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# elni REVIEW

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# Editorial

Already the founding conference of elni in 1990 discussed the potential benefits of the 'Environmental Impact Assessment' (EIA). The 'Strategic Environmental Assessment' (SEA) might be seen as the younger sister of EIA; however in terms of scope bigger. The European Directive on SEA has been subject to a REFIT-process by the European Commission. The results were published at the end of November this year. The conclusion in general terms: The SEA Directive is fit for purpose. However, some Member States expressed their concerns with regard to the recent decisions of the CJEU. *Thomas Bunge* assesses the Term 'Plans and Programmes' as interpreted by the highest EU court. Air quality is also a neuralgic point in many cities throughout Europe. In this respect, *Ulrike Weiland* reports on SEA in Air Quality Planning in Germany.

*Attracta Uí Bhroin* from Dublin based Irish Environmental Network comments on a November 2019 CJEU ruling following the 'Derrybrien case' concerning EIA in Ireland. According to Attracta, the judgement has profound implications for several legal questions concerning, i.a., obligations to remedy and state liability.

Besides, the current issue of the *elni Review*, once more, features several contributions on the governance of chemical substances. *Simon Johannes Winkler-Portmann* analyses the compliance challenges of the automotive industry concerning obligations of REACH on the communication of 'substances of very high concern' (SVHCs). He thus assesses the effectiveness in terms of compliance of the sector's governance approach to control chemical substances used in every single part of a vehicle, and develops options to overcome existing deficits.

The *Recent Developments* section starts off with *Silke Kleihauer* and *Leonie Lennartz* reporting on the results of a research project aiming to support 'more sustainable chemistry' in the textile supply chain, i.a. by broadening the view from the 'reactive' compliance position to a 'proactive' beyond compliance perspective. Thereby outlining, in addition, the highlights of a 'Scenario Process' together with actors from the textile chains, the piece also provides relevant methodological perspectives with a view to supporting transitions of industry sectors in the direction of sustainable development. The contributions by *Winkler-Portmann* and *Kleihauer / Lennartz* are also to be seen in the context of the pervasive goal of creating more 'Circular Economies', which is pushed recently by normative impulses (e.g. recast of the Waste Framework Directive – WFD) and which increasingly is reflected in strategic approaches of companies. Against this background, *Henning Friege* et al. comment on the 'tricky relationships' of chemicals, waste and product legislation. Considering the interfaces and intersections of these frameworks they formulate eminent policy recommendations aimed to ensure that 'Circular Economies' are capable of avoiding the 'recycling' of problematic chemical substances present in (waste) raw materials. Finally, *Martin Wimmer* from the Austrian Ministry for Sustainability and Tourisms outlines key findings of an 'International Conference on Green Chemistry' during the Austrian EU Presidency. The event discussed perspectives how to foster and better integrate into the legal frameworks the principles of 'Green Chemistry', which guide the design of chemical substances, products and processes to avoid hazards and reduce resource use – thus offering potentials for industries to ensure their compliance and also for 'Circular Economies'.

*Claudia Schreider, Julian Schenten and Martin Führ*
December 2019

# Remedying Failures to Conduct Environmental Impact Assessment, Should Not Result in a Game of Snakes and Ladders. Comment on Court of Justice Case C-261/18 of 12 November 2019

*Attracta Uí Bhroin*

## 1 Introduction

On the 12th of November 2019, the Court of Justice gave judgment in case C-261/18[1] against Ireland in a further action under Article 260(2) TFEU taken by the European Commission. The action was for failure to comply with part of an earlier judgment of the Court in case C-215/06[2], over 11 years earlier on 3 July 2008[3]. This was no mere administrative follow-up. In summary, the issues at stake were in the first instance:

– Ireland's continued failure to remedy a breach of EU law in respect of assessment obligations for the Derrybrien windfarm under Directive 85/337/EEC[4] ('the Environmental Impact Assessment Directive' or 'EIA Directive') either before or after amendment by Directive 97/11/EC[5], in circumstances where the local community and environment are still suffering the consequences of the original and ongoing failure;
– secondly and most importantly, Ireland's failure to properly observe and respond to the Court of Justice's earlier judgment from 3rd July 2008 on that breach, and the implications for its duty of sincere co-operation.

The Commission's further action was initiated in May 2018 following nearly ten years of failure by Ireland to remedy the breach in respect of the assessment required for the Derrybrien windfarm, as identified in the second ground of the operative part of the judgment of the Court in July 2008 in case C-215/06[6]. In fact, following the hearing for the Commission's latest action on April 1st, 2019, in his opinion, Advocate General Pitruzzella likened Ireland's vacillating proposals for responding to the 2008 judgment to "*a game of snakes and ladders*"[7]. The analogy was sadly all too apt as he set out in considerable detail the particulars of Ireland proposing an approach to, or a position on the judgment only to then subsequently abandon or divert it, bringing the overall advancement of a remedy back to square one, or close to it, time and time again.[8]

The judgment in this latest case C-261/18 follows a number of important judgments from the Court on both direct action by the EU Commission in respect of failures to conduct assessments as required by the EIA directive, and preliminary references from national courts under Article 267 TFEU seeking clarification from the Court of Justice on such matters. This latest judgment draws on these and presents a comprehensive landscape of jurisprudence and clarifications against which such matters can be viewed. Consequently, it will be of interest to all those concerned with the complex questions and issues which arise when dealing with developments which have been advanced and constructed without any, or any adequate assessment in accordance with Article 2(1) and Articles 4 to 10 of the EIA Directive.

As set out in more detail below, the judgment *inter alia* provides for a very clear rehearsal of the Court's previous jurisprudence of the obligation to remedy breaches of EU law and provides for further clarity on this. It further addresses the complex issue of legal certainty for developers with the obligations to nullify the unlawful consequences of a breach of EU law and the limitations on procedural autonomy for the Member States. It is particularly interesting in the context of the arguments presented by Ireland in respect of procedural autonomy and legal certainty for developers and how the Court robustly deals with them. The Court also provided Ireland with a very clear and financially significant reminder of the duty of sincere co-operation in respect of Member State's obligation to respond to the Court's rulings, and which it specifically highlighted in that element of the judgment assessing the financial penalties[9].

1 Judgment of the Court,12 November 2019, case C-261/18, Commission v Ireland, EU:C:2019:955.
2 Judgment of the Court, 3 July 2008, case C-215/06, Commission v Ireland, EU:C:2008:380.
3 Case C-215/06 concerned two matters. The first comprised flaws in Irish legislation used to implement the Environmental Impact Assessment Directive and the second a failure to apply that Directive to a specific project. Case C-261/18 relates to the second matter.
4 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment OJ L 175, 5.7.1985.
5 Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment OJ L 73, 14.3.1997.
6 Judgment of the Court 3 July 2008, case C-215/06, Commission v Ireland, EU:C:2008:380.
7 Court of Justice case C-261/18, Commission v Ireland, EU:C:2019:493, Opinion of Advocate General Pitruzzella, paragraph 63
8 *Ibid*., para. 7-19
9 Judgment of the Court, 12 November 2019, case C-261/18, Commission v Ireland, EU:C:2019:955 paragraph 120: "*It must be found that, in those*

The Court sets out in detail the rationale for the significant lump sum penalty it imposed[10], which was significantly over the minimum sought by the EU Commission, and for the daily penalty payment levied from the date of the 2019 judgment, until the earlier judgment at issue is complied with.[11]

The particularly protracted and complex issues which arose in this case may serve to highlight two further important issues. Firstly, the importance of the role of the EU Commission in being able to pursue action in a very timely way to enforce EU law, so that the homogeneity of market conditions through a consistent observance of EU law across the Member States is not to be compromised, as this is clearly so fundamental to the effective operation of the Union. Secondly, the importance for the public and environmental non-governmental organisations ('eNGOs') to be able to effectively access justice at Member State level and secure adequate and timely remedies. This allows for decisions, acts and omissions by public authorities, and acts and omissions by private parties which are contrary to EU law to be more immediately challenged and addressed, in accordance with Article 9 of the Aarhus Convention ratified by the EU[12] (forming an integral part of the EU legal order[13]), and for the public and eNGOs to be able to effectively in practice uphold their EU legal rights under Article 47 of the EU Charter of Fundamental Rights.

## 2 Context for this further judgment

There are few adults in Ireland today that won't remember the devastating images from 16 years ago of a massive bog slide in 2003 known as the Derrybrien landslide. The media reports at the time beamed images of the devastation into our homes. Those images seemed very alien at the time and more akin to something we then associated with other parts of the world more vulnerable to natural disasters. All reflected with relief on what a miracle it was that there was no loss of human life, as the devastating slide of tonnes of wet peat travelled over around 22 km across land, with around half a million cubic metres of rain sodden peat dislodged into the Abhainn Da Loilioch River (Owendalulleegh) and onto Lough Cutra. Details of the some 50,000 fish killed and the long term damage to spawning grounds, the massive local disruption with damage to roads and property, and the contamination of water supplies for local communities and live stock were all relayed.

Details unfolded, about an initial slide followed by this further massive movement following heavy rain, and the association with the development of what is known as the Derrybrien windfarm, came into sharp focus. The Derrybrien windfarm, was then the largest windfarm in Ireland and one of the largest in Europe. It is situated in the vicinity of Derrybrien, a tiny village in County Galway in the Slieve Aughty Mountains, where the impacts of the slide were felt by its people and those in the town of Gort and surrounding area, its environment and in particular aquatic species.

Fast forwarding 5 years to the Court's findings – the EU Court of Justice judgment in case C-215/06[14] in respect of the Derrybrien Windfarm found serious failures in respect of the compliance with the assessment obligation's for various phases of the windfarm project under the original EIA Directive 85/337/EEC and as amended by Directive 97/11. Two investigative reports from 2004 included in the case file concluded that the environmental disaster had to be linked to the construction of the Derrybrien windfarm.[15]

To fully appreciate the recent further judgment (case C-261/18) in November 2019 on this earlier case (C-215/06), it may be helpful to understand a little more about the original case, given the consequential complexities and arguments which arose.

As noted at the outset, there were two complaints in the original case C-215/06, with only the second complaint concerning the Derrybrien windfarm and its assessment under Directive 85/337 and as amended. The first complaint was more general in nature and focused on Ireland's transposing legislation, and the Commission contending that Ireland had not "*taken all the measures necessary to comply with Articles 2, 4 and 5 to 10 of Directive 85/337, either in its original version or as amended by Directive 97/11*"[16].

The first of the complaints had three limbs to it. The second legal plea made by the Commission is of interest here given that what Ireland subsequently introduced becomes intertwined with the second Derrybrien complaint. Put simply it concerned the

*circumstances, Ireland's conduct shows that it has not acted in accordance with its duty of sincere cooperation to put an end to the failure to fulfil obligations established in the second indent of point 1 of the operative part of the judgment of 3 July 2008, Commission v Ireland . (C-215/06, EU:C:2008:380), which constitutes an aggravating circumstance*".

10 *Ibid.*, para. 111-126.

11 Ibid., para. 127-135.

12 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Decision 2005/370/EC OJ L 124.

13 Judgment of the Court, case C-240/09 Lesoochranárske zoskupenie EU:C:2011:125, paragraph 30: "*the provisions of that convention [The Aarhus Convention] now form an integral part of the legal order of the European Union*".

14 Judgment of the Court, 3 July 2008, case C-215/06, Commission v Ireland, EU:C:2008:380.

15 Court of Justice case C-261/18, Commission v Ireland, EU:C:2019:493, Opinion of Advocate General Pitruzzella, para. 3.

16 Judgment of the Court, 3 July 2008, case C-215/06, Commission v Ireland, EU:C:2008:380, para. 34.

legislative framework in Ireland to routinely grant what was known as "retention permission" for developments carried out without complying with the EIA Directive in whole or in part. The Commission argued successfully that this undermines the preventive objectives of Directive 85/337 as amended. The Court clarified that: "*While 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*."[17] Having highlighted how any such regularisation should be of an exceptional nature, the Court then went on to take issue with the system then in place in Ireland[18]. It found in favour of the Commission on this issue[19].

Given that Ireland's system of granting retention permission was found non-compliant with the EIA Directive by the Court, Ireland following the judgment decided to institute a system which is known as 'substitute consent', in its planning legislation. This was to allow for the regularisation of consents and/or developments in certain circumstances and also provides *inter alia* for remedial assessments. Suffice to say the particular legislation introduced in Ireland for this regime remains controversial. It is simply highlighted here because the substitute consent regime introduced features largely in the issues which arose subsequently in relation to the resolution of the Derrybrien windfarm issue. This is set out later below in respect of the more recent further action in case C-261/18.

It may also be helpful to understand a little about some of the complexities of the second complaint pertaining to the Derrybrien windfarm in the original case (C-215/06), both pertaining to the assessment under the EIA Directive and the deficiencies found.

The windfarm had involved a number of different phases of development and changes which were helpfully summarised by the Court.[20] This meant that the applications for phases of development and changes to consents straddled, as it were, two versions of the EIA directive, namely the earlier original 85/337/EEC and that amended by Directive 97/11, where Article 3(1) of Directive 97/11/EC provides that the 14 March 1999 as the effective date for its provisions.

Certain amendments introduced by Directive 97/11 were particularly relevant, including that windfarms were added to the projects listed in Annex II[21] and thus were a project which required screening to determine the need for assessment under the Directive in accordance with the amended provisions of Article 4 and the new Annex III criteria further to the changes introduced by Directive 97/11. However, while windfarms were not listed as a category of project for the purposes of Environmental Impact Assessment in either Annex I or II of the original Directive, the Court still focused on the nature of ancillary works necessary for the development of the windfarm which were listed in Annex II. The judgment indicates that Ireland argued the ancillary works were minor aspects of the project's windfarm construction. – The court nevertheless focused on the likelihood of significant effects arising from them given the location and size of the peat and mineral extraction and road construction[22] of these ancillary activities, and went on to the consider the further phases and changes to the project under the relevant versions of the applicable Directive as well as the obligations arising.[23] This is highlighted simply to show the background of the failure and inadequacies of the assessment conducted, and any limitation on any plausible expectation of the windfarm operator that all was in order, and the potential for state liability, the relevance of which will become clear in the subsequent case C-261/18. However, as an aside, the robust manner in which the court interrogated the particulars of the project and how this triggers the obligations of the EIA Directive is very instructive and helpful for those wishing to argue such matters.

In respect of the second complaint, the Court declared[24] "*[...] that, by failing to adopt all measures necessary to ensure that: - [...] - the development consents given for, and the execution of, windfarm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive*".

17 *Ibid*., para. 57.
18 *Ibid*., para. 58.
19 *Ibid*., para. 61.
20 Ibid., para. 83.
21 Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, *OJ L 73, 14.3.1997*. The amended Annex II, includes in 3(i): "Installations for the harnessing of wind power for energy production (windfarms)".
22 Ibid., para. 96-105.
23 Ibid., para. 106-110.
24 *Ibid*., para. 113, point 1, second indent.

## 3 Overview of Case C-261/18 - the recent and subsequent action which followed

### *3.1 Relevant pre-litigation procedure for case C-261/18, the recent and subsequent action which followed*

In paragraphs 23-36 of C-261/18[25], (the action taken then by the Commission in respect of the failure to address the second complaint on the Derrybrien windfarm in case C-215/06), the Court describes what happened subsequent to its original judgment. It is a history as highlighted earlier, that Advocate General Pitruzzella likened to a game of snakes and ladders. In summary, Ireland originally indicated to the Commission that it fully accepted the judgment, and that an updated environmental impact assessment, in compliance with Directive 85/337, was anticipated before the end of 2008.[26] However this deadline was not met. Subsequently in March and April 2009, Ireland indicated that it proposed to introduce legislation for a regularisation procedure (the substitute consent procedure mentioned earlier above), and that the windfarm operator would apply for such a consent.[27] By June 2009 the Commission sent a letter of formal notice, to which Ireland replied in September confirming that the legislation would be enacted shortly and that the windfarm operator had agreed in principle to apply for substitute consent.[28] However, by March 2010, the Commission sent a further letter of formal notice to which Ireland replied, but it was only in September 2010 that Ireland informed the Commission of the enactment of legislation which provided for a regularisation procedure. Further legislation and contact ensued.[29] In September 2012 the Commission by letter requested Ireland to inform it of whether the developer of the windfarm would be subject to that regularisation procedure. In a letter in October 2012, now some 4 years after the judgment, Ireland then indicated that the windfarm operator was refusing to apply the regularisation procedure, and that neither national nor EU law made provision for its application to be imposed. Moreover, the Court summarised Ireland's position as outlined to the Commission at the time as follows: "*EU law, it was claimed, did not require the consents granted for the construction of the windfarm, which had become final, to be called into question and the principles of legal certainty and of the non-retroactive effect of laws, as well as the case-law of the Court on the procedural autonomy of the Member States, precluded the withdrawal of those consents*".[30] It is important to reflect at this point that the windfarm operator is a wholly owned subsidiary of a semi-public sector body, 90% owned by the State.[31]

In December 2013, the Irish authorities indicated that the windfarm operator had indicated willingness to undertake an unofficial non-statutory environmental impact assessment of the windfarm. In the course of 2014 various communications occurred between Ireland and the Commission in relation to this proposal and a concept document which set out a roadmap for the proposed process. In March 2015, a draft Memorandum of Understanding between the windfarm operator and the Irish Minister for the Environment in respect of the carrying out of a non-statutory environmental review was provided to the Commission, with a further version of the draft a year later in March 2016.[32]

The Court reflects that the "*Commission stated on several occasions that those documents did not enable Ireland to fulfil its obligations. Following a meeting held on 29 November 2016, the Commission's services informed the Irish authorities by email on 15 December 2016 that the final text of the signed memorandum of understanding should reach the Commission by the end of 2016, failing which the Commission would refer the matter back to the Court in early 2017*".[33]

The Court outlines the further exchanges which ensued, and that the Commission letter of January 2018 informed Ireland that it considered the failure to fulfil the obligation in respect of the windfarm to persist. It also states that Ireland replied in February indicating that, before taking the measures necessary to comply, it had been awaiting the Commission's observations of the documents sent in December 2016. The Commissions therefore initiated the action under Article 260(2) TFEU.[34]

After all of this, it appears that on March 29th, 2019, two days before the hearing scheduled for April 1st, Ireland wrote to the Commission indicating that the windfarm operator had agreed it would cooperate in the substitute consent procedure to be initiated under the Irish legislation introduced previously, and this letter was sent to the Court by the Irish authorities on the day of the hearing.[35]

25 Judgment of the Court, 12 November 2019, case C-261/18, Commission v Ireland, EU:C:2019:955.
26 *Ibid.*, para. 23.
27 *Ibid.*, para. 24.
28 *Ibid.*, para. 25.
29 *Ibid.*, para. 26-27.
30 Ibid., para. 28.
31 *Ibid.*, para. 86.
32 *Ibid.*, para. 29-30.
33 *Ibid.*, para. 31.
34 *Ibid.*, para. 32-35.
35 *Ibid.*, para. 36.

### 3.2 The arguments presented

Despite Ireland's eleventh hour letter indicating that the substitute consent statutory procedure would be applied to the Derrybrien windfarm, this was not the end of the snakes and ladders. Despite this communication, Ireland then argued in Court on the very same day, that "*the adoption of specific measures as regards the windfarm was not necessary*."[36] So the game of snakes and ladders turned into a battle royale as both sides set out their arguments for the Court, arguing in turn *inter alia* the obligations to eliminate and remedy the unlawful consequences of a breach of EU law; the limitations on procedural autonomy and the principles of legal certainty in respect of dealing with an unlawful consent. This followed a brief challenge by Ireland regarding the admissibility of the proceedings which the Court summarily dispensed with.[37]

The Commission set out the requirement for Ireland to eliminate the unlawful consequences of the failure to conduct the EIA, and to take all measures necessary to remedy that failure[38]. It relied on the case law of the Court, *Wells*, C-201/02[39] and *Inter-Environnement Wallonie and Terre wallonne*, C-41/11[40]. The Commission set out the obligation on national authorities[41] relying on *Comune di Corridonia and Others* (C-196/16 and C-197/16)[42] and *Comune di Castelbellino* C-117/17[43]. In the latter of these the Court had clarified: "*[...] that, in the event of failure to carry out an EIA required by EU law, Member States must nullify the unlawful consequences of that failure, and that EU law does not preclude regularisation through the conducting of an impact assessment after the plant concerned has been constructed and has entered into operation, subject to the twofold condition that, first, national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and second, an assessment carried out for regularisation purposes is not conducted solely in respect of the plant's future environmental impact, but also takes into account its environmental impact from the time of its completion.*"[44]

The Commission thus submitted that Ireland is required to revoke or suspend the consents at issue and carry out an ex post remedial assessment, even if those measures affect the windfarm operator's vested rights.[45] It further relied on *Stadt Wiener Neustadt*, C-348/15[46] in respect of the limitations of procedural autonomy consequent on the principles of effectiveness and equivalence.

Ireland in response, and despite everything which had preceded in the pre-litigation process, argued first against the need for any remedial assessment arguing that apart from transposition, no further action was required under the second indent of the operative part of the judgment now at issue in case C-215/06, and that two indents of point 1 related to one and the same failure, namely to transpose in full Directive 85/337.[47] (For convenience, the relevant indent[48] is quoted at the end of the Section 2 above.)

In responding to the obligation to nullify or suspend the consents at issue, Ireland pointed to paragraph 59 on the first complaint in the original judgment in case C-215/06 to argue the obligation to remedy is limited by the procedural framework applicable in the Member State.[49] It highlighted that in Ireland only the High Court can set aside a Development Consent following such an application, and pointed to the strict time limits in Irish planning law of 8 weeks for any such challenge.[50] Interestingly, it, like the Commission, also sought to rely on *Stadt Wiener Neustadt* (C-348/15, EU:C:2016:882) but this time for the entitlement to establish time limits governing proceedings brought against decisions adopted in the field of town planning.

Ireland then sought to distinguish the Derrybrien case from *Comune di Corridonia and Others* (C-196/16 and C-197/16, EU:C:2017:589) and of 28 February 2018, *Comune di Castelbellino* (C-117/17, EU:C:2018:129) referred to by the Commission, arguing that the consents in those cases had been annulled by the national courts, and the questions in those cases concerned the subsequent assessments. Equally, in relation to *Wells* (C-201/02, EU:C:2004:12**)** it argued the consent had been challenged in time. It thus argued

36 Ibid., para. 48.
37 Ibid., para. 65-68.
38 Judgment of the Court, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 38.
39 Judgment of the Court of 7 January 2004, Wells, C-201/02, EU:C:2004:12, paragraphs 64 and 65.
40 Judgment of the Court of 28 February 2012, Inter-Environnement Wallonie and Terre wallonne, C-41/11, EU:C:2012:103, paragraphs 42, 43 and 46.
41 Judgment of the Court, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 39.
42 Judgment of the Court,6 July 2017, Comune di Corridonia and Others (C-196/16 and C-197/16, EU:C:2017:589, para. 35.
43 Judgment of the Court ,28 February 2018, Comune di Castelbellino (C-117/17, EU:C:2018:129, para. 30).
44 *Ibid.*
45 Judgment of the Court, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 43.
46 Judgment of the Court, Stadt Wiener Neustadt C-348/15, EU:C:2016:882, para. 40.
47 Judgment of the Court, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 48.
48 Judgment of the Court, 3 July 2008, case C-215/06, Commission v Ireland, EU:C:2008:380, para. 113, second indent of point 1.
49 Judgment of the Court, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 51.
50 *Ibid.,* para. 51-52.

where planning consents may no longer be subject to challenge via judicial review, the principle of legal certainty, protection of legitimate expectations and property rights must be respected. It concluded here, stating that there was no obligation to carry out an *ex post facto* environmental impact assessment on the basis of the new Irish legislation on substitute consent.[51]

The Commission highlighted the failure by Ireland to give effect to any concrete remedy for the windfarm.[52] It acknowledged that although Article 260 TFEU does not specify the time frame for compliance with a judgment, it must be initiated at once and completed as soon as possible, highlighting the prolonged delay at issue.[53] It very particularly noted that the windfarm operator was a wholly owned subsidiary of an entity controlled by public authorities and was thus in fact subject to the obligations arising from the Directives.[54]

Ireland responded by highlighting the steps undertaken in respect of the concept paper for the non-statutory assessment, and that if such assessment was necessary, Ireland had sufficiently complied with the judgment, given that the assessment of effects would involve third parties, and this was outside of Ireland's control. They further argued that Ireland should not be penalised for taking the necessary time to determine the appropriate steps, or for failing to identify them.[55]

Ireland did clarify for the Court that the non-statutory procedure which had been proposed during pre-litigation and which it had relied on in its defence, was no longer proposed, and instead as per the letter of 29 March 2019, a statutory procedure under the substitute consent legislation was to be initiated. It further maintained the windfarm operator had agreed to co-operate. However it was still unable to clarify how the process would be initiated, given that the legislation allows for it to be initiated by an application for substitute consent by the windfarm operator, and also allows for the process to be initiated by the competent authorities on their own initiative.[56] So, some 11 years later from the original judgment of the Court in Case C-215/06 on the windfarm, the way forward still appeared to be disconcertingly blurry, and the timeframes envisaged by Ireland to comply vague.

### *3.3 The findings of the Court on the substance:*

The Court opened with a typically purposive approach focusing on the core objective of the EIA Directive in Article 2(1) on the obligation for projects likely to have significant effects on the environment, to assess those effects before consent is given. The underpinning rationale to protect the environment by such prior assessment was reflected upon[57] with reference to paragraph 58 of the first complaint in Case C-215/06, the original Derrybrien case, and also *Comune di Corridona and Others*, C-196/16 and 197/16[58]. Three main conclusions drawn from the judgment are set out here in respect of: The obligations to 1) remedy the failure, 2) the obligation to withdraw/nullify the consequences of a breach of EU law and the issue of legal certainty, 3) State Liability.

#### *3.3.1 The obligation to remedy the failure:*

The court then reflected that the EIA Directive does not have provisions to deal with a failure to carry out a prior assessment as required by the Directive.[59] However it then set out unequivocally in paragraph 75 the obligation to remedy such failure, with reference to *Wells,* C-201/02[60], *Comune di Corridona and Others*, -196/16 and 197/16[61].

The Court set out further considerations on regularisation, highlighting that respective national rules are not precluded, subject to the provision that the possibility for such regularisation should not incentivise circumvention of the Directive, and should be limited to exceptional circumstances[62], reflecting on the relevant case law[63]. In paragraphs 78 and 79 the Court was at pains to additionally point out the preclusion of legislation to regularise such consents where no exceptional circumstances pertained, referring to three cases.

It also highlighted that the scope of such remedial assessment needs to take into account not only the future impacts on the environment but also those occurring since its time of completion[64], again with reference to *Comune di Corridona and Others*, C-196/16 and 197/17[65].

51 *Ibid.,* para. 53-56.
52 *Ibid.,* para. 40.
53 *Ibid.,* para. 45.
54 *Ibid.,* para. 44 and the case law cited in: C-6/05, Medipac – Kazantzidis EU:C:2007:337 para. 43.
55 *Ibid.,* para. 59 and 61.
56 *Ibid.,* para. 62-63.
57 Judgment of the Court, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 72-73.
58 Judgment of the court of 6 July 2017, Comune di Corridonia and Others (C-196/16 and C-197/16, EU:C:2017:589, para. 33.
59 *Ibid.*, para. 74.
60 Judgment of the Court, 7 January 2004, Wells, C-201/02, EU:C:2004:12, para. 64.
61 Judgment of the Court, 6 July 2017, Comune di Corridonia and Others (C-196/16 and C-197/16, EU:C:2017:589, para. 35.
62 Judgment of the Court, case C-261/18, Commission v Ireland,:EU:C:2019:955, para. 76.
63 Judgment of the court of 6 July 2017, Comune di Corridonia and Others (C-196/16 and C-197/16, EU:C:2017:589 para. 37-38.
64 Judgment of the Court, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 77.
65 *Ibid.,* para. 41.

Turning specifically to the issue of consents which cannot be challenged before the national courts because of time limits, the Court referred back to *Stadt Wiener Neustadt*, C-348/15[66] to clarify that such projects cannot simply be considered to be lawfully authorised as regards the obligation to assess their effects – just because the statute of limitations has expired any challenge under national provisions. So it clarified forcefully that the remedial obligation persists regardless of time[67].

The Court then turned to the legislation which Ireland had introduced to regularise consents, known as 'substitute consent' and highlighted how it provides for the competent authority to initiate the procedure where permission for a consent was unlawfully granted, and also provides for the making of an application for substitute consent by the manager of the unlawfully authorised project.[68] It reflected unequivocally in paragraph 84 that: "*Ireland had failed to carry out a new environmental impact assessment of the windfarm within the context of the regularisation of the consents at issue and thereby failed to have regard to the authority attaching to the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380), as regards the second indent of point 1 of the operative part thereto.*"

The Court reflected that Ireland had argued that it was ultimately not in a position to apply the procedure itself, and highlighted that the public authority involved had initiated the procedure and then withdrawn it, and that while they are an emanation of the State they are independent and fall outside the Government's control. It also argued it could not compel the windfarm operator to apply, despite the fact that it had to acknowledge the windfarm operator as a wholly owned subsidiary of a semi-public sector body, 90% owned by the State.[69] The Court robustly dealt with this, highlighting that Ireland could not rely on limitations within its own domestic regime to justify failure[70] and emphasised the obligation "*of every organ*" of the Member State involved to remedy the breach.[71] It went on to clarify in paragraph 91 that the windfarm operator must be considered to be an emanation of the state on which the obligations of the Directive were binding, as it is controlled by Ireland referring to relevant case law.[72]

So in summary: Remedy for the failure to assess must be addressed; regularisation for consents in breach must be exceptional, so the obligation to remedy is in effect separate to regularisation; all relevant organs of the State must address the remedy. This is particularly interesting in the context also of a further recent preliminary reference from Ireland with profound implications for the duty of public authorities to dis-apply national law in breach of EU law, namely, C-378/17, *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission*.[73]

### *3.3.2 On the obligation to withdraw/nullify the consequences of a breach of EU law and the issue of legal certainty*

The Court also highlighted that withdrawal of a consent is in principle permitted while the withdrawal of an unlawful measure must occur within a reasonable timeframe. Furthermore, the extent to which the party concerned had reason to believe and rely on the lawfulness of the measure has to be considered[74], referring to *Commission v United Kingdom* C-508/03[75] which in turn sets out further case law, some of which goes back to 1956.

### *3.3.3 State Liability*

A consent can be withdrawn or amended consequent on the conduct of a remedial assessment for projects permitted and/or commenced and/or completed. The Court therefore highlighted that an operator who had acted in accordance with a Member State's legislation which is then proven contrary to EU law may, pursuant to national rules, bring a claim for compensation against the State in respect of the damage sustained as a result of the State's actions or omissions.[76]

## 4 Consequences – The financial penalties

A fixed lump sum penalty of five million euros was imposed by the Court. This was significantly more than the minimum €1,685,000 sought by the Commission, but in line with the daily penalty of €1,343.20 for the 4,150 days or over 11 years since

66 Judgment of the Court, 17 November 2016, Stadt Wiener Neustadt (C-348/15, EU:C:2016:882, para. 43.
67 Judgment of the Court, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 80.
68 *Ibid.*, para. 81-83.
69 *Ibid.*, para. 85-87.
70 *Ibid.*, para. 89.
71 *Ibid.*, para. 90.
72 Judgment of the Court,14 June 2007, C-6/05, *MedipaC- Kazantzidis*, EU:C:2007:337, para. 43 and the case-law cited.
73 Judgment of the Court, 4 December 2018, Minister for Justice and Equality, Commissioner of An Garda Síochána v workplace Relations Commission EU:C:2018:979, para. 48-52.
74 Judgment of the Court case C-261/18, Commission v Ireland, EU:C:2019:955, para. 92.
75 Judgment of the Court, case C-508/03 Commission v United Kingdom, EU:C:2006:287, para. 67-68.
76 Judgment of the Court, 12 November 2019, case C-261/18, Commission v Ireland, EU:C:2019:955, para. 96.

the judgment.[77] As indicated earlier in imposing the lump sum penalty, the Court censured Ireland for its failure in its duty of sincere co-operation[78]. A further penalty payment of €15,000 for each day following the delivery of 12 November 2019 judgment, until the date of compliance with the 3 July 2008 judgment was also imposed.[79]

## 5 Conclusions

The judgment is therefore a very robust further clarification of the obligations to conduct an assessment to remedy a breach of EU law which arises following a failure to conduct an assessment or adequate assessment as required by the EIA Directive. It further clarifies the associated obligations of all relevant organs of the State to act appropriately in that regard, and the extent to which unlawful projects may be impacted, and the potential for the State to be exposed consequent on their failures in such regard, to claims from economic operators whose projects have been impacted.

At time of writing in early December 2019, the relevant Irish Departments have failed to clarify in response to enquiries by an Irish eNGO on 29 November 2019 what, if any, steps have been taken since the judgment of November 12th, 2019 to advance the assessment required. It has also failed to indicate what budget the financial penalties are being drawn from (these now amount to nearly €350,000, on top of the lump sum penalty of €5 million). Thus the community and environment are still awaiting the benefit of the assessment required. Of further note is that, following the introduction of a further amendment to the EIA Directive through Directive 2014/52/EU which was due to be implemented by 16 May 2017[80], well over two years ago, Ireland has still not communicated its transposition to the Commission. Obvious issues can arise with consents granted in such circumstances, and equally protracted difficulties and delays in resolving failures to comply with the EIA Directive may occur as evidenced in this case. The ability of citizens to be able to access justice effectively in environmental decisions has thus never been more important. Yet ironically, Ireland is moving to curtail such rights, presenting the general scheme or 'heads' of a new bill to the relevant parliamentary committee in early November 2019.[81]

The Commission's notice on access to justice[82] and Section 4 on effective remedies will be of further interest to those seeking further exposition of the jurisprudence of the court on the all-important matter of remedies, and this notice will hopefully be updated soon.

To say the judgment in this further action was eagerly awaited by environmental NGOs here in Ireland and by members of the public who continue to suffer the impact of the original failures, would be an understatement. The extent to which the role of the EU Commission and the Court of Justice in this matter is appreciated by them, cannot be overstated.

77 *Ibid.,* para. 125-126.
78 *Ibid.,* para. 120.
79 *Ibid.,* para. 135.
80 Directive 2014/52/EU *OJ L 124, 25.4.2014,* Article 3(1).
81 GENERAL SCHEME OF HOUSING AND PLANNING AND DEVELOPMENT BILL 2019.
82 COMMUNICATION FROM THE COMMISSION of 28.4.2017 Commission Notice on Access to Justice in Environmental Matters Brussels, 28.4.2017 C(2017) 2616 final.

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# elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

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Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

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The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

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