



27.06.2012

NOTICE TO MEMBERS

Subject: Petition 0013/2008 by Mr. John McElligott (Irish), on behalf of Kilcolgan Residents Association, on alleged breaches of the EC Directive on Strategic Environmental Assessment in connection with the approval and planning of a Liquefied Natural Gas (LNG) terminal in the proximity of Shannon Estuary (Ireland)

1. Summary of petition

The petitioner criticizes the fast-track planning procedure applied by the Irish Government in connection with the construction of a Liquefied Natural Gas (LNG) terminal in the proximity of Shannon Estuary (Ireland). He considers that the EC Directive on Strategic Environmental Assessment and the Seveso II Directive have been breached. The petitioner explains that the fast-track planning procedure has been enacted on the basis of the Planning and Development Act 2006 and it allows the approval of certain projects without any public consultation. The petitioner maintains that the project has been sliced in order to circumvent the requirements concerning the conduct of a strategic environmental assessment and asks the European Parliament to have the matter investigated.

2. Admissibility

Declared admissible on 19 June 2008. Information requested from Commission under Rule 192(4).

3. Commission reply, received on 21 October 2008.

The petitioner criticizes the fast-track planning procedure applied by the Irish Government in connection with the construction of a Liquefied Natural Gas (LNG) terminal in the proximity of the Shannon Estuary (Ireland). He considers that the EC Directives on Strategic Environmental Assessment, on the Environmental Impact Assessment and the Seveso II

Directive have been breached. The petitioner explains that the fast-track planning procedure has been enacted on the basis of the Planning and Development Act 2006 and it allows the approval of certain projects without any public consultation. The petitioner maintains that the project has been sliced up in order to circumvent the requirements concerning the conduct of a strategic environmental assessment and asks the European Parliament to have the matter investigated.

Project slicing

The petitioner presents arguments according to which the project has been sliced up (LNG storage, pipeline, road and electricity supply). Project slicing implies the breaking up of one project into different parts. In this case, it is the Commission's opinion that the impact assessment covers one project (the Liquefied Natural Gas). Cumulative (indirect) impacts with other projects will, of course, have to be identified in the course of the remaining impact assessments.

EIA

Council Directive 85/337/EEC¹ on the assessment of the effects of certain public and private projects on the environment (known as the Environmental Impact Assessment or “EIA Directive”) as amended by Directives 97/11/EC² and 2003/35/EC³ covers the construction of thermal power stations with a heat output of 300 megawatts or more. For these projects, listed in Annex I, the directive requires that, before development consent is given, projects likely to have significant effects on the environment are made subject to an assessment of their environmental effects. During the EIA procedure, the public must be consulted and the final decision to grant or refuse development consent must take account of the results of the EIA and of public consultation.

According to the information provided by the petitioner, an EIA has been carried out, environmental aspects duly taken into account and the public was entitled to react and provide their opinion within 6 weeks. The time allocated for the public consultations is left to the discretion of the Member State.

SEA

Directive 2001/42/EC⁴ (the Strategic Environmental Assessment or SEA Directive) applies to plans and programmes. It determines in its Article 3(2) that land use plans (which sets the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC (EIA Directive)) are to be made subject to an SEA allowing for one exception: Art 3(3) stipulates that plans for small areas at local level could be exempted. In its national legislation, Ireland has defined this possible discretion as areas concerning a population of 10.000.

¹ OJ L 175, 5.7.1985.

² OJ L 73, 14.3.1997.

³ OJ L 156, 25.6.2003.

⁴ OJ L 197, 21.7.2001, p.30.

The petitioner claims that the community development plan was modified to allow a change of use from rural to industrial. It appears that the development plan was modified without the requirement of the SEA (a screening was carried out and concluded that no impact assessment was needed). Independently from this petition, the Commission has queried the conformity of Irish legislation with regard to the extent to which SEA is made discretionary rather than automatic for modifications of land-use plans of the kind referred to by the petition (Infringement N°2007/2166).

Seveso

The Seveso II Directive¹ applies to such terminals according to the quantity of gas present: only some requirements apply to terminals containing from 50 to 200 tonnes (lower tier establishments); all requirements apply to those terminals which contain more than 200 tonnes (upper tier establishments). For the purposes of this directive, establishment shall mean the whole area under the control of an operator where dangerous substances are present, including common or related infrastructure or activities. However, the transport of dangerous substances in pipelines outside the establishment is excluded. Several provisions of the directive already apply before the operator commences construction or operation. The land-use planning provisions require the control of siting of new establishments. Member States shall ensure that all competent authorities and planning authorities responsible for decisions in this area set up appropriate consultation procedures to ensure that technical advice on the risks arising from the establishment is available when decisions are taken.

Based on the information provided, the Commission cannot identify any breach of the EIA in relation to the procedure for the project in question.

As regards the SEA, the Commission has opened an exchange of views with the Irish authorities on compliance with Directive 2001/42/EC of the national laws which were used to deem an SEA unnecessary in this case.

4. Commission reply, received on 22 January 2010.

The additional documents provided by the petitioner have been analyzed by the Commission and give rise to the following comments.

SEA

Directive 2001/42/EC² (the Strategic Environmental Assessment or SEA Directive) applies to plans and programmes. It determines in its Article 3(2) that land use plans (which sets the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC (EIA Directive)) are to be made subject to an SEA allowing for one exception: Art 3(3) stipulates that plans for small areas at local level could be exempted from the mandatory carrying out of an SEA. Instead, a screening (an assessment as to whether an SEA is necessary) needs to be performed. In its national legislation, Ireland has defined this possible discretion as areas concerning a population of 10 000. Information provided by the

¹, OJ L 10, 14.1.1997, p.13.

² OJ L 197, 21.7.2001, p.30.

petitioner demonstrates that the population affected exceeds 10 000.

A screening process was carried out at the time of the proposal to re-zone the rural lands to industrial ones. The screening process concluded that no SEA was required on the basis that *"it does not appear that there is a need for a SEA in this instance as the proposed variation is unlikely to result in development which would have significant effects on the environment"*.. The petitioner is opposing the screening decision arguing that the independent expert who carried out the screening was not aware that the zone would later be used for an activity likely to have significant impact on the environment (i.e. in this case the LNG terminal). Furthermore, 10 hectares of the zone are in SAC waters and the site is surrounded by SAC, NHA and SPA land and water. The planning authority was satisfied that "any significant environmental issue arising for any development on the lands would be resolved through an EIS".

The Commission is also concerned by the discrepancy in the approach of the Irish authorities in dealing with the development under fast track legislation for 'strategic projects' whilst not requiring an SEA. Indeed, one issue raised by the petitioner is Ireland's use of the *Planning and Development Act 2006* (so-called "Strategic Infrastructure") in order to, according to Irish authorities, have a more efficient planning consent procedure for strategic infrastructure developments. This procedure provides for some type of infrastructure projects to be granted direct planning permission by the Planning Authority (An Bord Pleanála) and thus avoiding the step of the local authority. It also means that the public is denied of its right to participate and appeal in the planning process.

EIA

Council Directive 85/337/EEC¹ on the assessment of the effects of certain public and private projects on the environment (known as the Environmental Impact Assessment or "EIA Directive") as amended by Directives 97/11/EC² and 2003/35/EC³ covers the construction of thermal power stations with a heat output of 300 megawatts or more. An EIA has been duly carried out on this project (the Liquefied Natural Gas) and public opinion sought. However, the petitioner presents arguments according to which the project has been sliced (LNG storage, pipeline, road and electricity supply). Project slicing implies the breaking up of one project into different parts. The EIA Directive requires that cumulative (indirect) impacts with other projects have to be identified in the course of the respective impact assessments to ensure that the overall impact of the projects concerned can be assessed. On the basis of the information received, it is not clear whether the cumulative effects have been taken into account in this case.

Seveso

The provisions of the Seveso II Directive relevant to this development were outlined in the previous communication to the committee. On the basis of the information received to date, no evidence indicating a breach of that directive has been found in this case.

¹ OJ L 175, 5.7.1985.

² OJ L 73, 14.3.1997.

³ OJ L 156, 25.6.2003.

On the basis of the further information provided, the Commission has decided to raise the above-mentioned issues with the Irish authorities.

5. Commission reply, received on 11 February 2011.

On the basis of the additional information received, the Commission concluded that there was no evidence indicating a breach of the Seveso Directive. Regarding compliance with the SEA and the EIA Directives, the Commission initiated an EU Pilot procedure to request the Irish authorities to provide further information.

The Irish authorities were invited to comment on the adequacy of the screening process undertaken in this case, in particular, the petitioner's allegation that the screening did not take into account the intended use of the land following re-zoning (i.e. construction of this LNG terminal).

They were also asked to comment on the fact that, for purposes of the SEA, the rezoning was apparently treated as of local importance whereas, for purposes of project decision-making, the LNG terminal was treated as of national strategic importance (application of Strategic Infrastructure Act).

Furthermore, they were requested to comment on why the land-use rezoning linked to this project was not subjected to a SEA (only screening). Although falling below Ireland's threshold of an area concerning a population of 10 000, there was an implication that using such a population threshold was not sufficient to adequately take account of the wider importance of this site, for example, 10 hectares of the zone are in SAC waters and the site is surrounded by NATURA 2000 sites (SAC¹ and SPA²) and NHA³.

The Irish authorities replied that on the basis of the SEA screening process, a full SEA was not required for the rezoning of 189 hectares. The copy of the decision, and the rationale for it, were made available for public inspection as required by EU and national legislation.

The Irish Planning and Development (SEA) Regulations, 2004 (S.I. No. 436 of 2004) require that a full SEA be mandatory above a population threshold of 10 000; below this threshold, it is a matter for the planning authority to consider, by way of a screening report, if a proposed variation to a plan would have significant effects on the environment, thus warranting a SEA.

The Screening Report outlined that, at that point in time when there were no specific indications of the future uses of the lands or the likely industrial activity on the lands to be rezoned, no specific significant environmental problems were identified.

The magnitude and spatial extent of the effects (i.e. the geographical area and size of the population likely to be affected) were also considered in the Screening Report, having regard to the area of land (189 hectares) to be rezoned under the proposed variation. In the 2002

¹ SAC - Special Area of Conservation designated by Member States under the Habitats Directive.

² SPA - Special Protection Area designated under the Birds Directive.

³ NHA - Natural Heritage Area, designated under the Irish legislation, is an area considered important for the habitats present or which holds species of plants and animals whose habitat needs protection.

Census, Ballylongford had a population of 405 with Tarbert village at 805 and it was, therefore, considered that the magnitude and spatial extent of the likely effects were not significant in the context of the geographical area and the population likely to be affected. Furthermore, as the area to be affected by the proposed re-zoning was significantly under the 10 000 population threshold for a mandatory SEA, such an approach was not required in these circumstances.

The SEA Screening Report recognised that, while the lands were not subject to any environmental designations within SACs, SPAs or NHAs, there are located in proximity to a number of areas designated for protection under national and EU legislation. However, the report considered that, given the size and extent of areas designated, the localised nature of the lands to be rezoned and the mitigation measures required by the policies and standards outlined in local and national planning guidance, it was unlikely that there would be any significant environmental impact on these areas. The Screening Report also stated that the proposed variation was not regarded as having any significant effect on these designated areas as regulatory policy measures have been put in place within the Kerry County Development Plan in order to safeguard and mitigate against development proposals in the vicinity of or affecting in any way a designated SAC, SPA or NHA.

The Screening Report also took account of the cumulative nature of effects. It considered that there is potential for some cumulative impact due to the extent of the land to be rezoned. However, given the likely phased basis of development on these lands and the provision of appropriate mitigation measures through the development management process, it was considered that any potential cumulative impacts could be mitigated through the latter process.

On the basis, *inter alia*, of the foregoing considerations, the Screening Report concluded that the proposed variation was not likely to have significant effects on the environment.

The Irish authorities were asked to comment on the petitioner's assertion that the EIA Directive was not properly applied, as the cumulative impacts of all the projects on this site were not given due consideration, i.e. project 'slicing' took place.

In respect of the issue of project slicing, the Irish authorities referred to the Inspector's Report (PL08.PA0002) of 14 March 2008 which recommended to An Bord Pleanála (the planning authority for the purposes of development applications) that permission be granted for the development for the reasons and considerations and subject to the conditions set out in the Inspector's Report. The Inspector's Report noted that the board was fully aware of the need to consider, to some degree, ancillary issues, e.g. those relating to the pipeline, within the overall application in order to avoid project splitting and brought this clearly to the applicants' attention at pre-planning meetings. The Inspector's Report concluded that as much detail as could be expected from the applicant had been submitted in relation to these ancillary projects and that the making of the present application, separately from the ancillary projects, could not reasonably be considered a ploy to avoid an environmental impact assessment. In any event, a planning application for the gas pipeline would itself require the submission of an Environmental Impact Statement.

The analysis of the additional documents provided by the petitioner gives rise to the following

comments:

SEA Directive

The SEA Directive determines in its Article 3(2) that land use plans (which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive) are to be made subject to an SEA allowing for one exception: Art 3(3) stipulates that plans for small areas at local level could be exempted from the mandatory carrying out of an SEA. Instead a screening (an assessment as to whether an SEA is necessary) needs to be performed. In its national legislation, Ireland has defined this possible discretion as areas concerning a population of 10 000. The Commission notes that the Irish authorities followed the provisions of the transposed national legislation. Inclusion of such screening provisions (population or size thresholds) might be interpreted as a weakness of the national legislation and indicate that the Irish authorities exceeded the margin of discretion given by the directive in this respect. As such, the issue of SEA screening thresholds should be subject to further clarifications with the Irish authorities.

EIA Directive

The EIA Directive requires that cumulative (indirect) impacts with other projects have to be identified in the course of the respective impact assessments to ensure that the overall impact of the projects concerned can be assessed. On the basis of the additional information received, (Inspector's Report), it seems that cumulative effects have been taken into account in this particular case.

The Commission will raise the issue of the transposition of the SEA Directive with regard to the population threshold of 10 000 which gives discretion to the Irish authorities to decide whether a full SEA is needed or not. A meeting with the Irish planning authorities is planned in early 2011 and it will be used as an opportunity to discuss this issue.

Regarding the EIA Directive, the Commission has not detected a breach of EU legislation on the basis of the additional information provided.

6. Commission reply (REV III) , received on 16 December 2011.

The Commission held a meeting with the Irish authorities in early 2011 and received further information from the petitioner.

The information submitted by the petitioner regarding the timing of the discussions on the LNG project versus the timing of a SEA screening has brought new evidence to light. The Commission is currently re-examining this issue.

The petitioner has also raised several new elements related to compliance with the EIA and Habitats Directives which are potential issues of concern - lack of marine risk assessment, the likely significant impact on Natura 2000 sites and the cumulative impact (other plans and projects in the Shannon Estuary). These issues will also be raised with the Irish authorities.

As regards other EIA aspects, the assessment of alternatives and the decommissioning of the

LNG facility, the Commission does not consider that there is sufficient evidence to identify a breach of the EIA Directive.

7. Further Commission reply (REV IV), received on 27 June 2012.

The Commission raised the issue of the Liquefied Natural Gas (LNG) terminal (Shannon Estuary) at the meeting with the Irish authorities and received additional clarifications regarding the following issues raised by the petitioner: SEA screening; marine risk assessment of an LNG spill on water; cumulative impacts of the project with other plans and projects in the estuary; 'appropriate assessment' under the Habitats Directive (Article 6.3). A summary of the main findings regarding the above issues is as follows:

SEA screening

The Commission asked the Irish authorities to clarify why the LNG project and other associated developments were not taken into account within the SEA screening procedure for the variation of the County Development Plan.

The Irish authorities responded that the variation served to regularise and give effect to the long-term objectives and policy to develop these lands for industry and to remove any possible misunderstanding of the intended use of the lands as adopted in the County Development Plan and previous plans as objectives.

While the Council was aware of the Shannon LNG proposal from mid-2006, it had no concrete application or any guarantee that such a proposal would ever come to fruition (like other proposals in the past which never materialised) and for this reason, it would have been inappropriate in any case to assess a variation in the context of one such proposal. It was considered that the impact of any specific proposal (including cumulative effect) would be addressed in the context of the EIA.

Marine risk assessment

As regards the concern expressed by the petitioner regarding the risk of an LNG spill on water, the Irish authorities explained that the environmental impact statement submitted with the application included the summary of a Quantitative Risk Assessment (QRA) undertaken in support of the proposed development. The complete QRA was made available to the public a few days after the lodging of the application. During the consideration of the application, An Bord Pleanála received advice from the Health and Safety Authority and held a 7-day public oral hearing, two days of which were devoted to a Health and Safety module during which the probability and consequences of an LNG spill on water and the credibility of such an event, were discussed in detail.

The Irish authorities explained that, taking into account the processes employed in the transfer of the liquid gas from ship to shore, the nature and location of the re-gasification process, as well as a safety shut-off in case of emergency, any leakages of liquefied natural gas would be momentary and minimal in volume.

On the basis of the above, An Bord Pleanála, as consenting authority, was and is of the

opinion that there is no credible likelihood of a significant inter-mixing of liquid natural gas and estuarine water, arising from the operation of the terminal and that accordingly did not consider that a more detailed and separate marine risk assessment was warranted.

Cumulative impacts with other plans and projects

The Irish authorities stated that at the time of the LNG terminal assessment, An Bord Pleanála was unaware of any other plans or projects of significance on the estuary. In particular, the four plans/projects cited by the petitioner, namely an intensified electricity generation hub, a plan for a European trans-shipment hub, a renewable energy hub and an oil and gas storage hub, were not known as agreed upon or as having any particular status at that time. Indeed, the Board remains unaware of any plans/projects fully meeting these descriptions, although the reference to an intensified electricity generation hub may allude to the proposed construction of a combined cycle gas turbine power plant of 450 megawatts at the Tarbert generating station for which permission was granted on 3 December 2010, almost three years after the permission was granted for the LNG terminal.

'Appropriate assessment' under the Habitats Directive (Article 6.3)

While the use of the precise terminology 'screening for appropriate assessment' and 'appropriate assessment' does not specifically occur throughout the application and the environmental impact statement documentation for the LNG project, An Bord Pleanála considered that the principles and requirements of Article 6.3 of the Habitats Directive were clearly and fully met. The environmental impact statement was comprehensive in dealing with the implications of the project for the adjoining and nearby Natura 2000 sites in view of their conservation objectives. In particular, relevant chapters of the environmental impact statement on terrestrial and freshwater ecology and marine and estuarine ecology, respectively, acknowledged the species and habitats which constitute the interest of the relevant Natura 2000 sites.

In addition, An Bord Pleanála commissioned an independent ecology consultant's report on the proposed development, spent considerable periods at the oral hearing discussing ecological matters and included thirteen conditions in the permission decision relating to the protection of the specified species and habitats and the prevention of water pollution.

On the basis of the environmental impact statement and the ecology consultant's report mentioned above, An Bord Pleanála, as consenting authority, is of the view that the requirements of Article 6.3 of the Habitats Directive were fully met in its assessment prior to granting permission for this development.

On the basis of the additional information provided by the Irish authorities, no breach of the EU environmental legislation can be identified in relation to the LNG terminal.