECR I-10997 (‘the wild birds decision’).

Ireland's wind developments in breach of the Birds and Habitats Directives

On 13 December 2007, the Second Chamber of the CJEU found that Ireland had breached both the Birds¹³² and Habitats¹³³ Directives,¹³⁴ in a case that would have huge ripple effects for both wind development in Ireland. Similar to the Swords and Derrybrien wind decisions, the decision highlighted major deficiencies in Irish environmental and planning law relating to Ireland's compliance with the Birds and Habitats Directives (of direct relevance to wind development). Ireland had failed to classify 42 of the 140 sites identified by the Court as requiring designation as Special Protection Areas (SPAs), a fact that was undisputed.¹³⁵ Ireland had failed to designate suitable sites as SPAs to protect birds (including the kingfisher and the corncrake)¹³⁶ and to classify sufficient territory to protect additional named birds within Ireland's designated SPAs. The implementing measures for the Birds and Habitats Directives were found to be insufficient for failing to protect wild birds both present in areas by Ireland's designated SPA network, and outside this network. In this regard, the Commission gave the specific example of the hen harrier (a bird that breeds on low hills between April and August and is currently in decline, a fact that has speculatively been attributed to increased wind development in Ireland).¹³⁷

The CJEU criticised the Irish measures designed to designate and trigger protections in designated areas. It noted that protections for designated sites were only activated following the issue of a notice outlining restricted activities, and that many such notices had simply not been issued.¹³⁸ The Irish practice of considering an EIA as equivalent to an Appropriate Assessment (AA) was also condemned. Here, the Court distinguished the binding nature of the AA procedure from the non-binding nature of the EIA procedure¹³⁹ to find that Ireland had authorised identified projects (aquaculture programmes) in violation of the requirements of the Birds and Habitats Directives. It also distinguished another major requirement of the AA procedure that Member States take the cumulative effect of proposed plans or projects into account when determining whether they could be permitted as not adversely affecting the integrity of a designated site.¹⁴⁰ Following the case, on 10 December 2009, the Irish Department of Environment, Heritage and Local Government published Guidelines for Planning Authorities on the AA of plans and projects¹⁴¹ and in 2010¹⁴² and

¹³²The Birds Directive, n 29 above.

¹³³The Habitats Directive, n 30 above.

¹³⁴Specifically: Arts 4(1) and 4(2) of the Birds Directive, n 29 above; and Arts 6(2) and 6(4) of the Habitats Directive, n 30 above.

¹³⁵The wild birds decision, n 131 above, para 75.

¹³⁶*Ibid* paras 111 (kingfisher) and 123 (corncrake).

¹³⁷Coillte, 'Hen harrier' (Webpage) www.coillte.ie/coillteforest/environment/nature_conservation/biodiversity_action_plans/hen_harrier accessed 2 September 2013.

¹³⁸The wild birds decision, n 131 above, para 206.

¹³⁹*Ibid* para 231.

¹⁴⁰*Ibid* para 238.

¹⁴¹Department of Environment, Heritage and Local Government, 'Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities' (DEHLG 2009) www.npws.ie/media/npws/publications/codesofpractice/AA%20Guidance%2010-12-09.pdf accessed 8 September 2013.

¹⁴²In 2010 the Planning and Development (Amendment) Act 2010 (Number 30 of 2010) was enacted to introduce a new Part XAB into the Planning and Development Act 2000 (as amended) to substantially update Irish legislation in line with the direction of the CJEU. Among other changes made, it enhanced the Irish provisions on the AA procedure, it introduced the concept of 'substitute consent', it strengthened certain enforcement provisions and removed the possibility for developments that should have been required to undergo an EIA/AA to apply for retention planning.

2011¹⁴³ legislation was enacted designed to remedy the implementation defects identified in the judgment.¹⁴⁴

DIRECT CONSEQUENCES

This decision placed a large proportion of Irish wind developments in a precarious situation under EU law. At the time of the decision many productive wind sites in Ireland were situated in or near sites that should have been subject to the protections outlined in the Birds and Habitats Directives, but were not. In 2011, when a large number of additional sites had been designated as protected, Professor Scannell noted that approximately ‘50 per cent of proposed wind farm projects [were] situated in areas classified as Special Conservation Areas *or areas with other environmental designations*¹⁴⁵ where obtaining planning permissions is always difficult for bureaucratic and genuine environmental reasons’.¹⁴⁶ More recent information indicates that 115 of the 587 protected Irish Natura 2000 sites are within 5 km of Irish wind turbines; and 228 of these sites are within 10 km of Irish wind turbines.¹⁴⁷ Irish wind developments adjacent to these sites (which are likely to have an impact on the sites’ conservative objectives) are also considered to be subject to the requirements of the directives.¹⁴⁸ Moreover, the CJEU had previously ruled that even where a Member State had failed to designate an area as an SPA, the obligation placed on Member States to avoid pollution or disturbances affecting birds within these sites continued to apply.¹⁴⁹

The case of open-cast mining¹⁵⁰ provides guidance on the position and level of exposure of continuing projects (ie, operational wind developments) permitted in violation of the Birds and Habitats Directives. The decision is useful for its consideration of both the requirements of the AA procedure and the continuance of invalidly permitted projects. It determined that an assessment could not be considered appropriate if it contained gaps and lacked the complete, precise and definitive findings and conclusions necessary to remove all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned.¹⁵¹ (By this logic, no Irish wind developments permitted before 2011 would have assessments that could be considered appropriate.)

Next the Court considered the position of the projects, focusing on their effects on the conservation objectives of the site, and on the species requiring protection. Here, the Court determined that by allowing a situation that caused significant disturbance to one

¹⁴³In 2011, the European Communities (Birds and Habitats) Regulations were enacted. These Regulations repealed the European Communities (Natural Habitats) Regulations 1997, and provided the Minister with the extensive powers to select areas as candidate SPAs and establish conservation objectives for ‘European sites’, a term defined in the Regulations to include SPAs, candidate SPAs (cSPAs), SACs and candidate SACs at each phase of designation. They also provided further detail to the Irish EIA and AA procedures.

¹⁴⁴The wild birds decision, n 131 above.

¹⁴⁵Emphasis added.

¹⁴⁶Yvonne Scannell, ‘Renewable Energy Policies, Programmes and Progress in Ireland’ (2011) JERL 29(2), 155–176.

¹⁴⁷Colin Broderick, ‘How many Natura 2000 sites are within 5-10 km of Wind Turbines in Ireland?’ *Rusty’s Waffle* (10 June 2014) <http://rustyswaffle.tumblr.com/post/86529638960/how-many-natura-2000-sites-are-within-5-10-km-of-wind> accessed 7 July 2014.

¹⁴⁸Case C-355/90, *Commission v Spain* [1993] ECR I-04221 (the ‘Santona Marshes case’).

¹⁴⁹*Ibid.*

¹⁵⁰C-404/09, *European Commission v Kingdom of Spain*, 24 November 2011 (not yet reported) (the ‘open-cast mining case’).

¹⁵¹*Ibid* para 100.

of the sites in question for at least four years, Spain omitted to take, in good time, the measures necessary to bring those disturbances to an end.¹⁵² Drawing from this, it would appear that where an operational Irish wind development is challenged and it can be shown that it has caused significant disturbance to a protected site (or one that should have been designated as protected) Ireland would be legally obliged to bring the disturbance to an end. This obligation to bring the disturbance to an end in good time includes the requirement ‘to adopt the necessary measures to prevent the deterioration of habitats, including the habitats of species, and the disturbances caused to species’.¹⁵³ Accordingly, the consequences for wind developers could range from a direction to cease operating at particular times of the year, to an order for the removal of the wind development and the restoration of the site concerned.

The position under Irish law is less exposed for already constructed developments. Similar to developments improperly permitted under the EIA Directive, developments constructed in breach of the Birds and Habitats Directives are eligible to benefit from the seven-year safety rule.¹⁵⁴ Developers can also apply to regularise developments, or be served notice to do so, following the procedures outlined for ‘substitute consent’. By contrast to the procedure used for developments in breach of the EIA Directive, here the application must be accompanied by a remedial Natura Impact Statement¹⁵⁵ (NIS) and undergo an AA. Similar to the procedure used for developments in breach of the EIA Directive, potential enforcement penalties against such developments are only triggered by a failure to comply with a served notice.¹⁵⁶ Accordingly, again there is little incentive for developers to draw attention to irregularities by making a voluntary application.

The central practical consequence of the wild birds¹⁵⁷ and Derrybrien wind¹⁵⁸ decisions for evolving wind developments was to increase the delays experienced in obtaining construction consents.¹⁵⁹ In 2009 (following both decisions), a report by the Irish Academy of Engineering¹⁶⁰ on Irish energy policy noted:

It is difficult to have any confidence in the ability of Ireland’s planning, regulatory and legal framework to facilitate the delivery of new [wind] energy projects on time or on

¹⁵² Open-cast mining case, n 150 above, para 152.

¹⁵³ *Ibid* para 197.

¹⁵⁴ The seven-year safety rule, n 112 above.

¹⁵⁵ See reg 4 of the Planning and Development (Amendment) (No 3) Regulations 2011 (SI 476 of 2011) and n 108, s 177 G.

¹⁵⁶ The Planning and Development Act, n 117 above, s 177O.

¹⁵⁷ The wild birds decision, n 131 above.

¹⁵⁸ The Derrybrien wind decision, n 97 above.

¹⁵⁹ Note: one instance of increased delays in the wind permitting process (which resulted from the wild birds decision) occurs pursuant to the regs 42(2) and 42(3) of the European Communities (Birds and Habitats) Regulations 2011 (SI 477 of 2011) and concerns projects requiring multiple consent procedures, which would inevitably include all commercial wind developments, which must acquire (i) a planning permission from An Bord Pleanála or the local planning authority and (ii) an Authorisation to Construct a Generating Station and a Licence to Generate Electricity from the Irish Commission for Energy Regulation (CER), the Regulator for the Irish gas and electricity sectors in Ireland. These Regulations place a requirement on all public authorities to carry out a screening for an AA before consent to the project can be given and give them the power to require a Natura Impact Statement. Accordingly, following the wild birds decision, developers who had progressed through the first stage of the consent procedure to the second faced delays as the second authority sought to ensure that AAs were conducted where required.

¹⁶⁰ Note: the Irish Academy of Engineering is an all-Ireland body, concerned with long-term issues where the engineering profession can make a unique contribution to economic, social and technological development. Its members are Irish engineers of distinction, drawn from a wide range of disciplines. See further the Irish Academy of Engineering, *About IAE* (Irish Academy of Engineering 2014) www.iae.ie/about-iae/executive-members accessed 7 July 2014.

budget. Large infrastructural projects in Ireland cannot be planned and completed in a predictable economic timeframe. The risk return calculations for such projects are currently little better than a lottery... Indeed ... Ireland is viewed as a high risk location for such large scale international investment precisely because of the unpredictability of its permitting processes ...¹⁶¹

The wild birds decision,¹⁶² in particular, is likely to affect future investment in commercial wind development. Since the decision, the AA procedure has been implemented, protections have been strengthened, and the number of SPAs designated in Ireland has increased considerably. This has made it more difficult for developers to secure planning permission in or near these sites. Furthermore, the enactment of the European Communities (Environmental Liability) Regulations 2008¹⁶³ has made it even less attractive to (i) develop in or near protected sites or (ii) continue with operations likely to affect protected species and their habitats. These Regulations make damage caused, knowingly or recklessly, to protected species or natural habitats since 1 April 2009 an offence under Irish law, which developers will be obliged to remedy in line with the stipulations of Ireland's Environmental Protection Agency (potentially a very costly penalty).

Overall consequences

The wild birds¹⁶⁴ and Derrybrien wind¹⁶⁵ decisions have had a large ripple effect. As a result, the regulation required to develop in Ireland has increased, wind development has become a less attractive prospect and wind farm construction has experienced further protracted delays.¹⁶⁶ In 2012, the number of additional Irish wind turbines developed was the lowest since 2008.¹⁶⁷ Partially as a result Ireland has failed to meet its wind targets for recent years and on 27 March 2013, the Irish Minister for Communications, Energy and Natural Resources, Pat Rabbitte, gave a speech that described the gap that existed between the 3521MW renewable electricity target pledged (the 40 per cent target) and the then present level of wind development (1826.5MW)¹⁶⁸ to state:

In terms of the 2020 renewable electricity target, [Ireland is] 630MW behind where the National Renewable Energy Action Plan has outlined [it] should be in 2012. The target will not be achieved without an increase in wind energy build from an historic average of 180MW per year to at least 250MW per year.¹⁶⁹

¹⁶¹The Irish Academy of Engineering, 'Review of Ireland's Energy Policy in the Context of the Changing Economy' (Dublin, June 2009) www.iae.ie/site_media/pressroom/documents/2009/Jun/24/Review_of_Irelands_Energy_Policy_-_June_2009.pdf accessed 18 August 2013.

¹⁶²The Derrybrien wind decision.

¹⁶³SI 547 of 2008.

¹⁶⁴The wild birds decision, n 131 above.

¹⁶⁵The Derrybrien wind decision, n 97 above.

¹⁶⁶See regs 42(2) and 42(3) of the European Communities (Birds and Habitats) Regulations 2011 (SI 477 of 2011), n 159 above.

¹⁶⁷International Energy Association, 'Ireland' (IEA, 2013) www.ieawind.org/annual_reports_PDF/2012/Ireland.pdf accessed 5 September 2013.

¹⁶⁸*Ibid.* Note: Ireland is also off-target to meet its connected emission reduction targets from 2016 onwards. See Environmental Protection Agency, 'Greenhouse gas emissions projections for the period 2010 to 2020' (EPA, 14 April 2011) www.epa.ie/newsandevents/news/previous/2011/name,47795,en.html accessed 8 September 2013.

¹⁶⁹Pat Rabbitte, Minister for Communications, Energy and Natural Resources, speech at the Irish Wind Energy Association's Annual Conference, Dublin, 27 March 2013.

The gap between these projections and the level of renewable electricity generated is likely to increase further with a successful challenge to either Ireland's NREAP or to any of its larger commercial wind developments. As this 40 per cent renewable electricity target was devised as the contribution required from the electricity sector to attain Ireland's legally binding 16 per cent renewable energy target, Ireland is currently off target to reach this goal.¹⁷⁰ A failure to meet the 16 per cent target will also have repercussions for Ireland's scheme to become a renewable electricity exporter, making it impossible for Ireland to statistically transfer renewable electricity to other Member States.¹⁷¹ While it will not prevent an export of Irish renewable electricity through a joint project mechanism, the use of this mechanism has become a much less attractive prospect as it carries with it additional regulatory requirements (including public participation and environmental assessment). A statistical transfer based on a continuation of the existing policy would be a much simpler procedure.

Conclusion

In 2010, Ireland submitted its NREAP. In essence this document constituted the sole comprehensive plan (required by law) to outline Ireland's renewable energy strategy up until 2020, and provide detail of Ireland's strategy to meet a legally binding target of 16 per cent in renewable energy consumption by 2020. In it, Ireland gave a political pledge to convert 40 per cent of its electricity market to onshore wind generation and indicated its willingness to become a renewable electricity exporter (either through a statistical transfer of electricity or through developing joint projects with other Member States). However, as has been discussed in this article, problems are evident that threaten these ambitions and Ireland's wind policy and most of its commercial wind developments (namely those constructed before 2011) are open to legal challenge for having breached EU law.

The problems faced by the wind industry are twofold. The market rests on an unsolid foundation, and no evidence can be produced that supporting wind is the best option for Ireland to fulfil its renewable energy obligations up to 2020. Such evidence would be available had Ireland's NREAP fulfilled the requirements of the SEA Directive, particularly those requiring the government to subject the plan to an environmental assessment, and to allow the public an early and effective opportunity to express their opinion on both the NREAP and its accompanying environmental assessment. However, these requirements were not fulfilled, and as a result the NREAP remains vulnerable to a legal challenge seeking its revocation or suspension.

Compounding this instability, following the Derrybrien wind and wild birds decisions a large proportion of individual Irish wind developments can be identified as vulnerable to legal challenge or enforcement proceedings (for having been developed in breach of either the EIA, or the Birds and Habitats Directives). In this instance the result of a successful challenge could bring an order requiring a development's removal and the restoration of the site. Alternatively, compensation could be awarded. As such Irish wind developers are in a precarious position. Furthermore, as the regulation and the delays experienced in obtaining permits for wind developments have increased, future Irish wind development is a much less attractive prospect. The overall

¹⁷⁰National Renewable Energy Action Plan. Ireland, n 4 above.

¹⁷¹The Renewable Energy Directive, n 1 above.

consequence is that Ireland is unlikely to meet its 40 per cent renewable electricity or its 16 per cent renewable energy target. Moreover, a failure to meet the 16 per cent target will prevent Ireland utilising the Renewable Energy Directive's flexibility mechanism to statistically transfer renewable electricity to other Member States, thus preventing Ireland from fulfilling its ambitions to become a significant renewable energy exporter. While it is unclear if Irish wind development can recover in the interim, what is apparent is that a large potential for lawsuits exists. As such it will be interesting to see if *in sowing the wind, Ireland will ultimately reap the whirlwind*.