

It was suggested by counsel for the appellants in *Lingam v Health Service Executive* that the courts have developed a tendency to imply a term of good faith and mutual trust into contracts of employment and that this means that an employer is bound not to act in a manner which would undermine the contract and that he should act in good faith on the basis that there is a relationship of mutual trust between the parties. Fennelly J commented that “this is a development which is perhaps at its early stages” and made it clear that the principle that there is an implied term of mutual trust and good faith in contracts of employment does not extend so as to prevent an employer terminating a contract by giving proper notice.⁶⁸ However, the growing acceptance of the principle that the relationship of mutual trust and confidence between employer and employee gives rise to rights and obligations on both sides should undoubtedly make it easier for an employee to obtain interlocutory injunctive relief to ensure that for example an employer observes accepted standards of natural justice in pursuing disciplinary proceedings against him. It would therefore be ironic if the absence of a continuing relationship of mutual trust and confidence in the traditional sense of that term were to work against an employee who might be refused an injunction on the grounds that this relationship no longer existed between the parties.

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THE EUROPEAN COMMUNITIES (NATURAL HABITATS)
(AMENDMENT) REGULATIONS 2005

Introduction

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora marked a significant departure in European Community nature conservation law.¹ Whereas Community law had until then protected particular species,² the Habitats Directive marked an attempt to protect

68. 4 October 2005 (SC) (*ex tempore*), at 6. See also the reservations expressed by Lord Nicholls in *Eastwood v Magnox Electric plc* [2005] 1 AC 503, at 524 about developing the obligations arising out of the common law principles relating to mutual trust and confidence in an area governed by the statutory unfair dismissal code.

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1. OJ L206/7. Hereinafter referred to as “the Habitats Directive” or “the Directive” as the context permits.
2. Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L103/1, as amended. Hereinafter referred to as “the Birds Directive” as the context permits. For a general discussion of nature conservation law and, in particular,

habitats, thus providing a more holistic approach to nature conservation. The most significant aspect of the Habitats Directive is the establishment of the Natura 2000 network of protected sites stretching across the European territory of the Member States.

The Habitats Directive provides for a complicated site designation process. In outline, this process, which is based exclusively on scientific criteria, requires each Member State to submit to the European Commission a list of the sites from within its own territory which are suitable for adoption into the Natura 2000 network. The continent has been divided into seven biogeographical regions and the Commission, for each biogeographic region, adopts sites as “sites of Community importance” (SCIs), drawing from the lists submitted by the Member States. Once a site is adopted by the Commission as an SCI, the relevant Member State has an obligation to designate it as a “special area of conservation” (SAC) as soon as possible but no later than six years after the date of the Commission’s decision.³

The Directive provides a number of protections for Natura 2000 sites. Article 6(1) imposes an obligation on Member States to manage the sites; article 6(2) imposes a general obligation on Member States to avoid deterioration of the sites; articles 6(3) and 6(4) require a habitats-focused authorisation process for plans or projects that are likely to have a significant effect on Natura 2000 sites. The management obligation in article 6(1) only applies once a site has been designated as an SAC. The other obligations in article 6 apply once a site has been adopted by the Commission as an SCI. Although the Directive does not explicitly provide any protection to sites prior to their adoption as SCIs, the European Court of Justice has held that Member States are “required to take protective measures that are appropriate, from the point of view of the directive’s conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level”.⁴ In any event, Ireland has generally afforded such sites the same level of protection as that afforded to SCIs. It has done this by adopting an umbrella

habitat protection law, see Henry Comerford, *Wildlife Legislation 1976-2000* (Round Hall Sweet and Maxwell, 2001); Yvonne Scannell *et al*, *The Habitats Directive in Ireland* (Irish Centre for Environmental Law and Policy, 1999); Owen McIntyre, “Irish Implementation of EC Nature Conservation Law” (2002) 9 *IPELJ* 59-66 and 103-113; Rachel Minch, “Habitats, Wildlife and Natural Heritage” in Anne-Marie Cotter ed, *Environmental Law* (Cavendish, 2004), at 189-212; and Yvonne Scannell, *Environmental and Land Use Law* (Thomson, 2006), at 245-294.

3. Ireland lies entirely within the Atlantic biogeographic region; a list of sites has been adopted for this region. See Commission Decision 2004/813/EC of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographic region. 2004 OJ L387/1.
4. Case C-117/03 *Società Italiana Dragaggi SpA v Ministero delle Infrastrutture e dei Trasporti* 13 January 2005, at [30].

term “European site” to cover the various stages in the designation processes under both the Birds Directive and the Habitats Directive.⁵ Most, though not all, of the land use restrictions under the Habitats Regulations are applicable to European sites; most, though not all, of the sites protected by the Directive are covered by the definition of European site.⁶

There was considerable delay both in the transposition of the Habitats Directive into national law and in the submission of sites to the Commission for adoption as SCIs. Ireland only transposed the Directive in 1997 through SI 94/1997 European Communities (Natural Habitats) Regulations 1997,⁷ and it took some time for sites to be submitted to the Commission. These delays led to the Commission instituting many enforcement actions pursuant to Article 226 of the Treaty. However, as noted above, the Commission has now adopted a list of SCIs for the Atlantic biogeographic region. Accordingly, the hugely important but legally straightforward issues of formal transposition and list submission have now largely been dealt with. Perhaps because of this, more cases raising habitats issues are coming before the courts. In this context, greater attention is being paid both to the site protection requirements of the Directive and to how these have been implemented in Irish law.⁸ The legal jigsaw of what the Habitats Directive requires is slowly being put together.

One new piece of that jigsaw is the European Communities (Natural Habitats) (Amendment) Regulations 2005, signed into law in July 2005.⁹ This legislation tidies up a number of anomalies in the Habitats Regulations and introduces a number of significant provisions, largely in an apparent effort to make Irish law consistent with the requirements of the Habitats Directive. The purpose of this note is to analyse the changes made by the Habitats Amendment Regulations and to assess whether full transposition of the Directive has now been completed.¹⁰

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5. Wildlife (Amendment) Act 2000, section 75; Planning and Development Act 2000, section 2.
 6. The only type of site for which some sort of protection is explicitly envisaged by the Directives that does not fall within the definition of “European Site” is the “article 5 site”. Where the Member State fails to submit to the Commission a site that the Commission believes should have been submitted, article 5 triggers a process of bilateral consultation. During that consultation period, the site is afforded the non-deterioration protection specified in article 6(2). The relevance of this protection is considered further below.
 7. Hereinafter referred to as “the Habitats Regulations” or “the 1997 Regulations”, as the context permits.
 8. For instance, *Power v An Bord Pleanála* 17 January 2006 (HC).
 9. SI 378/2005. Hereinafter referred to as “the Habitats Amendment Regulations” or the “2005 Regulations”, as the context permits.
 10. For a discussion of Ireland’s transposition of the Directive prior to the Habitats Amendment Regulations, see Oran Doyle, “Ireland” in Jessica Makowiak ed, *La Mise en Place du Réseau Natura 2000: les Transpositions Nationales* (Pulim, 2005).

Environmental Trespass

The new regulation 14A is one of the most significant changes effected by the 2005 Regulations. It effectively provides a fire brigade mechanism whereby activities that threaten a Natura 2000 site, done without the consent of the landowner, can be quickly ended, with possible criminal sanctions for those partaking in the activity. The typical example of such an activity is where some people go quad-biking over another's land without that person's consent. Obviously, such an activity has the potential quickly to do significant damage to the integrity of the site.¹¹ These activities pose particular problems where carried out by non-owners because the participants will often have disappeared long before legal processes can take effect.

Regulation 14A(2) provides that it will be an offence for a person, without the duly given consent of the owner to:

Enter and occupy any European Site, or bring onto or place on any European Site any object or carry out any activity where such entry or occupation or bringing onto or placing on site of such object or carrying out of such activity is likely to damage the site.¹²

The offence is punishable on summary conviction by a fine not exceeding €3,000 or by imprisonment for a term not exceeding 6 months or both. More significant than the penalties attaching to the offence, however, are the enforcement powers that accrue to a member of an Garda Síochána or an authorised officer who has reason to believe that a person is committing or has committed the offence.¹³ The Garda or the authorised officer may (a) demand of the person her name and address and (b) direct the person to leave the land concerned and to remove from the land any object that belongs to the person or that is under her control. The Garda or authorised officer must inform the person of the nature of the suspected offence and the statutory consequences of failing to comply with a

11. For instance, on 13 July 2004, the European Commission announced that it was initiating enforcement proceedings against Ireland in relation to inappropriate recreational activities within Natura 2000 sites.

12. Under regulation 14(3) of the Habitats Regulations, it was already an offence for a person to carry out, without the consent of the owner, an operation or activity on a candidate list site or an SAC. It appears from regulation 14A that it is not an offence for a non-owner, with the consent of the landowner, to enter and occupy land, to bring an object onto land or to carry out an activity on land. However, in those circumstances, both the owner and the consensual land-user would be covered by the normal regulatory regime established by the Habitats Regulations.

13. An authorised officer is one appointed pursuant to regulation 7 of the Habitats Regulations. Not all of the powers given by regulation 14A to members of the Garda Síochána are also given to authorised officers.

demand or direction. It is an offence to refuse to give one's name or address or to give a false or misleading name or address or to fail to comply with a direction, and a Garda may arrest such a person without warrant. An authorised officer has no power of arrest, but a Garda may arrest where, for instance, the direction was first issued by an authorised officer.

Where a person fails to comply with a direction, a Garda may remove or cause to be removed any object which the Garda has reason to believe was brought onto the site without the landowner's consent and the presence of which was likely to damage the site. Regulation 14A(5) provides in a detailed way for the storage of such objects, the release of such objects to their owner and their sale where the owner cannot be located.

The effect of regulation 14A is to criminalise trespass where it occurs on a European site and is likely to damage that site. Where authorised officers or Gardaí have reason to believe that this offence is occurring, they acquire powers to direct a person to leave the land and to require such a person to take an object with them. Where the person does not remove the object, Gardaí have, in effect, a power to confiscate the object. It is an offence to obstruct or impede an authorised officer or a Garda in the exercise of her functions under the regulation. Regulation 7(5) of the Habitats Regulations has been amended to allow authorised officers enter and inspect any lands to which regulation 14A relates.

These provisions are clearly modelled on Part IIA of the Criminal Justice (Public Order) Act 1994, as inserted by section 24 of the Housing (Miscellaneous Provisions) Act 2002, the constitutionality of which is currently being challenged before the courts on various grounds.¹⁴ A comparison with Part IIA points up a number of interesting features in regulation 14A. First, regulation 14A criminalises the "carrying out of an activity" as well as bringing objects onto land and entering and occupying that land. So it is of somewhat broader scope than Part IIA. In procedural terms, the most significant divergence between the two is the onus of proof. Section 19G(2) of the 1992 Act contains a reverse onus provision, whereby it is presumed until the contrary is shown that the entry onto land occurred without the landowner's consent. Some doubts have been raised as to the constitutionality of this provision.¹⁵ Whatever about the constitutionality of such a provision, its absence from regulation 14A is interesting. One of the difficulties in implementing the Habitats Directive in Ireland has been the often confused state of land ownership in some Natura 2000 sites. Much environmentally sensitive land is often held in common, with little official record of ownership. In such circumstances, it is difficult to

14. *Ann Lawrence and Others v Ballina Town Council & Ors* High Court 2003 No.5813P.

15. See William Binchy, "The Criminal Trespass Legislation: What Does it Do and Is It Constitutional?" Paper delivered to conference, Trinity College 23 July 2002, at 13-16.

know just who owns the land. *A fortiori*, it would be difficult to prove beyond a reasonable doubt that a person entered onto that land without the consent of the owner. In such circumstances, it is difficult to envisage successful prosecutions under this provision. That said, it is possible that successful prosecutions are not the main object of regulation 14A. As noted above, where a Garda or authorised officer has reason to believe that an offence has been committed, certain enforcement powers ensue. These enforcement powers, and not the possibility of criminal conviction, are perhaps the real point of regulation 14A as it is these that allow a fast response to acts of environmental degradation.

Perhaps related to the absence of a reverse onus provision, regulation 14A has no equivalent to section 19H of the 1992 Act, allowing the District Court to decide title issues for the purpose of the criminal proceedings. Thus if an issue as to title of the land is raised by a defendant in proceedings under regulation 14A, the District Court cannot deal with that issue. In such circumstances, a consultative case stated would presumably have to be initiated. However, if such a case stated were required to decide the issue, it is arguable that the various elements of the offence could not be proved beyond a reasonable doubt.

Finally, regulation 14A(1) implicitly allows the Garda Commissioner to delegate his powers in relation to confiscated property to an officer not below the rank of superintendent. The Commissioner has no such power of delegation under Part IIA of the 1992 Act. It seems likely that this power of delegation is a response to administrative difficulties encountered in the operation of the 1992 Act.

Consents to Operations or Activities in Natura 2000 sites

The Habitat Amendment Regulations provide additional options to the Minister for the Environment when she is considering whether to authorise an operation or activity.¹⁶ Under Regulation 4 of the 1997 Regulations, when the Minister issues a notice at the start of the designation process, she indicates the operation or activity which she considers would be likely to alter, damage, destroy or interfere with the integrity of the site.¹⁷ A person then cannot carry out that operation or activity without, *inter alia*, notifying the Minister of her intention to do so, and either getting the written consent of the Minister or carrying out the operation or activity in accordance with the terms of a management agreement. This both creates an incentive for landowners to enter into

16. Hereinafter, I refer to the Minister for the Environment as “the Minister” where the context permits.

17. An “operation or activity” is a residual category of land use that is not normally subject to an authorisation procedure by any public authority.

management agreements and ensures (insofar as any legal measure can) that those who do not enter such agreements are unable to use their land in a way that adversely affects the integrity of the site.

Regulation 16(1A) now allows the Minister to grant consents to carry out operations or activities subject to conditions and to vary such conditions as she deems appropriate. This power to make consents subject to a condition is a useful addition. Very often a land use that would be problematic if performed in one way or at one time will not be problematic if performed in a different way or at a different time. This new power allows the Minister to approve a type of land use in principle but at the same time to specify the circumstances in which the land can be used in that way. This allows people to use their land but in a way that does not adversely affect the integrity of the site, supporting one of the guiding principles of the Habitats Directive.¹⁸

Regulation 16(1A) also grants to the Minister the new power to revoke a consent to works either if the conditions attached to the consent have been breached or if the continuation of such consent would be “liable to destroy, or significantly alter, damage or interfere with the site’s conservation objectives”.¹⁹ These powers to vary conditions and revoke consents are also useful. It is quite possible that an unforeseen circumstance, perhaps related to an extreme

18. For instance, the Fourth Recital to the Directive recognises, “the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities.”

19. It is odd that the 2005 Regulations provide for “works” to be prohibited, as this term is not defined in either the 1997 Regulations or the 2005 Regulations. However, section 15 of the Wildlife (Amendment) Act 2000 defines “works” for the purposes of chapter II of part II of that Act. As regulation 1(2) of the 2005 regulations provides that the Wildlife Acts 1976-2000 and the Habitats Regulations 1997-2005 are to be construed together as one, the courts should presumably rely on this definition of works. Section 15 provides that “works” includes:

any activity which destroys or which significantly alters, damages or interferes with the integrity of—

(a) a site, or

(b) any of its species, communities or habitats,

either intentionally or unintentionally, or any activity which has a significant impact on the site or on any of its species, communities or habitats, or on its landforms or geological or geomorphological features, or on its diversity of natural attributes, other than development by a local authority or development which is not exempted development for the purposes of the Planning and Development Act 2000.

One difficulty with this approach, however, is that chapter II of part II of the Wildlife (Amendment) Act 2000 is also concerned with matters other than strict nature conservation, such as geological and geomorphological preservation. In this regard, the definition of works might be thought to be too wide for the Habitats (Amendment) Regulations.

weather event for example, could significantly impact on the conservation status of a species or habitat. In such circumstances, a land use that had previously not threatened the integrity of the site might now do so, rendering at least an alteration in condition, but possibly a revocation of consent, essential to the maintenance of the integrity of the site.²⁰

Although these powers to vary conditions and revoke consents are important, care should be taken in such cases to respect the rules of natural and constitutional justice. In *Eircell v Leitrim County Council*, the county manager of Leitrim County Council had granted planning permission for a mobile phone mast.²¹ At a meeting of the Council's elected members, it was decided to revoke the planning permission and a notice to that effect was served pursuant to section 30 of the Local Government (Planning and Development) Act 1963. Although the legislation prescribed no consultation requirements, O'Donovan J held that the rules of natural and constitutional justice required the elected members of the Council to give Eircell prior notification of their intention to consider revocation and to afford it the opportunity to make submissions or representations.²²

It follows from this that the Minister, when exercising her power to revoke consents under regulation 16(1A), should notify the person who benefits from the consent and allow her to make representations. In more urgent situations, the Minister has the power to apply to court for an interim injunction prohibiting an authorised operation or activity (see below). The obligation of fair procedures probably also applies where the Minister wishes to vary the conditions attaching to a consent. Some such variations could be as significant as a revocation of consent. However, any consultation processes entered into by the Minister would necessarily be limited to the same sorts of considerations that are relevant to the initial grant of consent, *ie* the impact of the operation or activity on the site and, where appropriate, any imperative reasons of overriding public importance.

Appeals against Refusal of Consent

Under the 1997 regulations, a landowner whose land fell within a site hosting a priority habitat or priority species had no right of appeal where the Minister refused consent for an operation or activity, whereas the owners of land that

20. In Case 6/04 *Commission v United Kingdom* 20 October 2005, at [56]-[60] the European Court of Justice held that article 6(3) of the Directive imposed no obligation to review existing authorisations. However, the Court followed Advocate General Kokott in suggesting that such an obligation might be derived from article 6(2), although this point did not arise for decision in the case.

21. [2000] 1 IR 479; [2000] 2 ILRM 81.

22. [2000] 1 IR 479, at 494-495; [2000] 2 ILRM 81, at 96-97.

fell within sites hosting only non-priority habitat types or species had that right.²³ Regulation 16(4) has now been amended to provide that right of appeal to all aggrieved landowners. All appeals now proceed in the way previously specified under Regulation 16(4).

The Minister's Power to Apply to Court

Regulations 17 and 18 of the original Habitats Regulations provided the Minister with a power to apply to court to prevent an operation or activity from taking place on certain sites.²⁴ This power was considered by Murphy J in *Minister for Arts, Heritage, the Gaeltacht and the Islands v Kennedy*.²⁵ The new regulations 17 and 18 appear to be largely a response to that case, so it is important to set it out in some detail. Murphy J held that, before applying for a court order, the Minister must carry out an appropriate assessment of the implications for the site in view of the site's conservation objectives. The Minister, however, had simply relied on an opinion from one of her own staff to justify going to court. Murphy J held that a mere opinion, however expert, did not constitute an appropriate assessment.²⁶ This reading of regulation 17 required the Minister to have a very clear plan of what was required for the site before she could apply for a court order prohibiting a particular operation or activity. This in turn reduced the usefulness of regulations 17 and 18, particularly in relation to new sites worthy of protection that have come to the Minister's attention.²⁷

In an apparent response to this judgment, the Habitats Amendment Regulations insert a new regulation 17 and regulation 18. As before, regulation 17 deals with on-site operations or activities whereas regulation 18 deals with operations or activities outside a European site but likely to affect such a site. Otherwise, they are phrased the same as each other; I shall therefore analyse regulation 17 only.²⁸ Regulation 17(1) now provides:

23. A priority habitat type is one that is in danger of disappearance while a priority species is one that is endangered, but in both cases only where the European Community has particular responsibility in view of the proportion of their natural range that falls within the European territory of the Member States. Habitats Directive, article 1. They are denoted by an asterisk (*) in Annexes I and II to the Directive.

24. The Minister has no power to apply to court in respect of types of land use other than operations or activities. In such cases, only the enforcement provisions that apply under the relevant regulatory regime can be invoked.

25. [2002] 2 ILRM 94.

26. *Ibid*, at 115.

27. The environmental trespass provisions of regulation 14A do not adequately address this problem because they apply only to land uses carried out without the consent of the owner.

28. My comments apply, *mutatis mutandis*, to regulation 18.

Where the Minister forms an opinion that an operation or activity is being carried out or may be carried out on a European Site which is neither directly connected with nor necessary to the management of the site but likely to have a significant effect thereon either individually or in combination with other operations or activities, the Minister may, in view of the site's conservation objectives, make an application under this Regulation to a Court of competent jurisdiction to prohibit the commencement or continuance of the operation or activity.²⁹

A number of points arise from this provision. First, the "appropriate assessment" requirement of the old regulation 17 has been excised, thereby removing the stumbling block in *Kennedy*. However, the Minister's decision to apply to court must still be made "in view of the site's conservation objectives", which may require some sort of assessment as a condition precedent to the Minister's application, although probably not as extensive an assessment as that required by Murphy J in *Kennedy*. Secondly, it is clear that the Minister may apply for the prohibition of the continuance or *commencement* of the operation or activity. It had been unclear under the old regulation 17 whether a *quia timet* injunction prohibiting the commencement of an operation or activity could be obtained. In *Kennedy*, Murphy J had suggested, but not with complete confidence, that such an injunction could be granted. The new regulation 17(1) clarifies that *quia timet* injunctions are available. Thirdly, the Minister's power to apply to court appears to extend to all operations or activities, even ones she has consented to. However, regulation 17(4) provides that the court may make permanent orders only where there has been an *unauthorised* operation or activity, which seems to include authorised operations or activities that stray beyond the terms of the consent. The position thus seems to be that the courts can grant interim or interlocutory injunctions in relation to all operations or activities, including those that have a valid consent. However, the courts cannot grant permanent injunctions in relation to operations or activities that have a valid consent, provided that any conditions attached to the consent are observed. This lacuna, however, is more apparent than real, for the Minister is entitled, under regulation 16(1A), to revoke consents for operations or activities. Therefore, where the Minister believes that an authorised operation or activity is likely to have a significant effect on the integrity of a site (perhaps due to a change of circumstance since the consent was granted), she should do two things: (a) initiate a consultation process with a view to the revocation of the consent and

29. Regulation 17(2) defines a court of competent jurisdiction as "either the Circuit Court where the lands or part of the lands concerned are situated or the High Court". Presumably this should read "the Circuit Court for the circuit within which the lands ...".

(b) institute court proceedings seeking interim or interlocutory injunctions pending the determination of the revocation process.

As noted above, when placing a site on the candidate list, the Minister indicates a number of generic operations or activities for which consent is required. Under regulation 17, the courts can grant permanent injunctions, as well as interlocutory and interim injunctions, in respect of operations or activities that were not indicated at the time of initial designation and thus in respect of which consents were not required. This is likely to be one of the most significant applications of regulation 17.

Regulation 17(3) provides some minimal guidance as to the procedure to be used by the Minister in seeking a court order, stating that an application shall be “by motion”. It is probably advisable to ground any application on an affidavit and to put on notice those persons (where known) who are alleged to be carrying on the operation or activity, even though there is no express requirements in the Regulations to this effect. That said, the courts are likely to entertain *ex parte* applications for interim relief in circumstances of considerable urgency.³⁰

Regulation 17(3) allows the court to make such interim or interlocutory orders as it considers appropriate, having regard to article 6(4) of the Habitats Directive and the overall requirement of safeguarding the integrity of the site concerned. This distinguishes the enforcement provisions in regulation 17 from those in other planning and environmental legislation. Under section 160 of the Planning and Development Act 2000, for example, the issue at all stages is whether unauthorised development has been (or is about to be) carried out. It is not for the court to decide whether, having regard to the proper planning and sustainable development of the area, the development should be permitted. In contrast, under regulation 17, the court’s role extends to deciding whether, according to the habitat protection criteria laid down in article 6 of the Directive, the operation or activity *should* be permitted, at least when considering whether to grant interim or interlocutory relief.

The court’s role in granting permanent injunctions is different. Regulation 17(4) specifies the orders which a court may make where an unauthorised operation or activity has been, is being or is likely to be carried out or continued. These orders are to be directed at individual persons, whether or not they have an interest in the land, and may require such a person to do or not to do or cease to do anything that the court considers as necessary to ensure either (a) that the unauthorised operation or activity is not carried out or continued or (b) that any operation or activity is carried out in accordance with the terms of

30. Given the provisions contained in regulation 14A, regulation 17 may not need to be invoked that often in such urgent situations. However, where the activity occurs with the consent of the owner, reliance on regulation 17 will be necessary to ground any court application.

the consent provided under regulation 14.³¹ Whereas the court must consider habitats considerations before granting interim or interlocutory injunctions, when granting permanent injunctions, the court's sole responsibility is to terminate unauthorised operations or activities. This is much more similar to standard enforcement provisions, such as that contained in section 160 of the Planning and Development Act 2000. However, one wonders about the wisdom of requiring courts to undertake a detailed assessment of habitat considerations at the interim and interlocutory stage when no such assessment will be required at the final stage of the proceedings.

Site Designations

One of the difficult aspects of this area of law is the plethora of site designations. Such complexity is inevitable when one develops as complicated a site-designation process as that provided for by the Habitats Directive. This problem was made worse by the Habitats Regulations which applied some land use protections to some types of sites and other land use protections to other types of sites, without any apparent rhyme or reason. The Habitats Amendment Regulations have thrown up further anomalies in this regard, so it is necessary to review the various site designations under the Habitats Directive itself and under the Regulations.

The site designation process under the Habitats Directive and Regulations involves four basic types of site:

- Candidate list sites: sites placed on the candidate list by the Minister, thus initiating consultation with landowners;
- National list sites: sites placed on Ireland's list of sites submitted to the Commission, after consultation with landowners;
- Sites of Community importance (SCIs): sites adopted by the Commission from the various national lists;
- Special areas of conservation: SCIs designated in national law.

As well as these four types of site, there are also SPAs – sites classified pursuant to the Birds Directive. Such sites form part of Natura 2000 and are subject to articles 6(2), 6(3) and 6(4) of the Habitats Directive. These five types of site are all covered in Irish law by the umbrella term “European site”, as defined in section 75 of the Wildlife (Amendment) Act 2000 and in section 2 of the Planning and Development Act 2000. There is one further type of site, however: the “article 5 site”.

Under article 5 of the Directive, where the Commission considers that a

31. As consents are provided under regulation 16, not regulation 14, this provision is presumably meant to refer to regulation 16.

member state has omitted from its national list a site hosting a priority species or habitat type, a consultation process is initiated between the Commission and the member state concerned. If a resolution is not reached, the Council of Ministers of the European Union takes a decision.³² While that consultation process is ongoing, the site is subject to the non-deterioration and non-disturbance requirements of article 6(2):

Member States shall take appropriate steps to avoid, [during the consultation period and pending a Council decision], the deterioration of natural habitats and the habitats of species as well as the disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive.

The main way in which this obligation was transposed into Irish law was through the powers of the Minister, under regulations 17 and 18, to apply to court to prohibit an operation or activity that might adversely affect an article 5 site. However, the powers under the new regulations 17 and 18 only apply with respect to “European sites”, the definition of which does not include article 5 sites. It is difficult to see why the regulations should have been amended to remove this protection for article 5 sites, which protection is – after all – a requirement of Community law.³³

Regulation 3(11) of the Habitats Amendment Regulations amends regulation 34 of the Habitats Regulations to ensure that the protections of regulations 17 and 18 are now extended to SPAs. As regulations 17 and 18 have in any event been reworded to apply to European sites (which term includes SPAs), this amendment serves no purpose.

Other Changes

A few other changes have been made to lists of species and species protection. No licence or permit granted under the Wildlife Acts 1976-2000 can now authorise something to be done that would be prohibited under the Habitats Regulations.³⁴ The activities prohibited by section 21(3) of the 1976 Act, as amended, have been slightly changed; more significantly, those prohibitions are now applied to species listed in Annex IV(B) to the Habitats Directive, as

32. Such a decision must be taken unanimously.

33. Regulation 19 continues to allow the Minister to require the restoration of land within article 5 sites, but this cannot amount to a transposition of the article 6(2) obligation to avoid the deterioration of habitats and the disturbance of species.

34. Regulation 2(1) of the Habitats Amendment Regulations, amending section 9 of the Wildlife Act 1976, as amended.

opposed to species prescribed by the Minister for the Environment.³⁵ The exceptional circumstances in which killing of fauna is permissible no longer apply to fauna listed in Annex IV(A) of the Habitats Directive.³⁶ The protection of section 45 of the 1976 Act, as amended, has been extended to fauna added by the Habitats Amendment Regulations to the First Schedule to the Habitats Regulations.³⁷ In this regard, regulation 3(12) ensures that Irish law automatically keeps up-to-date with the species protected by the Habitats Directive, by incorporating by reference Annex IV(A) (including future amendments thereto) into the First Schedule to the Habitats Regulations. Finally, regulation 3(10) clarifies that regulation 23 of the Habitats Regulations only applies to those species referred to in Annex IV(A).

Part 1 of the Second Schedule to the Regulations has been amended to include the Forestry Acts 1946-1988. This essentially ensures (a) that authorisations under those Acts are subject to assessment in light of their implications for Natura 2000 sites and (b) that the activities covered by such authorisations no longer require an “operation or activity” consent from the Minister for the Environment.

Regulations 3(1) and 3(2) amend regulations 4 and 7 of the Habitats Regulations to reflect changes in areas of ministerial responsibility since the adoption of the original regulations. Regulations 3(8) and 3(9) amend typographical errors in regulations 19 and 20 of the Habitats Regulations.

Remaining Inadequate Transposition of Article 6 of the Habitats Directive

The Habitats Amendment Regulations are welcome as a considerable strengthening of habitat protection. However, there remain many ways in which article 6 of the Habitats Directive has not been properly transposed. I wish to focus on five that are particularly significant. Before addressing the specific issues, however, it is necessary to note that the European Court of Justice has taken a robust approach to the transposition of the Directive. In Case C-6/04 *Commission v United Kingdom*,³⁸ the Court considered a number of instances of alleged non-transposition of the Directive on the part of the United Kingdom. The Court made the following general observations that are of some relevance for the Irish situation:

23 The United Kingdom’s argument that the most appropriate way of implementing the Habitats Directive is to confer specific powers on nature

35. Regulation 2(2) of the Habitats Amendment Regulations.

36. Regulation 2(3) amending section 23 of the 1976 Act, as amended by section 31 of the 2000 Act.

37. Regulation 2(4).

38. 20 October 2005.

conservation bodies and to impose on them the general duty to exercise their functions so as to secure compliance with the requirements of that directive cannot be upheld.

24 First, it is to be remembered that the existence of national rules may render transposition by specific legislative or regulatory measures superfluous only if those rules actually ensure the full application of the directive in question by the national authorities.

25 Second, it is apparent from the 4th and 11th recitals in the preamble to the Habitats Directive that threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Consequently, as the Advocate General has observed in point 11 of her Opinion, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see by analogy, in respect of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), Case 262/85 *Commission v Italy* [1987] ECR 3073, paragraph 39, and Case C-38/99 *Commission v France* [2000] ECR I-10941, paragraph 53).

26 It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by Articles 11, 12(4) and 14(2) of the directive.

In most Irish cases of non-transposition, set out below, it is possible to find other legal mechanisms that can be employed by competent authorities to secure substantive compliance with the provisions of the Directive. The *Commission v United Kingdom* judgment clarifies, if clarification were needed, that such an approach does not amount to adequate transposition of the Directive. The subject-matter of the Directive is so important that the legal transposition must clearly and precisely impose all relevant obligations on the various competent authorities. The Irish Habitats Regulations, even as amended, signally fail to do this.³⁹

39. For a discussion of the inadequacies in the Habitats Regulations 1997, see Yvonne Scannell *et al*, *op cit*, note 2 and Oran Doyle, *loc cit*, note 10.

Inadequate protection for SCIs

Although the definition of “European site” has been expanded by the Wildlife (Amendment) Act 2000 and although it is now used as the trigger term for most of the land use restrictions in the regulations, there are some areas that have been passed by. The obligation to apply to the Minister for consent to carry out an operation or activity, under regulations 14-16, only applies with respect to candidate list sites, national list sites, SACs and SPAs. There is no obligation to apply for consent to carry out an operation or activity on an SCI. As all Habitats Directive sites (as distinct from Birds Directive sites, *ie* SPAs) in the country are now SCIs, this is currently a very significant lacuna. Although the Minister can apply to court to prohibit an operation or activity in an SCI, it is impractical for the Minister to have to resort to that power in relation to all the Habitats Directive sites in the country. That, however, appears to be the current position.

The obligation to avoid deterioration of sites and disturbance of species

Article 6(2) of the Directive imposes an obligation on Member States to:

Take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.⁴⁰

This rather general obligation appears to be substantiated by articles 6(3) and 6(4) which require the habitats-sensitive authorisation procedure for plans or projects affecting Natura 2000 sites. However, in Case 6/04 *Commission v UK*, the Court viewed article 6(2) as having an independent effect, distinct from articles 6(3) and 6(4). The Court held that certainty of transposition requires that domestic law contain an express provision obliging the competent authorities to avoid the deterioration of natural habitats and the habitats of species.⁴¹ Ireland has imposed such an express obligation only on the Minister for the Environment. It seems likely that the failure to impose this obligation on other competent authorities constitutes inadequate transposition of the Directive.

Assessment of plans

Articles 6(3) and 6(4) of the Habitats Directive require a process by which

40. This requirement also applies with respect to SPAs and SCIs.

41. Case 6/04 *Commission v UK* 20 October 2005, at [37].

both proposed plans and proposed projects must be tested against habitats considerations. Article 6(3) provides:

Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Article 6(4) then outlines a number of exceptional circumstances in which a plan or project may proceed, notwithstanding a negative assessment of its implications for the site. In Case 6/04 *Commission v United Kingdom*, the Commission challenged the United Kingdom's failure to subject land use plans to a form of article 6(3) assessment. The United Kingdom government countered that land use plans do not authorise a particular programme to be carried out and thus cannot be said to have a significant effect on sites. The Court tersely rejected this contention:

55 As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.

56 It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard.

This clarifies that, as the wording of article 6(3) clearly implies, plans are capable of having a significant effect on a Natura 2000 site; there must therefore be legal mechanisms for the assessment of such plans. In Ireland, the various prior authorisation procedures for projects have been amended to take account of habitat considerations. However, the transposition of the requirements of articles 6(3) and 6(4) as regards plans has been much more patchy. No provision of the Habitats Regulations, as amended, provides for the assessment of plans. I shall therefore consider the various legal provisions contained elsewhere that appear

to give some effect to the obligations in article 6(3) and 6(4).

Section 10(2)(c) of the Planning and Development Act 2000 (when read in conjunction with article 12 of the Planning and Development Regulations 2001) provides that every development plan must contain an objective for:

The conservation and protection of the environment including, in particular, the archaeological and natural heritage and the conservation and protection of European sites and any area designated as a natural heritage area under section 18 of the Wildlife (Amendment) Act 2000 and any area the subject of a notice under section 16(2)(b) of [that Act].

This cannot amount to a proper transposition of articles 6(3) and 6(4) of the Directive as it simply requires development plans to contain an objective that must then be taken into account by the planning authority concerned (and by An Bord Pleanála in the case of a planning appeal) at later stages. It does not provide for any prior assessment of the plan as a whole with reference to Natura 2000 sites.

The only provision in the Act which in any way addresses this aspect of articles 6(3) and 6(4) is section 10(5) which provides that a development plan shall contain information on the likely significant effects on the environment of implementing the plan. However, this provision actually highlights the ways in which articles 6(3) and 6(4) have not been properly transposed. For under article 6(3), if the plan were likely to have a significant effect on a Natura 2000 site, it would not suffice merely to mention that effect in the plan. Instead, there would have to be an assessment of that effect to see whether it was an adverse effect. If it were an adverse effect, it could be permitted (*ie* that aspect of the plan could remain unchanged) only if one of the exceptions listed in article 6(4) were satisfied. In contrast, section 10(5) only requires the provision of information on the significant environmental effects of implementing the plan.

Other statutory plans, such as local area plans (section 19 of the Planning and Development Act 2000 as amended) and waste management plans (section 22 of the Waste Management Act 1996, as amended) need not even go so far as development plans in identifying objectives for the Natura 2000 sites within the area to which the plan applies. This amounts to an even clearer failure to transpose the requirements of articles 6(3) and 6(4) with regard to plans.

Transposition of articles 6(3) and 6(4) may finally have been achieved, however, by Ireland's adoption of strategic environmental assessment. SI 435/2004 and SI 436/2004 implement in Ireland Council Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.⁴² These regulations allow for the evaluation of plans,

42. OJ L197. This Directive is commonly known as the Strategic Environmental Assessment (SEA) Directive.

thereby ensuring that environmental considerations are relevant at a much earlier stage in the planning process. SI 435/2004 European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 deals with plans outside the planning and development context. SI 436/2004 Planning and Development (Strategic Environmental Assessment) Regulations 2004 deals with plans in the planning and development context. Article 9(1)(b) of SI 435/2004 requires that an environmental assessment be carried out of all plans that are not directly connected with or necessary to the management of a European site but, either individually or in combination with other plans, are likely to have a significant effect on any such site. At the same time as preparing that plan, the competent authority must prepare an environmental report that identifies the likely significant environmental effects of the plan and reasonable alternatives taking account of the objectives and the geographical scope of the plan. Both the general public and certain public authorities, including the Minister, must be consulted. Article 15 requires the competent authority to take account of the environmental report, as well as any submissions or observations or consultations, during the making of the plan and when deciding whether to adopt the plan.

Although SI 435/2004 establishes a framework for the assessment of plans, it does not transpose the stringent requirements for the authorisation of plans that are laid down by articles 6(3) and 6(4) of the Habitats Directive. Thus the competent authorities must only *take account* of the environmental report and, by implication, may – as a matter of Irish law – adopt a plan even though it will have an adverse effect on a European site. Now the Minister for the Environment, who has statutory responsibility for the Natura 2000 network, must be consulted under the regulations. It is therefore possible for the Minister to carry out a proper assessment, as required by articles 6(3) and 6(4), and inform the competent authority of the outcome of that assessment. If the competent authority treats the Minister's assessment as binding on it, then Ireland would be in substantive compliance with the Directive. Nevertheless, the absence of any legal obligation to adopt this approach is a cause for concern.

The approach taken under SI 436/2004 is somewhat different. An environmental report is required for certain plans, including development plans and strategic planning guidelines. For local area plans, however, an environmental report is only required where the implementation of the plan is considered likely to have significant effects on the environment. Again, the competent authority must only *take into account* the environmental report, as well as any submissions or observations or consultations, both during the making (or variation) of the plan and when it is being adopted. This limited obligation to *take into account* is open to the same objection as that made with respect to SI 435/2004 above.

In summary, although there is now legislative machinery in place to allow for the assessment of plans according to the requirements of articles 6(3) and

6(4), there is no legal requirement – as a matter of Irish law – to assess plans in that way. Full, formal transposition of articles 6(3) and 6(4) has not yet been achieved.

Trigger for assessment: cumulative effect

The assessment obligations in article 6(3) are triggered where a plan or project “either individually or in combination with other plans or projects” is likely to have a significant effect on a Natura 2000 site. In implementing these obligations, the Habitats Regulations have subdivided the concept of “project”. Each type of project that was already regulated under Irish law continues to be regulated under Irish law, but now has habitats considerations integrated into that regulatory regime. Thus development that requires planning permission (unexempted development) continues to be regulated by the planning legislation, but that legislation now takes account of habitats considerations. A new residual category “operations or activities” was created for projects not subject to any regulation in Irish law. Thus unexempted development and operations or activities, although both projects under the Habitats Directive, are subject to different regulatory regimes. This approach has the benefit of avoiding a duplication of regulatory regimes whereby a developer, for instance, might have to acquire both planning permission and a habitats authorisation. It also ensures that habitat considerations are integrated into general decision-making on the environment and land use. The subdivision becomes problematic, however, where a competent authority has to decide whether to carry out an assessment.⁴³ Regulation 15(1) illustrates the problem:

Where it appears to the Minister that an application for consent ... relates to an operation or activity which-

- (a) is neither directly connected with nor necessary to the management of the site, but
 - (b) is likely to have a significant effect on the site, either alone or in combination with other operations or activities,
- the Minister shall cause an assessment to be made of the implications for the site in view of that site’s conservation objectives.

Thus whereas, under the Directive, the likely cumulative effect of all types of project triggers an assessment, under the Regulations, only the likely cumulative effect of the same type of project can trigger an assessment. That is, under the

43. As already noted, under the SEA Regulations, the competent authority must prepare an environmental report when preparing a development plan, strategic planning guidelines and a planning scheme so this problem does not arise in that context.

Regulations, the likely cumulative effect of an operation or activity *and* an unexempted development (*ie* a development that requires planning permission) does not trigger an assessment. This is a clear failure properly to transpose the requirements of the Directive.

Under the SEA regulations, the cumulative effect of a proposed plan outside the planning and development context in conjunction with any other plan (which presumably includes plans inside the planning and development context) does trigger an assessment. Within the planning and development context, however, some plans automatically trigger an assessment. However, local area plans do not automatically trigger an assessment. An environmental report must be prepared where the implementation of the local area plan (or its variation) is likely to have significant effects on the environment. However, the likely cumulative effect of the local area plan with any other plan is not a trigger for an environmental report.

A further problem arises in that article 6(3) seems to view the cumulative effect of a proposed project and a plan (as well as a proposed plan and a project) as a trigger for an assessment. Nothing in Irish law requires projects and plans to be considered together in this way.

Planning and development legislation

The Habitats Regulations did not amend the old Local Government (Planning and Development) Acts. Rather, they establish a set of parallel requirements that had to be followed when competent authorities were deciding on development applications that had implications for habitat sites. Regulation 27(1) illustrates the approach adopted:

A local authority when duly considering an application for planning permission, or the Board when duly considering an appeal on an application for planning permission, in respect of a proposed development that is not directly connected with, or necessary to the management of, a European site but likely to have a significant effect thereon either individually or in combination with other developments, shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

Regulation 28 took a similar approach in relation to the obligations of the Minister for the Environment in relation to local authority development where an environmental impact statement (EIS) was required. Regulation 29 took a similar approach for self-authorised local authority development.

A difficulty arises because regulations 27-29 of the Habitats Regulations referred to legal provisions that have since been repealed. Ideally the Planning and Development Act 2000 would have incorporated the authorisation

procedures set out in regulations 27-29; this approach would have meant that all the relevant legal provisions were, insofar as possible, in the same place. This approach was not adopted. Instead, sections 34 and 175 of the 2000 Act require planning authorities and an Bord Pleanála, as appropriate, only to *have regard* to European sites when making decisions on planning applications and on local authority applications for approval where an EIS is required. This is clearly inadequate transposition of articles 6(3) and 6(4) of the Directive. Section 179, which deals with local authority self-authorised development, does not refer to habitats considerations at all.

The question that therefore arises is whether the obligations in regulations 27-29 have been carried over to apply to decisions made pursuant to the Planning and Development Acts 2000-2006. In this regard, section 265(2)(b) of the Planning and Development Act 2000 provides:

The continuity of the operation of the law relating to the matters provided for in the repealed enactments [which include the Local Government (Planning and Development) Acts 1963-1999] shall not be affected by the substitution of this Act for those enactments, and – ...

(b) so much of any enactment or document (including repealed enactments and enactments and documents passed or made after the commencement of this Act) as refers, whether expressly or by implication, to, or to things done or falling to be done under or for the purposes of, any provision of the repealed enactments shall, if and so far as the nature of the subject matter of the enactment or document permits, be construed as including, in relation to the times, years or periods, circumstances or purposes in relation to which the corresponding provision of this Act has effect, a reference to, or, as the case may be, to things done or deemed to be done or falling to be done under or for the purposes of, that corresponding provision.

When parsed carefully, this provision appears to be sufficient to interpolate the requirements of regulations 27-29 of the Habitats Regulations into sections 34, 175 and 179 of the Planning and Development Act 2000. Whether it constitutes clarity of transposition is another matter.

Conclusion

The Habitats Amendment Regulations have usefully strengthened the protection afforded to Natura 2000 sites. Of particular importance are the environmental trespass provisions, the new powers of the Minister to issue conditional consents and to revoke consents, and the less cumbersome procedures for court applications on the part of the Minister. However, by removing any protection in Irish law for article 5 sites, the Regulations have also diminished to a certain

extent the protection afforded to Natura 2000 sites. Moreover, many of the serious deficiencies in the transposition of article 6 of the Habitats Directive remain unaddressed.

ORAN DOYLE*

*McCAULEY CHEMISTS: THE SUPREME COURT INVOKES ARTICLE 234
EC TO RESOLVE THE “NECESSITATED” QUESTION*

The latest installment in the jurisprudence as to delegated legislation, the “principles and policies” test and its interaction with European law has come in the form of the interesting twist posed by *McCauley Chemists (Blackpool) Ltd v Pharmaceutical Society of Ireland*.¹ That the law has been left in a most unsatisfactory state in the wake of the Supreme Court decisions in *Browne v Attorney General*² and *Kennedy v Attorney General*³ is becoming quite apparent.⁴ The *McCauley* decision may in large part fundamentally affect the

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1. 31 July 2002 (HC). The decision of McCracken J was appealed to the Supreme Court and an order for a preliminary reference to the Court of Justice made on 11 May 2005. The hearing before the Court of Justice was held on 16 March 2006.
2. [2003] 3 IR 205.
3. 31 May, 2005 (SC).
4. See Fahey “*Browne v Attorney General and Kennedy v Attorney General: The Current State Of The Ultra Vires Doctrine And The “Necessitated” Clause*” (2005) 23 *ILT* 258; Doherty “Land, Milk and Freedom- Implementing Community law in Ireland” (2004) 11 *IJEL* 141 and Hogan and Whyte eds, *Kelly: The Irish Constitution* (4th ed., Lexis-Nexis, 2003) at [5.3.71] *et seq.* In essence, the Supreme Court has rendered unclear the manner in which to apply the “principles and policies” test as to European delegated legislation pursuant to Article 15.2.1 and has appeared eager to shirk the arduous task of deciding what is “necessitated” by the obligations of membership of the European Union and Communities, pursuant to Article 29.4.10 of the Constitution (the “necessitated” clause). Both decisions in *Browne* and *Kennedy* entailed challenges on similar facts to secondary legislation, pursuant to which fisheries prosecutions had ensued. Whilst a complete consideration of the cases is outside the scope of this analysis, the most controversial and perplexing aspect of the current Supreme Court’s analysis of the “necessitated clause” is contained in a passage in *Browne* of the former Chief Justice. Keane CJ stated:

While there was some discussion in the course of the written and oral submissions as to whether the creation of an indictable offence was “necessitated” by the obligations of our membership of the communities within the meaning of Article 29.4.5° of the Constitution, having regard to the provisions of art. 31 of the