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1st May 2019
James Kane BL

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Principles of Environmental Law in a Construction Context

James Kane BL *

I. What are the principles of environmental law?

There are five principles of environmental law. They are found in article 191(2) of the Treaty on the Functioning of the European Union ("TFEU"), article 11 TFEU and article 37 of the Charter of Fundamental Rights of the European Union ("CFREU").

Article 191(2) TFEU provides:

> *"Union policy on the environment shall aim at high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."*

Article 11 TFEU provides:

> *"Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."*

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Article 37 of the CFREU provides:

> *"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."*

Five principles are referred to in the respective articles of the TFEU and CFREU.

The first principle is the precautionary principle. This principle means that it is appropriate to take steps to prevent environmental harm if there is a *risk*, as opposed to a certainty, of environmental harm occurring. In *Brownfield v Wicklow County Council*[1] Humphreys J stated: *"If a risk is there, arising from the presence of vast quantities of illegal waste on a highly vulnerable site, I am not too concerned about precisely where or when the pollution is going to show up in receptors. The issue is whether there is a risk of such pollution showing up and if so, such measures as are necessary to remove it should be taken."*

Second, is the preventative principle. This means that it is appropriates to take steps to prevent environmental damage before it occurs. It is similar to the precautionary principle. In the Northern Ireland case of *In Murphy*[2] the High Court described article 6(2) of the Habitats Directive as "*a general provision designed to prevent deterioration and disturbance*" and that it was "*rooted in the preventative principle*", being an "*anticipatory provision.*"

Third, reference is made to the rectification at source principle. This principle provides that environmental pollution and harm should be rectified at its source. In *Commission v Belgium*[3] (also known as "*Walloon Waste*") the CJEU stated: *"The principle that environmental damage should as a matter of priority be remedied at source, laid down by… the Treaty as a basis for action by the Community relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste."*

[1] [2017] IEHC 456.
[2] [2017] NIQB 35.
[3] C2/90.

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Fourth, the polluter pays principle establishes that the person responsible for pollution or environmental damage ought to pay the costs of remediation or restoration. This principle is found in several domestic and EU laws. In domestic law, Regulation 10 of the European Communities (Environmental Liability) Regulations 2008 (SI 547/2008) empowers the EPA to issue a direction to an occupier as to remediation required in the case of environmental damage. In addition, Regulation 17 provides that an operator whose activity *causes* a threat of environmental damage or actual environmental damage is, subject to the Regulations, liable for the costs incurred in remediating that damage. Provision is made empowering the EPA to recover such costs as a simple contract debt.

Fifth and finally, the integration principle arises. Arguably this is the most innovative of all principles of environmental law. This principle expresses a requirement to integrate environmental protection into all areas of EU policy and competence. The power of EU institutions to operate in any particular sphere is dependent on the Union having *competence* to so act. The Union derives its competence to act in any particular zone through the TFEU.[4] The integration principle requires the Union to act in *an environmentally-protective manner* in the course of exercising its powers in other fields.

Each of these principles enjoy Treaty-level status in EU law, meaning that they derive from the highest source of Union law, and are intended to influence EU environmental policy. In *Brownfield v Wicklow County Council*[5] Humphreys J described one of the environmental principles as a *"binding Treaty-level commitment of EU law."*

The principles are relevant in *national* law in at least three respects.

First, the Irish Courts have recently suggested that the commitment to a high level of environmental protection referred to in article 191(2) forms part of the context within which

[4] Article 5(2) TFEU.
[5] [2017] IEHC 456.

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they will assess the lawfulness of decisions of public bodies on an application for judicial review. In that regard, Humphreys J stated in *Holohan v An Bord Pleanála*[6] that:

> "*… the function of the court on judicial review is to assess the lawfulness of the decision in question, in the overarching context of the Charter-level commitment to a high level of environmental protection and the need to ensure effective implementation of EU environmental law overall."*

Secondly, where possible, national measures which implement EU law must be interpreted consistent with EU obligations.[7]

Thirdly, in the case of a conflict between national law and EU law, the latter must prevail.[8]

These environmental principles are important in a construction context. Specifically, they are important in the area of development consent and the area of procurement.

II. Development consent and the precautionary principle

The precautionary principle arises in the context of development proposed in the vicinity of protected European sites, such as special areas of conservation and special protection areas. An important provision concerning such development is article 6(3) of the Habitats Directive, which, essentially, prohibits development consent for projects unless it can be ascertained, without any doubt, that the project will not affect the site concerned. This is a manifestation of the precautionary principle. Article 6(3) reads:

> *"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*

[6] [2017] IEHC 268.
[7] See for example: *People over Wind v An Bord Pleanála* [2015] IEHC 393. See also *Von Colson v Land Nordrhein-Westfalen* (C14/83) and *Marleasing SA v La Comercial Internacionale de Alimentacion SA* (C106/89).
[8] See for example *Minister for Justice and Equality v Workplace Relations Commission* (C378/17).

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> *combination with other plans or projects, shall be subject to 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."*

The Habitats Directive was implemented in Irish Law by Part XAB of the Planning and Development Act 2000 (as amended). Section 177U of the Planning and Development Act 2000 (as amended) provides that a competent authority must screen for an appropriate assessment to assess whether the proposed development is likely to have a significant effect on a European site. The competent authority must decide that an appropriate assessment is required if *"it cannot be excluded, on the basis of objective information, that… [the development] will have a significant effect on a European site."*[9]

In *Grace and Sweetman v An Bord Pleanála*[10] the CJEU noted that article 6(3) comprised a two step process: first an AA is performed, second, the project is only permitted where it will not adversely affect the integrity of the site concerned, subject to a derogation contained in article 6(4).

In *Wadenzee v Staatssecretaris van Landbouw*[11] the CJEU referred to the requirement to obtain an appropriate assessment under article 6(3) and held that it applied were the plan or project has a mere probability or a risk of significant adverse effects. Such *"… a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site."*

[9] A summary of the principles applicable to the requirement to screen for appropriate assessment is found in *Kelly v An Bord Pleanála* [2019] IEHC 84 at para 68.
[10] C-164/17.
[11] C127/02.

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The Court also explored the issue of "appropriate assessment" in the Directive. It noted that the Directive does not define that term, but the Court explained that AA must *precede* development consent and must cover all aspects of the development which might affect the site. It stated:

> *"… an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field."*

The Court also confirmed the mandatory nature of article 6(3) such that consent for development shall not be granted unless all doubt is removed as to whether the development will or may adversely affect the integrity of the site. The Court stated:

> *"… the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation."*

With respect to the proposed activity in that case (mechanical cockle fishing at the site) the Court explained that:

> *"[t]he competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."*

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Accordingly, the precautionary principle in environmental law, as expressed in article 6(3) of the Habitats Directive, means that development occurring near protected sites is impermissible, unless it is doubtless that the project will not adversely affect the site.

There are two particularly relevant recent developments around article 6(3).

The first concerns construction details which are left over for agreement post-consent. In *Holohan v An Bord Pleanála*[12] the CJEU ruled that it was impermissible, in light of the precautionary principle, to grant development consent in circumstances where the consent left open decisions relating to construction details to be agreed post-consent between the developer and planning authority, without strict conditions to guarantee that those matters would not adversely affect the integrity of the site. The rationale for such an approach is that, if the Board or planning authority does not impose strict conditions governing the construction aspects of the project but leaves the developer to agree those details with the planning authority, it cannot be said that the project will not have adverse effects on the site. In such a case the precautionary principle is violated.

The second issue concerns the relevance of proposed mitigation measures when screening for AA. Recently, cases have come before the courts in which a developer has proposed numerous environmental "mitigation" measures and sought to argue that an appropriate assessment was not required in light of those measures.

For example, in *People Over Wind v Coillte Teoranta*[13], the High Court referred a question to the CJEU concerning article 6(3). The development in question comprised the laying of pipes to connect a wind farm to the electricity grid. An Bord Pleanála granted earlier permission for the overall project, but excluding the aspect which dealt with the laying of the pipe in question, subject to conditions, including one in which a Construction Management Plan was to be agreed with the planning authority prior to the commencement of the development. Coillte was the competent national authority to grant consent for the grid connection. A report was submitted to Coillte which provided that *in light of protective measures* the grid connection

[12] C461/17.
[13] C323-17.

would not have a significant effect on the relevant sites and would not require an appropriate assessment. Coillte granted consent on foot of this report.

The question referred was whether these protective or mitigation measures could be considered when screening for an AA under article 6(3).

The CJEU noted that the Directive does not refer to a concept of "mitigation measures", nor does it refer to "protective measures" (which was the term used in the report submitted to Coillte). The CJEU noted that measures of this sort *"should be understood as denoting measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned."*

The Court held that *"... in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site."*

III. Procurement and the integration principle

The second area of particular relevance in a construction context is the relevance of environmental principles to the procurement process. Here, the integration principle is relevant.

In *Concordia Bus Finland Oy Ab v Helsingin kaupunki*[14] an unsuccessful tenderer for a bus services contract challenged the award of the contract on the basis that the contracting authority awarded points relating to Nitrogen Oxide emissions and noise levels of the fleet. In that regard, Concordia Bus argued that it was impermissible to have regard to ecological factors in the procurement process. Concordia relied on the procurement Directive existing at the time which identified a non-exhaustive list of factors to which contracting authorities could have regard. One of the bases on which the CJEU rejected that argument was by reference to the integration principle. Accordingly, it was held that the procurement Directive in existence at that date did

[14] C513/99.

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"*… not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment.*"

There are a number of EU Directives which are relevant to the award of public contracts. Perhaps the most relevant Directive pertaining to construction projects is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.[15] Directive 2014/24/EU is transposed into Irish Law by virtue of European Union (Award of Public Authority Contracts) Regulations 2016 (S.I. 284/2016). The recitals to Directive 2014/24/EU deal in some detail with the integration of environmental principles into the procurement process. By way of examples, the following Recitals are relevant:

> Recital 1: *"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU)."*
>
> Recital 37: "*With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law…*
>
> Recital 91: *"Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts."*

[15] The projects within the scope of this Directive are set out in Annex II to the Directive and include large construction contracts.

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> Recital 97: *"Furthermore, with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance…"*

However, the approach set out in Directive 2014/24EU is to *not* impose mandatory environmental requirements on Member States, rather it is for Member States or contracting authorities to determine the appropriate environmental standards to be integrated into the procurement process.[16]

Under the Directive, contracting authorities are permitted to impose environmental related obligations at virtually all stages of the process, provided that those obligations are linked to contract, are proportional, transparent and not calculated to restrict competition and applied in a non-discriminatory manner.[17] In further detail, the substantive provisions of Directive 2014/24/EU which are relevant are as follows.

Compliance with environmental obligations

Article 18(2) provides that:

> *"Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective*

[16] Recital 95.
[17] Article 18(1).

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> *agreements or by the international environmental, social and labour law provisions listed in Annex X."*

This is an important article as non-compliance with the obligations referred to in article 18(2) (which include obligations under environmental law) has ramifications for the tenderer or economic operator. First, article 57(4) provides for the exclusion from further participation in the procurement process where it is shown that there is a violation of the obligations in article 18(2). Second, article 69 provides that, where a tender appears to be "abnormally low", the contracting authority is required to explain the costs involved and they may seek explanations as to compliance with the obligations contained in article 18(2). Third, article 56 permits a contracting authority to decline to award a contract to the "most economically advantageous tender" (which usually results in the award of a contract) where there is non-compliance with the obligations in article 18(2).

Preparation and Technical specifications

Article 42 governs the preparation of technical specifications (which lay down the characteristics required by the contracting authority). Where contracting authorities elect to formulate the technical specifications by reference to performance or functional requirements, they may stipulate a requirement to comply with environmental characteristics, provided they are sufficiently precise.[18]

In addition, subject to certain conditions, article 43 allows contracting authorities to require "specific labels" as proof of conformity of works, services or supplies with certain environmental characteristics.

Contract award

Generally, a contract is awarded to the most economically advantageous tender.[19] In identifying the most economically advantageous tender, contracting authorities may include qualitative

[18] Article 42(3)(a).
[19] Article 67(1).

criteria, including environmental criteria, *provided* those criteria are "*linked to the subject-matter of the public contract in question.*"[20]

The weighting to be given to such criteria must be published in the procurement documents and is a matter for the contracting authority.[21]

Article 68 deals with life cycle costs, which is one of the methods prescribed for determining the most economically advantageous tender. Under the life cycle costs methodology, environmental costs may be factored into the analysis as the contracting authority may examine costs associated with all stages of the life cycle of the works, service or product. Specifically, article 68 provides for the inclusion of the following costs as part of the life cycle cost analysis: costs, borne by the contracting authority or other users, including acquisition costs, costs of use (including energy consumption), maintenance costs and end of life costs (including collection and recycling costs). In addition, where it is possible to measure, "costs imputed to environmental externalities" including the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs, they may be factored in to the cost analysis.

Conditions for performance

Contracting authorities are also empowered by article 70 to lay down special conditions relating to the *performance* of the contract, provided, once more, that those conditions are "linked" to the subject matter of the contract in question. Among the conditions permitted by article 70 are environmental considerations.

[20] Article 67(2).

[21] Article 67(5). See also *EVN AG v Republik Österreich* (C448/01) in which a challenge was mounted to a procedure which adopted a 45% weighting for renewable energy sources. The CJEU stated: *"... provided that they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.*"

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Subcontractors

In the case of sub-contractors, contracting authorities are empowered to ensure, "through appropriate action," that subcontractors comply with the obligations listed in article 18(2) (which, again, include, the requirement to comply with environmental law obligations).[22]

Possible future developments

Future Directives, or future national Regulations, may make certain environmental standards or considerations *mandatory*.

Disappointed tenderers or other economic operators seeking to challenge awards on the basis of the application of environmental criteria may challenge those criteria on the basis that those criteria are not "linked" to the subject matter of the contract or on the basis of the *application* of those criteria, which must be applied transparently, proportionately and in a non-discriminatory manner.

[22] Article 71(1).