

OPINION

Querist:

Córas Iompair Éireann

Agent:

Rita Monaghan Solicitor, Solicitor's Office, Córas
Iompair Éireann

Re:

Replacement of seven manned level crossings on the
main Dublin to Cork Railway Line

Date:

4th February 2020

Introduction

1. My advices have been sought in relation to proposed works at seven manned level crossings on the main Dublin to Cork Railway Line. I understand that this request for advices arises from a meeting between Querist and An Bord Pleanála on the 17th October 2019.
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The proposed development

2. My understanding (with the exception of the crossings at Fantstown and Ballyhay) that it is proposed to replace a number manned level crossings with overbridges and other works. The crossings occur along a 24 kilometre section of the Dublin to Cork Railway Line and straddle the boundary of Cork and Limerick, with two sites in County Limerick and five sites in County Cork. Again, I understand, subject to confirmation, that the crossings are on the public road.
3. In summary, the proposed application for a Railway Order would address the following works:
 - Fantstown – closure
 - Thomastown – construction of a new overbridge
 - Ballyhay – construction of a 4-barrier CCTV
 - Newtown and Ballycoskery – construction of a new access road and new overbridge
 - Shinanagh – an upgrade to the existing overbridge and junction on the N20 with a tie-in to existing local road to the north
 - Buttevant – construction of a new overbridge and tie-in to existing regional road to east and west. It is noted that the Blackwater River SAC is proximate to this site.
4. I am instructed that the Iarnród Éireann Board approved the preparation of a feasibility study into the elimination of these currently seven manned level crossings on the main Dublin to Cork Railway Line and that the issues

involved include *inter alia* property issues such as potentially seeking to compulsory purchase land, planning and environmental considerations, safety, costs and risk profile. I am further instructed that none of these schemes were previously progressed due to a lack of funding. In 2017, it was estimated that it would cost in the region of €12.3 million to automate all of the said seven manned level crossings.

The designations

5. Helpfully, the briefing note which accompanied the request for advices, set out four different types of designations for manned level crossings, as follows:

- (1) C type- gates normally closed to road traffic;
- (2) CX type- gates normally open to road traffic;
- (3) CD type-gates normally open to road traffic by day and normally closed at other times;
- (4) CN type- gates normally open to road traffic by night and normally closed at other times.

The seven manned level crossings

6. The first of the manned level crossings examined is located at Fantstown, Limerick. It is a C type. It is noted that a process was initiated by Limerick County Council pursuant to section 73 of the Roads Act 1993 which sought to close the crossing by extinguishing the public right-of-way. At an oral hearing the inspector recommended closure which was supported by the management/executive of Limerick County Council. However, some of the Local Elected Members/Councillors objected despite an offer of €250,000 to the Council to upgrade an alternative route. Essentially, progress has been halted since 2009 and the 'section 73' motion was never put before the Council. It is noted that the area is close to archaeological monuments. An outline overbridge scheme was developed in 2011 at a cost estimate of €1.6 million.

7. While this is addressed later in these advices it should be noted that typically a proposed Railway Order will have set out as part of its Schedule public and private rights of way which are to be extinguished or otherwise affected.
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8. The second of the manned level crossings examined is located at Thomastown, Limerick. Again it is a C type. An outline overbridge scheme was developed in 2011 at a cost estimate of €1.6 million and it, too, is close to archaeological monuments. A significant issue here relates to the necessity to acquire lands from a landowner who is not willing to dispose of the required lands and therefore may involve the compulsory purchase of certain lands.
9. Again, while this is addressed later in these advices, one of the main aspects of a Railway Order is the power to compulsory acquire land.
10. The third of the manned level crossings examined is located at Ballyhea, Cork. It is a CD type. An outline overbridge scheme was developed in 2011 at a cost estimate of €3.4 million. Three significant issues which arise here are the (i) the refusal of access by a landowner into lands required for the purpose of carrying out survey works and (ii) the proximate location to the River Blackwater SAC (iii) the proximate location of known archaeological monuments.
11. The importance of the Board carrying out a screening for Appropriate Assessment under the Planning and Development Act 2000 (as amended)¹ and the Habitats Directive in relation to the Blackwater SAC is dealt with later.
12. The fourth of the manned level crossings examined is located at Newtown, Cork. It is a CD type. It is a joint scheme with the fifth of the manned level crossings examined located at Ballycoskery, Cork (which is also a CD type). Thus a new alternative access road at Newtown is proposed to be connected to a new overbridge at Ballycoskery. The estimated cost of the scheme proposed by Iarnród Éireann is €2.75m. The significant issues which arise include the initial proposal and subsequent withdrawal of a Part 8 proposal by

¹ Hereafter referred to as "the PDA 2000."

Cork County Council because of local opposition arising from the proximity to school and housing.

13. Again, while this is addressed later, railway works are deemed to be **exempted development** under the Transport (Railway Infrastructure) Act 2001.²
14. The sixth of the manned level crossings examined is located at Shinanagh, Cork. It is a CD type. The level crossing is directly adjacent to the existing N20 which is due to be downgraded on the completion of the M20 in 2027. The proposal is a new overbridge and a new alternative access route via an existing overbridge. The cost estimate of the alternative access is €2.0m and the overbridge is €3.0m. The issues which arise here are (i) the fact that no discussions have taken place with affected landowners (ii) again the proximate location to **the River Blackwater SAC** (iii) the proximate location of known archaeological monuments.
15. The seventh of the manned level crossings examined is located at Buttevant, Cork. It is a CX type. Notwithstanding that this overbridge scheme was developed to planning stage in 2011 in conjunction with Cork County Council and that engagement took place with landowners and their solicitors and engineers, the application was not progressed due to funding constraints. The issues which arise here are (i) again the proximate location to **the River Blackwater SAC** (ii) the proximate location of known archaeological monuments. The estimated cost is €2.5m.

Why is an application for a Railway Order necessary ?

16. The Transport (Railway Infrastructure) Act 2001 (as amended)³ provides for the application for a Railway Order by *inter alia* Coras Iompair Éireann⁴ to An Bord Pleanála⁵. The prior written consent of the National Transport Authority⁶

² Hereafter referred to as "the 2001 Act."

³ Hereafter referred to as "the 2001 Act".

⁴ Hereafter referred to as "CIÉ".

⁵ Hereafter referred to as "the Board".

is required before an application is made when an application is within the NTA's functional area.

17. In my opinion, the proposed elimination (or de-manning) of the aforesaid seven manned level crossings on the public road and their replacement in most instances with overbridges and road improvements, and all associated works, is best achieved by CIÉ applying for a Railway Order to An Bord Pleanála.

18. The Dublin-Cork Railway Line was originally known as the Great Southern & Western Railway which was the subject of various Acts of Parliament from 1844-1856. The legislation now dealing with works in relation to a Railway Line is that contained in the 2001 Act.

The role of the Board

19. In 2006 An Bord Pleanála⁷ assumed the role of the Minister for Transport where the granting of Railway Orders is concerned.

20. Subsequently, section 49 of the Planning and Development (Strategic Infrastructure) Act 2006 amended the 2001 Act *inter alia* by substituting new sections 37 to 47A for sections 37 to 47.

21. These new sections were primarily intended to transfer responsibility for the approval of a Railway Order from the Minister for Transport to the Board and to make certain related amendments.

22. Accordingly, pursuant to the 2001 Act, the Board has the powers to *inter alia* :

- Receive an application for a Railway Order;
- Assess the application;

⁶ Hereafter referred to as "the NTA".

⁷ Also referred to herein as "the Board."

- Hold an oral hearing;
- Consider a range of matters before deciding whether to grant the order to which the application relates (section 43);
- After considering these matters, if the Board is of opinion that the application should be granted, it shall make an order authorising the construction of the works applied for, including improvement and the operation of the railway subject to such conditions, modifications, restrictions and requirements (and on such other terms) as the Board thinks proper and specifies in the order.

The nature of the works

23. While I have only set out a very brief summary of the works encompassed as part of the proposed replacement of seven number manned level crossings on the main Dublin to Cork Railway Line, these proposed works are encompassed by section 2(1) of the 2001 Act which defines 'railway works' as meaning ***any works required for the purposes of a railway or any part of a railway, including works ancillary to the purposes aforesaid*** (such as parking by buses or by persons using vehicles who intend to complete their journey by railway) and relocation of utilities, and in this definition "works" includes any act or operation of construction, excavation, tunnelling, demolition, extension, alteration, ***reinstatement, reconstruction, making good, repair or renewal***.⁸

24. Further, issues identified as significant matters can be addressed in a Railway Order.

25. For example, section 36 of the 2001 Act allows for CIÉ to carry out surveys and inspections on any land and do the following: (a) inspect and survey the land and make any inquiry, investigation or examination for the purpose of ascertaining whether or not the land is suitable for the purposes of the construction of a railway; (b) carry out any investigation or examination

⁸ Emphasis added.

thereon preliminary or incidental to the purposes aforesaid, (c) bring thereon such other persons or equipment as he or she may reasonably consider necessary for the purposes of his or her functions under this section; (d) line sight, drill, bore, probe or excavate, or take such samples and carry out such tests as he or she reasonably considers necessary or expedient for the purposes of such functions; (e) if authorised, inspect and survey the land and make any inquiry, investigation or examination for the purpose of ascertaining whether or not the land is suitable for the purposes of fulfilling any of its related functions.

Exempted development

26. As pointed out above, it is important to note that a Railway Order is deemed to be 'exempted development for the purposes of the PDA 2000' and Part IV of the 2000 Act is dis-applied, by virtue of section 38 of the 2001 Act as inserted by section 115(6) of the Dublin Transport Authority Act 2008 which *inter alia* references 'railway works' specified or pursuant to a Railway Order:

...38. (1) Each of the following shall be exempted development for the purposes of the Act of 2000: (a) development consisting of the carrying out of railway works, including the use of the railway works or any part thereof for the purposes of the operation of a railway, authorised by the Board and specified in a railway order or of any incidental or temporary works connected with such development; (b) development consisting of the carrying out of railway works for the maintenance, improvement or repair of a railway that has been built pursuant to a railway order. (2) Part IV of the Act of 2000 does not apply and is deemed never to have applied to developments specified in subsection (1)....

27. The existence of a Railway Order is a necessary prerequisite to its 'exempted development' status.

28. As mentioned earlier, railway works are defined in the 2001 Act and encompass the works as part of the proposed replacement of seven number manned level crossings on the main Dublin to Cork Railway Line.

The nature of a Railway Order

29. It is important to note that an application for a Railway Order which encompasses works which comprise the proposed replacement of seven number manned level crossings on the main Dublin to Cork Railway Line is a combination of planning law, environmental law and compulsory purchase law.

30. For example, the application for a Railway Order is more than a 'planning consent' and the important question of *vires* is addressed in the Railway Legislation and the Railway Order, **interpreted together**. The Transport (Railway Infrastructure) Act 2001 repealed (and replaced) the entire of the Transport (Dublin Light Rail) Act 1996 and made certain changes to the Transport Act, 1963 (which, it may be noted, was enacted at the same time as the Local Government (Planning and Development) Act, 1963). For example, unlike the recent case law dealing with decisions of An Bord Pleanála concerning windfarms, a Railway Order treats differently "utilities" and "utility diversions." The definition of "railway works" in section 2 of 2001 Act includes any works required for the purposes of a railway or any part of a railway, **including works ancillary to the purposes aforesaid** (such as parking by buses or by persons using vehicles who intend to complete their journey by railway), **and relocation of utilities**, and in this definition "**works**" **includes any act or operation of construction, excavation, tunnelling, demolition, extension, alteration, reinstatement, reconstruction, making good, repair or renewal**.

31. By way of further example, section 2 of the 2001 Act defines "railway infrastructure" as meaning any land, buildings, structures, equipment,

systems, vehicles, services or other thing used in connection with, or necessary or incidental to, the movement of passengers or freight by railway.

32. Typically, a proposed Railway Order, including one that comprises *inter alia* the replacement of seven number manned level crossings on the main Dublin to Cork Railway Line, will provide (usually for example at Article 4 of same) authorisation for the construction of railway works in the deposited plan and these works are usually specified in detail in the First Schedule of the Railway Order. This includes “work numbers” contained in the First Schedule in any of the recent railway orders.
33. Again, a proposed Railway Order can cover *inter alia* the following matters:
(1) interpretation (2) works provisions – including the power to alter the layout of public roads (and bridges) (3) the power to create new roads (and bridges) (4) the compulsory acquisition and possession of land (5) the acquisition of rights over land (6) the extinguishment of public and private rights of way (7) temporary possession of land (8) arbitration (9) interference with apparatus (10) agreements with local authorities (11) interference with roads.
34. In addition, the 2001 Act requires that a proposed Railway Order is required to be the subject matter of an Environmental Assessment Report.
35. Thus, an application for a Railway Order which provides for the replacement of seven manned level crossings on the main Dublin to Cork Railway Line has three central legal components:
- (a) a planning/environmental consent process;
 - (b) the legal approval or authority to construct, operate and maintain a railway;
 - (c) the authority to acquire land compulsorily.
36. Each of these is required when one considers the nature of the works to be carried out at Fantstown, Thomastown, Ballyhay, Newtown, Ballycoskery, Shinanagh and Buttevant, as described above.

37. In this context the relationship between the Railway Order and the Legislation underpinning the Railway Order, namely the Transport (Railway Infrastructure) Act 2001 (the "2001 Act") is very important. For example, Railway Orders which provided for all of the railways (heavy, light rail or metro) constructed and operated in Ireland in the last 30 years usually contain the following provisions (or similar words) in Article 3 (or in an early paragraph in the Railway Order): "*The Regulation of Railways Acts, 1840-1893 and any other Act relating to railways shall apply to the railway so far as they are applicable for the purposes of and are not inconsistent with or varied by the conditions of this Order, and the Principal Act together with the Order shall be deemed to be **the Special Act** for the purposes of those enactments.*"⁹
38. This is a very significant provision in relation to the construction and operation of all railways in Ireland. For example, a railway order is defined as an order made under section 43 of the 2001 Act. Sections 37-43A were inserted/substituted in the 2001 Act by section 49(b) of the Planning and Development (Strategic Infrastructure) Act 2006.
39. Accordingly, reference to "Principal Act" above is a reference to the Transport (Railway Infrastructure) Act 2001. Consequently, it is the 2001 Act and the Railway Order which together constitute "the Special Act." The reference to the "the Special Act" has a particular significance. Similarly, section 69 of the 2001 Act expressly refers to the application of the "Railway Acts" which are significant from a construction and operational perspective. It is important, therefore, that the proposed replacement of seven number manned level crossings on the main Dublin to Cork Railway Line be applied for under the 2001 Act rather than separately under the planning code. The 2001 Act has, of course, been amended by various provisions of the Planning and Development Acts 2000-2019 and by other legislation.
40. Some of the lands required for the replacement of the manned level crossings at Thomastown, Ballyhay, Newtown, Ballycoskery, Shinanagh and Buttevant

⁹ Emphasis added.

will require Querist to exercise its compulsory purchase powers which form an important part of a Railway Order. In this regard it should be noted that the requirement now to serve a Notice to Treat within 18 months in a railway order application arises from the High Court judgment (Peart J.) at the end of 2013 in two joint cases entitled *Flancrest Enterprises Limited & Sherborough Securities Limited v. An Bord Pleanála*, (unreported, High Court, (Peart J.) December 20, 2013).

EIA/EIAR

41. The 2001 Act – as matters stand- in fact provides for “a bespoke EIS” [now EIAR] within the railway order application and indeed the 2001 Act disappplied the then regulations which provided for a (then) EIS under the planning code.
42. As presently enacted, the 2001 Act requires an application for a Railway Order to be accompanied by (what is now known as) an Environmental Impact Assessment Report¹⁰ (previously referred to as an Environmental Impact Statement) which provides a statement of the likely effects on the environment of the proposed railway works.
43. Accordingly, an application for a Railway Order requires an EIA to be carried out by the Board and I understand that an EIAR will be submitted by CIÉ to the Board as part of the application for a Railway Order. It will be recalled that the proposed works are to a railway line. As is usual with any application for a Railway Order (be it heavy rail, light rail or metro) the assessment will be in relation to the works proposed to be carried out which will be carried out in accordance with the Directive and the 2001 Act. It is therefore one Railway Order which is being applied for, but, of course, this has many aspects it.
44. A perusal of a Railway Order applied for in recent years illustrates in detail the nature of the varied works in different locations. It would be contrary to the scheme of the legislation and the Railway Order process to apply for a series

¹⁰ Also referred to as “EIAR” arising from the provisions of the EIA Directive 2014/52/EU.

of separate railway orders. Rather, these are all works in one proposed Railway order to facilitate one railway line, from Dublin to Cork.

45. Any application, will of course, have to give effect to EU Directive 2014/52/EU. At the moment there has been no transposition of the Directive insofar as the 2001 Act is concerned but it is noted that section 172 of the PDA 2000 provides for the "*Requirement for environmental impact statement*" (which has been replaced by "an EIAR"). In particular, section 172(1A)(a)(i) of the PDA 2000 defines "proposed development" as meaning "a proposal to carry out" *inter alia* a number of matters and includes at (V) and (VI) respectively "development under section 43 of the Act of 2001" and "development under section 51 of the Roads Act 1993".
46. In this regard it is noted that the "Act of 2001" is the Transport (Railway Infrastructure) Act 2001 and section 43 deals with the "Railway Order." It should also be noted that section 6(c) of the Planning and Development (Strategic Infrastructure) Act 2006 had amended the definitions section (section 2) in the Planning and Development Act 2000 so that the definition of "*strategic infrastructure development*" included: *...(g) any proposed railway works referred to in section 37(3) of the Transport (Railway Infrastructure) Act 2001 (as amended by the Planning and Development (Strategic Infrastructure) Act 2006), or (h) any compulsory acquisition of land referred to in section 214, 215A or 215B, being an acquisition related to development specified in any of the preceding paragraphs of this definition.*
47. In September 2018, the Regulations contained in S.I. No. 296 of 2018 transposed Directive 2014/52/EU into Irish planning law and on the same date associated ministerial guidelines and a ministerial circular were also published.
48. On the 12th October 2018 the Regulations contained in S.I. 404 of 2018 gave further effect to EIA Directives 2011/92/EU and 2014/52/EU by amending section 172(1)(b)(ii) of the Planning and Development Act 2000, which specifies the bodies or persons empowered to make a determination as to

whether a proposed development is likely to have a significant effect on the environment has effect for the purposes of the planning code. (The Regulations also amend paragraph 2(e)(iv) of Part 2 of Schedule 5 to the Planning and Development Regulations 2001, which sets out particular circumstances in which environmental impact assessment is not required in respect of deep drilling carried out as part of specified classes of development).

49. In addition, given the proximity of the River Blackwater SAC, screening for Appropriate Assessment¹¹ under the Habitats Directive will also be required and this is addressed below.

The role of An Bord Pleanála: EIA and AA

50. The provisions of Article 4(4) of the EIA Directive *inter alia* provide that account shall be taken, where relevant, of the available results of other *relevant assessments* of the effects on the environment carried out pursuant to Union legislation *other than under the EIA Directive*.

51. The 2014 EIA Directive replaced the reference to flora and fauna with a reference to 'Biodiversity with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EEC', namely the Habitats and Birds Directives.

52. The qualitative distinction between the assessments required to be carried out by the Board (as the Competent Authority) under the Habitats Directive compared to the EIA Directive has been clarified in a number of recent judgments: the High Court (Simons J.) in *Friends of the Irish Environment Ltd. v. An Bord Pleanála*¹²; the Supreme Court (Clarke C.J.) in *Connelly v. An Bord Pleanála*¹³ where the Supreme Court endorsed the approach of the High Court (Finlay Geoghegan J.) in *Kelly v. An Bord Pleanála*¹⁴.

¹¹ Hereafter referred to as an "AA."

¹² [2019] IEHC 80 at paragraph 42.

¹³ [2018] IESC 31; [2018] 2 I.L.R.M. 453.

¹⁴ [2014] IEHC 400.

53. Generally, Ireland has adopted a bifurcated approach to the Habitats Directive.
54. On the one hand, arising from the decision in *Case C-418/04*, Part XAB of the PDA 2000 (as amended) was introduced in respect of land use plans and proposed development projects which require development consents.
55. In this regard it is important to understand how the planning code treats of Railway Orders and their relationship with each other. For example, section 177U(8)(f) of the PDA 2000 defines '*consent for proposed development*' as *inter alia* including **approval** for development under section 43 of the Transport (Railway Infrastructure) Act 2001' i.e. **the granting** of a Railway Order.
56. In contrast, on the other hand, the European Communities (Birds and Natural Habitats) Regulations 2011¹⁵ (the 2011 Regulations) have been interpreted as applying in the non-planning context and arguably have a wider 'catchment' than Part XAB of the PDA 2000 as the 2011 Regulations apply to activities, plans and projects.
57. Article 6 of the Habitats Directive was implemented into Irish law by Part XAB of the PDA 2000. Section 177U of the PDA 2000 deals with screening for AA; section 177V deals with AA. Part XAB (section 177U) of the PDA 2000 provides that the Board must carry out a screening for AA of an application for consent for proposed development to determine, in view of the best scientific knowledge, if the proposed development, individually or in combination with another plan or project, is likely to have a significant effect on a European site.
58. Section 177 U(1) provides as follows: "A screening for appropriate assessment of a draft Land use plan or application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that Land use plan or proposed

¹⁵ S.I. No. 477 of 2011.

development, individually or in combination with another plan or project is likely to have a significant effect on the European site.”

59. Article 6(3) of the Habitats Directive and section 177 U (1) of the PDA 2000 are similar in their consideration of stage 1 screening. For example, both require the screening to consider whether the particular development is “likely to have a significant effect” on the relevant European site “individually or in combination” with other plans or projects.
60. By virtue of section 177U(2) of the PDA 2000, a competent authority is required to carry out a screening for appropriate assessment under section 177 U (1) of the PDA 2000 before consent for a proposed development is given. Under section 177 S (2) of the PDA 2000 the competent authority in the State, for the purposes of Part XAB and Article 6 and 7 of the Habitats Directive is, in the case of a proposed development, the planning authority or An BP, as the case may be. Section 177 U (8)(b) of the PDA 2000 provides that “consent for the proposed development” in section 177 U (1) of the PDA 2000 means, *inter alia*, a decision of An BP to grant permission on a planning application or an appeal.
61. European sites are defined in Regulation 2(1) of the Habitats Regulations and comprise Special Areas of Conservation (SACs) and Special Protection Areas (SPAs), at all stages of designation commencing with a ministerial notice of intention to designate. Section 2 of the PDA 2000 provides that a ‘ European site ’ has the meaning given to it by section 177R of Part XAB of the PDA 2000. Section 177R(1) of the PDA 2000 provides that ‘ European site’ means (a) a candidate site of Community importance, (b) a site of Community importance, (ba) a candidate special area of conservation, (c) a special area of conservation, (d) a candidate special protection area, (e) a special protection area.
62. It is important to note that the revisions and various amendments to the statutory provisions in the PDA 2000 dealing with AA have been informed by the jurisprudence of the CJEU and this jurisprudence has been applied and

interpreted in a number of domestic cases. The consideration, for example, of the stages involved in Article 6 was assessed by the High Court (Finlay Geoghegan J.) in *Kelly v. An Bord Pleanála*¹⁶ which decision was approved of and endorsed by the Supreme Court (Clarke C.J.) in *Connelly v. An Bord Pleanála*¹⁷. The CJEU considered the meaning of the test “*likely to have a significant effect*” on the relevant protected site in a number of judgments. Many of these judgments were discussed by Finlay Geoghegan J. in *Kelly* and more recently by the High Court (Barniville J.) in a decision of the same name but involving different parties: *Kelly v. An Bord Pleanála*¹⁸. In the latter *Kelly* case, Barniville J. helpfully reviewed the case law and set out the applicable principles.

Summary of AA screening principles

63. The following principles can be identified from the case law:

- Screening for AA may be necessary even where ‘a claim’ of exempted development (as distinct from a ‘pipeline project’ where development consent for a project had been sought prior to the expiry of the time-limit for transposing the Directive) is being relied upon: *Bulrush Horticulture Ltd v. An Bord Pleanála*¹⁹.
- Only plans and projects directly connected with the conservation management of a European site, either individually or as components of other plans and projects, are generally excluded from the provisions of Article 6(3) of the Habitats Directive because, for example, the process involved in appropriate assessment would be duplicative of that involved in conservation management: see the comments of AG Kokott in *Case 241/08 Commission v. France*; see *Case C-441/17 Commission v. Poland* where the CJEU held that the amendment of forest management plan for the Forêt de Bialowietza which authorised an increase in the volume of harvestable timber for the purposes of

¹⁶ [2014] IEHC 400.

¹⁷ [2018] IESC 31; [2018] ILRM 453.

¹⁸ [2019] IEHC 84.

¹⁹ [2018] IEHC 58 (Meenan J.).

reducing the spread of the spruce bark beetle did 'not' constitute a plan or a project directly connected with or necessary to the management of the forest.

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- ~~The probative standard involved in the screening exercise which is the catalyst or 'trigger' for both assessing and determining whether an AA is necessary is whether the plan or project, either individually or in combination with other plans or projects, is likely to have a significant effect on the European site. The standard is a light one and has been explained as 'the mere probability' or the 'risk' that a plan or project might have a significant effect: see *Case C-127/02 Mechancial Cockle Fishing* at paragraphs 41 to 43; see also the comments of AG Sharpston in *Case C-258/11 Sweetman* at paragraphs 47 to 49 which also confirmed that the requirement of a *likely significant* effect provided a *de minimis* threshold which excluded plans or projects which had no appreciable effect. The word 'likely' should be read as being less than a balance of probabilities standard and there need not be any hard and fast evidence that such a significant effect was likely, it merely has to be a possibility that this significant effect was likely: *Alen-Buckley v. An Bord Pleanála (No.2)*²⁰.~~
 - The screening exercise should not make any reference to the phrase "mitigation measures". The Habitats Directive makes no mention of the phrase "mitigation measures". The measures at issue are, rather, the measures which are intended to avoid or reduce the harmful effects of the proposed project on the site concerned: *Case C-323/17 People Over Wind*.
 - The screening for AA should not take account of the measures intended to avoid or reduce the harmful effects of the plan or project on the European site: *Case C-323/17 People Over Wind*.
 - Arising from the decision of the CJEU in *Case C-323/17 People Over Wind*, the decisions of the High Court (Haughton J.) in, for example, *Ratheniska Timahoe and Spink (RTS) Substation Action Group & Another v. An Bord Pleanála*²¹ and *Rossmore Properties Ltd. v. An Bord Pleanála*²² must now be

²⁰ [2017] IEHC 541 (Haughton J.)

²¹ [2015] IEHC 18.

²² Unreported, High Court, (Hedigan J.), August 28, 2014.

in doubt. For example, in the application for a certificate for leave to appeal pursuant to s. 50A(7) and s. 50A(11) of the Planning and Development Act, as inserted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, the High Court in *Rossmore Properties Limited v. An Bord Pleanála*²³ refused to certify at that point the following question: "...To what extent is the Competent Authority entitled to take account of mitigation measures in the Stage One screening decision in determining that there would be no likely significant effect on an SAC?..."

- Thus, in the context of carrying out a screening for AA and assessing any "likely significant effect", assumptions cannot be made that, for example, best practice construction management techniques, would prevent harmful effects to a European site.
- In light of the precautionary principle, a "risk" will be found to exist if it cannot be excluded on the basis of objective information that the particular development will have significant effects on the protected site. By virtue of section 177U(4) of the PDA 2000 an appropriate assessment will be required if, on the basis of objective information, a significant effect on a European site cannot be excluded. Under section 177U(5) of the PDA 2000, an appropriate assessment will not be required if, on the basis of objective information, a significant effect on a European site can be excluded.
- Where there is doubt as to the absence of significant effects an AA must be carried out. The requirement to conduct an AA will arise where, at the screening stage, it is ascertained that the particular development is capable of having any significant effect.
- The possibility of there being a "significant effect" on the European site will give rise to a requirement to carry out an AA for the purposes of Article 6(3). There is no need to establish such an effect and it is merely necessary to determine that there "may be" such an effect.
- In order to meet the threshold of likelihood of significant effect, the word "likely" in Article 6(3) and S. 177U(1) should be read as being less than the

²³ [2014] IEHC 557; unreported, High Court (Hedigan J.). November 24, 2014.

balance of probabilities. Thus the requirement is that there is a "*possibility*" that this significant effect is likely.

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- ~~The assessment of whether there is a risk of "significant effect" on the European site must be made in light of the characteristics and specific environmental conditions of the site concerned by the relevant plan or project.~~
 - Plans or projects or applications for developments which have "no appreciable effect" on the protected site are excluded from the requirement to proceed to AA. In this regard, if all applications for permission for proposed developments capable of having any effect whatsoever on the protected site were to include "activities on or near the site would risk being impossible by reason of legislative overkill".

Conclusion


64. In summary, I am of the view that the works required in the replacement of seven numbered manned level crossings come within the ambit of the 2001 Act and accordingly CIÉ should make an application for a Railway Order to carry out these works.

65. In this regard it is important to point out that while CIÉ prepares and submits the documents comprising EIAR (EIA) and, if necessary an NIS (AA) as part of its application for a Railway Order, it is An Bord Pleanála –as the competent authority- which carries out the environmental assessment and the appropriate assessment.

66. Given the land which is also which is required to be acquired compulsorily, the Railway Order, if granted by An Bord Pleanála under the 2001 Act also has effect as if it was a compulsory purchase order referred to in section 10(1) of the Local Government (No.2) Act 1960 (as inserted by section 86 of the Housing Act, 1966). Further in this regard, the provisions of a Railway Order (in its articles and schedules) can address land over which rights of way and other easements may be acquired, public and private rights of way which may

required to be extinguished, new roads which may require to be constructed, public roads which may require to be altered, agreements with the two relevant planning authorities as well as containing conditions which An Bord Pleanála may prescribe in the event of granting a Railway Order.

67. In due course I can advise further in relation to the overall process involved in the making of the application to An Bord Pleanála (including publication and notification requirements before an application is made for a Railway Order) and in the drafting of the proposed Railway Order having regard to the nature of the proposed development.


CONLETH BRADLEY SC

4th February 2020

