THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW

2022/1016 JR

IN THE MATTER OF S.50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED and S.3 OF THE ENVIRONMENTAL (MISCELLANEOUS PROVISIONS) ACT 2011, AS AMENDED

Between:

MOYA POWER
WILD IRELAND DEFENCE CLG

Applicants

and

AN BORD PLEANÁLA
MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE
IRELAND AND THE ATTORNEY GENERAL

Respondents

and

KNOCKNAMONA WINDFARM LIMITED

Notice Party

JUDGMENT OF MR JUSTICE DAVID HOLLAND, DELIVERED 28 February 2024.

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INTRODUCTION

1. The Applicants challenge a decision of the First Respondent ("the Board"), dated 28 September 2022 and made pursuant to the Planning and Development Act 2000 as amended[1] ("the Impugned Decision"), to grant planning permission ("the Impugned Permission") to the Notice Party, Knocknamona Windfarm Limited ("KWFL"), for amendments ("the Proposed Development") to the permitted (in 2016) but as yet unbuilt, Knocknamona Windfarm, consisting of 8 turbines, on a site ("the Site"/"the Knocknamona Windfarm Site"), at present consisting mostly of commercial forestry, about 9km southwest of Dungarvan, and 3km east of Aglish, Co. Waterford.[2] Those amendments – the Proposed Development – consist only[3] of,

- An increase in the uppermost tip height of the previously authorised turbines from up to 126 metres to up to 155 metres.

- Amendment of the height and design of the previously authorised meteorological mast from a tubular tower mast up to 80 metres to a lattice tower mast up to 99 metres.

[1] "PDA 2000".
[2] More particularly in the townlands at Knocknaglogh Lower/Barranastook Upper/, Knocknamona/Woodhouse or Tinakilly, Monageela/Killatoor.
[3] For example, the Inspector's report notes at §8.4.1.4 "The proposed amendment will not require any additional land take, and no additional excavations over and above those which are already permitted are proposed. No additional forestry felling will be required. …. the proposed amendment will not require any changes to the permitted KWF grid connection and haul route to the site." The EIAR says at §3.1.4 "The only part of the authorised windfarm that will change is the size of the turbines and size and design of the mast and all else remains the same."

2. Only the tip height increase is controversial. As I understand, the uppermost tip height is the highest point above ground reached by the tip of a rotor in the vertical position. Thus, tip height is composed of two elements – hub height above ground and rotor length. The hub is the central axle around which the rotors spin.[4]

3. The practical reason for KWFL's application for the Impugned Permission is that, whereas ESB Networks has approved a Maximum Export Capacity[5] of 34MW for the Knocknamona Windfarm, KWFL take the view that the Board by the 2016 Permission, in reducing the number of turbines from the 12 sought to 8, had reduced Knocknamona Windfarm's power output by 33% to 23MW. By the increased tip height permitted by the Impugned Permission, KWFL considers that it can increase the power output by about 11MW to the 34MW for which it has ESB Networks approval. KWFL asserts that, as the windfarm is already permitted and the Proposed Development will increase its GHG[6] emission offset potential by 43%, and so contribute to efforts on climate change and protection of biodiversity, the Proposed Development represents sustainable development.[7]

4. As to sustainable development, one may add that national policy generally favouring onshore wind energy as a major element in the move from fossil fuel to renewable energy generation and in the reduction of the GHG[8] emissions of power generation by way of addressing climate change is well-established and is briefly described in the Board's Inspector's report.[9] It is recorded also in the 2021 EIAR[10] to the conclusion that, by the Proposed Development, there will be a significant positive change to the impacts on climate through the avoidance of emissions from fossil fuel generation. One may, of course, dispute how significant that 11MW will be in the great scheme of things and sustainability is certainly not concerned only with climate change – it also requires respect for the health and welfare of local residents. But that wind power represents sustainable development, at least as to the discrete issue of GHG emissions reduction, is clearly national policy to which the Board must have regard.

5. The Board,

- decided to grant permission for Proposed Development – generally in accordance with its Inspector's recommendation.[11]

[4] That axle conveys the motive force of the rotor movement to the turbine itself – the electricity generating components - which sit atop the mast in a cover/housing called the nacelle.
[5] A measure of the power output - quantum of electricity - which ESB Networks will accept to the national grid from the windfarm.
[6] Greenhouse gas.
[7] "The 2021 EIAR asserts at §1.2 "Since 2014, wind turbine technology has advanced and become more controllable and efficient, with larger rotors capable of higher energy capture. This amendment will facilitate the installation of the latest wind turbine technology which delivers higher energy production and also enhanced controllability of noise and shadow flicker emissions. The proposal represents a sustainable use of the planning permission for 8 No. turbines which has already been assessed through the planning process as acceptable."
[8] Greenhouse gas.
[9] Inspector's report §5.
[10] EIAR §7.
[11] Board Direction 26/09/2022.

- to comply with the EIA Directive[12] as transposed to Irish law, did an Environmental Impact Assessment ("EIA") of the Proposed Development. For that purpose it,
  - identified the "project" to be subjected to EIA as specifically the amendments described above (as opposed to the entire Knocknamona Windfarm).
  - adopted the Inspector's report as to EIA.
  - concluded that the environmental effects of the Proposed Development, by itself and in combination with other projects, would be acceptable. Those other projects included the Woodhouse Windfarm and the proposed Grid Connection from Knocknamona Windfarm to the Woodhouse Windfarm 110kV electricity substation.

- to comply with the Habitats Directive[13] as transposed to Irish law and having "screened in" 5 European Sites, did an Appropriate Assessment ("AA") of the implications of the Proposed Development for, inter alia, the Blackwater Callows Special Protection Area[14] (the "SPA"). It adopted the Inspector's report in that regard and concluded that there was no reasonable scientific doubt but that the Proposed Development would not adversely affect the integrity of European sites.[15]

6. The Knocknamona Windfarm Site adjoins[16] and lies generally south-west of the existing Woodhouse Windfarm and its 110kV electricity substation – to which substation (the "Woodhouse Substation"), KWFL intend the Knocknamona Windfarm will be connected. KWFL and the Board[17] say that the Woodhouse and Knocknamona Windfarms are separate projects by different developers. The Applicants assert a relationship between the developers and the lands. It is not apparent that anything turns on this dispute for present purposes.

7. Moya Power, the First Applicant ("Ms Power") lives north/north-east of and near to the Woodhouse Windfarm and substation. The Knocknamona Windfarm Site lies further from the Power family home and generally south and southeast of the Woodhouse Windfarm. Ms Power's home lies greater than 1km but less than 2km from the nearest proposed Knocknamona Windfarm turbine. To some extent, the Woodhouse Windfarm lies between the Power family home and the Knocknamona Windfarm Site. Ms Power did not object to the Woodhouse Windfarm planning application as, she says, she was assured it would not affect her home or family. She says that, as matters turned out, the impacts of the Woodhouse Windfarm on her home and family have been intolerable by way of noise, shadow flicker and visual impact. Whether that is so is not for decision in these proceedings. She is one of the applicants in two separate proceedings:

- "S.160 proceedings"[18] complaining of noise and other nuisance by the operation of the Woodhouse Windfarm and seeking injunctive relief in respect thereof.

[12] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU.
[13] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora as amended.
[14] Within the Meaning of the Birds Directive.
[15] By Article 1 of the European Communities (Birds and Natural Habitats) Regulations 2011 as amended "European Site" means — (a) a candidate site of Community importance, (b) a site of Community importance, (c) a candidate special area of conservation, (d) a special area of conservation, (e) a candidate special protection area, or (f) a special protection area;
[16] They may or may not be precisely contiguous but lie as near as makes no difference.
[17] Inspector's Report §7.3.12 – "I do not consider that the planning status of Woodhouse windfarm is relevant to the assessment of the subject case as it and KWF are two separate projects which are not proposed by the same developer."
[18] Proceedings seeking injunctive relief pursuant to s.160 PDA 2000.

- Judicial review proceedings in which the planning permission for a grid connection between Knocknamona Windfarm and the Woodhouse Substation was recently quashed.

Wild Ireland Defence, the Second Applicant, is a non-governmental organisation established in 2019 to promote environmental protection. Since its establishment, it has engaged in planning processes in the interest of environmental protection. Ms Power and Wild Ireland Defence participated in the appeals to the Board which resulted in the Impugned Decision.

Reliefs Sought

8. The Applicants seek the following reliefs:

- Certiorari quashing the Impugned Decision.
- A declaration that the Second, Third and/or and Fourth Respondents ("the State") have failed to fulfil their obligations under Articles 3, 4(1) and 4(2) of the Birds Directive[19] and Article 6 of the Habitats Directive, as implemented by the Habitats Regulations 2011[20] – in particular Article 26 thereof – by failing to establish the necessary site-specific conservation objectives and conservation measures for the Blackwater Callows SPA, corresponding to its qualifying interests.[21]
- Mandamus requiring the establishment of such site-specific conservation objectives and conservation measures.

Chronology

9. A chronology of some of the background to these proceedings will assist:

Date	Event	Comments[22]
2004	WCCC[23] granted planning permission 04/1788 to Hibernian Wind Power for an 8-turbine Woodhouse Windfarm on lands adjoining the Site. • EIA was done.	The Applicants allege that • no proper EIA or AA were done for the 2010 permission 10/45.

[19] Directive 2009/147/EC on the conservation of wild birds.
[20] European Communities (Birds and Natural Habitats) Regulations 2011 as amended.
[21] By Article 3 of the Habitats Directive the Natura 2000 Network is the EU-wide network of Special Areas of Conservation ("SAC") designated under the Habitats Directive and Special Protection Areas ("SPA") designated under the Birds Directive. SACs are so designated for the conservation of habitats and species "of Community Interest". Analogously, SPAs are so designated for the protection of wild birds and their habitats of "Special Conservation Interest". Given that the protection of both SACs and SPAs is regulated by Habitats Directive the phrase "Qualifying Interests" is used to refer to both Birds Directive "Special Conservation Interests" and Habitats Directive habitats and species "of Community Interest" that is to say the interests for which both SACs and SPAs are so designated. They are identified in the designating instrument. In the case of the Blackwater Callows SPA and, as designated by SI 191 of 2012, they are the Whooper Swan, the Wigeon, the Teal, the Black-Tailed Godwit and the Wetland Habitats in the SPA and the Waterbirds' that use them.
[22] Where convenient, I have merged this column with the "Event" column.
[23] Waterford City and County Council. (At the time, Waterford County Council).

Date	Event	Comments[22]
	• The turbines were to have a 70m tower/ hub height, 42m long blades and an overall height of 112m.	• This is relevant to the present proceedings as to the cumulative effect of both windfarms. However, this point was not pursued at trial.
2010	WCCC granted planning permission 10/45 to ESB Wind Development Limited to amend Woodhouse Windfarm permission 04/1788 by way of • increase in tower height to 80m. • increase in maximum blade length to 45m. • relocation of 4 turbines.	WCCC later, by decision 10/175, extended the duration of permission 04/1788 to 23 May 2015.
	WCCC granted planning permission for a 110kV substation to serve the Woodhouse Windfarm.	
2014	Malachy Walsh & Partners conducted a Noise Assessment for KWFL, which: • Was done to inform the planning application and EIA for the Knocknamona Windfarm. • Assumed a Nordex N100 turbine of 126m overall height and 100m rotor diameter. • Applied to a study area of the homes within 1km of the proposed Knocknamona Windfarm. • Assessed background/baseline noise at 3 monitoring points within that study area.[24]	Woodhouse Windfarm was not yet in operation. The Applicants say that this 2014 baseline noise assessment did not include/apply to Ms Power's house.
	The first Knocknamona Windfarm EIS[25] was finalised, and: • Incorporated the 2014 Noise Assessment. • The Communications Impact Study assumed a turbine of 85m hub height and 90m rotor diameter. • The shadow flicker analysis assumed a turbine of 75m hub height and 100m rotor diameter.	Revised in 2015.

[24] Marked with a 'green square' on a study area mapped on Figure 10.1 of the Noise Impact and Vibration Assessment prepared in August 2015.
[25] Environmental Impact Statement. Since the 2014 EIA Directive came into effect, such documents are known as Environmental Impact Assessment Reports ("EIAR").

Date	Event	Comments[22]
31 July 2014	Ecopower[26] applied to WCCC for planning permission for a 12-turbine windfarm at Knocknamona.	
23 September 2014	WCCC decided[27] to refuse permission for Knocknamona Windfarm on two grounds: • inadequacy of the EIS. • adverse effect on landscape and visual amenity.[28]	
	Ecopower appealed to the Board WCCC's refusal of permission for Knocknamona Windfarm and, in doing so, downsized the proposal to 9 turbines.	
	The Board requested a revised Knocknamona Windfarm EIS.	
2015	The revised Knocknamona Windfarm EIS was finalised. Inter alia, it considered the implications of the Ó Grianna judgment[29] as to the relationship between the windfarm and its grid connection.	This Revised EIS 2015 informed the EIA recorded in the Board's decision of 12 December 2016 permitting the 8-turbine Knocknamona Windfarm. The Applicants say that this EIS did not consider the noise impacts of • the Woodhouse Substation – as, at that time, it was not intended to connect the Knocknamona Windfarm to the Woodhouse Substation. • the Knocknamona Windfarm on Ms Power's family home and John Reynolds' house – which are outside the EIS study area.
	Woodhouse Windfarm and its 110kV substation started operation.	• In the s.160 proceedings the Applicants assert that 5 of the 8 Woodhouse Windfarm turbines rotors are 100m in diameter – 10m greater than permitted. • KWFL asserts that: o the Applicants may not in these proceedings impugn the validity of the permitted Woodhouse Windfarm. KWFL is correct in that regard. o whereas the Woodhouse Windfarm turbines rotors are 100m in diameter, the hub height was reduced to maintain the overall permitted tip height.[30]
2 September 2016	Inspector's addendum report in light of the revised EIS 2015 for Knocknamona Windfarm.	

[26] Ecopower Developments Limited.
[27] Ref. 14/600109.
[28] As recorded in Alen-Buckley v An Bord Pleanála [2017] IEHC 541.
[29] Ó Grianna & Ors v An Bord Pleanála [2014] IEHC 632.
[30] Citing the Revised EIAR 2021 for the Impugned Development, 'Appendix 6.1: Noise and Vibration Assessment' §2.1.2, Table 4 (page 4).

Date	Event	Comments[22]
12 December 2016	**The Board granted permission PL93.244006 for the 8-turbine Knocknamona Windfarm ("the 2016 permission").** • EIA was done on foot of the revised EIS 2015. • Condition 2 permitted 8 turbines only. • Condition 3 allowed 10 years for completion of the windfarm. • Condition 5A provided for a maximum tip height of 126 metres. • Condition 7 provided that Knocknamona Windfarm turbine noise , by itself or in combination with the Woodhouse Windfarm, was not to exceed the greater of ○ (a) 5 dB(A)[31] above background noise levels or, ○ (b) 43 dB(A) L90, 10min. when measured externally at dwellings or other sensitive receptors.	The planning application had sought permission for 12 turbines, KWFL's appeal had reduced the proposal to 9. The Board permitted 8. The 2016 Permission provided for a maximum tip height but did not stipulate hub height or rotor length. The Applicants contend that this permission consented to an open-ended range of turbine design found to be contrary to the PDR 2021[32] in Sweetman XVII.[33] However that contention did not feature in argument and, in any event, judicial review of the 2016 Permission and EIA failed.[34] It has been correctly observed that: • The Impugned Permission does not affect Condition 7 of the 2016 Permission – the noise limit applicable pursuant thereto will continue to govern the operation of whichever version of the Knocknamona Windfarm is built. • Certiorari of the Impugned Permission will not prevent development of the Knocknamona Windfarm in accordance with the extant 2016 permission if that is what KWFL choose to do.
August 2020	"Proposed Larger Turbines at Knocknamona Windfarm – Noise & Vibration Impact Assessment" by Malachy Walsh & Partners for KWFL. This assessment • was prepared in contemplation of the Proposed Development – as its title indicates. • states[35] that, in response to a scoping submission, the HSE replied: ○ *"Any likely significant changes in noise and vibration resulting from*	This assessment ("the 2020 Noise Assessment") was included in the September 2020 EIAR for the Proposed Development as Appendix 6.1. The Applicants do not criticise the HSE view that the noise baseline should exclude "*any existing turbines in the area*" – such as the Woodhouse Windfarm Turbines. Such exclusion accords with the 2006 Windfarm Guidelines. The proper method is that Woodhouse Windfarm Turbine noise is brought into the EIA for the Proposed Development as part of the assessment of cumulative effects. The Applicants say that,

[31] dB stands for decibels. "A" stands for A-weighting which is a system for approximating the noise profile to the sensitivities of the human ear.
[32] Planning and Development Regulations 2001.
[33] Sweetman v An Bord Pleanála [2021] IEHC 390
[34] See Alen-Buckley v An Bord Pleanála [2017] IEHC 541.
[35] §2.3

Date	Event	Comments[22]
	the increase in hub height and blade length on all sensitive receptors must be clearly identified in the EIAR. … ○ *A baseline noise monitoring survey should be undertaken to establish the existing background noise levels.* ○ *Noise from any existing turbines in the area should not be included as part of the background levels*." • used the 2014 baseline noise assessment because "*Woodhouse Windfarm was not operational at that stage and those baseline measurements are still considered representative.*"[36] • modelled the as-built Woodhouse Windfarm for the purposes of the cumulative noise assessment of the Woodhouse Windfarm and the Proposed Development. • calculated impacts on all houses within 2km of the Knocknamona Windfarm[37] – including Ms Power's family home.[38]	• the 2020 Noise Assessment calculated impacts at Ms Power's house at just below the noise limit set by Condition 7 of the 2016 planning permission. • as the 2014 baseline noise assessment did not include/apply to Ms Power's house the 2020 Noise Assessment could not have properly assessed noise impacts at her house.
September 2020	EIAR[39] for the Proposed Development.[40]	This EIAR, later revised, was not exhibited. It is mentioned only to clarify the chronology.
13 November 2020	KWFL applied to WCCC for permission for the Proposed Development. • The application was accompanied by the September 2020 EIAR and an AA Screening Report.[41] • It was not accompanied by an NIS.[42]	The Applicants say that at this time KWFL intended to connect the Proposed Development to a substation a considerable distance away at Dungarvan and not to the Woodhouse Substation.
	74 submissions were made to WCCC opposing KWFL's planning application – including by:	The Applicants say that Mr Reynolds' house is also outside the 2014 1km noise modelling study area.

[36] §2.3.
[37] §3.
[38] House #59.
[39] Environmental Impact Assessment Report
[40] See Inspector's Report §8.1.4.
[41] Appropriate Assessment Screening Report.
[42] Natura Impact Statement.

Date	Event	Comments[22]
	• Wild Ireland Defence. • the Alen-Buckley family. • John Reynolds. He said that Woodhouse Windfarm noise in excess of 43 dB had been measured at his house at night and he invited investigation.	It is not apparent that Mr Reynolds enclosed any detail or record of the noise measurements to which he refers. This is no criticism of Mr Reynolds, who is free to object in such terms as he thinks proper. Nor do I doubt the genuineness of his objection. Nor is Mr Reynolds expected to retain experts to ground his objection. But given his assertion of such measurements, the omission is noteworthy as such measurements, the place and circumstances in which they are taken, the equipment used, the expertise of the user, the precise parameters measured of the many possible,[43] the duration of the measurements, the atmospheric and wind conditions during such measurements and the records kept are, at least potentially, very relevant to the weight to be given to any such objection.
14 January 2021	WCCC decide to refuse permission for the Proposed Development.[44] The reasons for refusal were: • failure to robustly demonstrate that the proposal for significantly larger turbines would not have a detrimental impact on the visual and residential amenities of the local area and wider visual catchment, • conflict with the Development Plan as to landscape protection, • serious concerns regarding the adequacy and robustness of and information gaps in the EIAR and AA.	
February 2021	**KWFL's Revised EIAR for the Proposed Development**.[45] • It was revised in various respects, including consideration of an alternative turbine of 145.3m tip height. • It included the 2020 Noise and Vibration Assessment[46] – as had the September 2020 EIAR.	This is the EIAR which informed the EIA which informed the Impugned Decision.
	AA Report 2021 • For Proposed Larger Turbines and Meteorological Mast at the	This is the AA Report which informed the AA which informed the Impugned Decision.

[43] For example, L_{den} or $L_{(A)90}$.
[44] WCCC Ref. 20/845.
[45] See Inspector's Report §8.1.4.
[46] Revised EIAR 2021, Appendix 6.1.

Date	Event	Comments[22]
	Authorised Knocknamona Windfarm. • Prepared by Inis[47] for KWFL. • It includes: ○ An AA Screening Report. ○ An NIS.[48]	
10 February 2021	KWFL appealed WCCC's decision to refuse permission for the Proposed Development. The appeal enclosed the Revised EIAR 2021 and the AA Report 2021.	
18 February 2021	The Board granted permission ABP-306497-20 for • a grid connection between Knocknamona Windfarm and the Woodhouse Substation. • the use of the Woodhouse Windfarm internal access roads as construction access for the Knocknamona Windfarm.	This "Grid Connection Permission" quashed in February 2024.
February 2021	Michael & Gianni Alen-Buckley and Wild Ireland Defence (both per Reid Associates) appealed to the Board WCCC's decision to refuse permission for the Proposed Development. • Both appeals complain of turbine noise. The Alen-Buckley appeal includes a noise report by MAS Environmental. • The Wild Ireland Defence appeal complains of confusion caused by the non-adoption of up-to-date wind energy guidelines.	This is a very brief and selected account of these appeals. Both asserted reasons, additional to those given by WCCC, for which, they said, permission should be refused. The MAS Environmental report is swingeingly critical of the 2020 Noise Assessment.
	Judicial review of the Grid Connection Permission was sought.[49]	
22 March 2021	"Response to Submissions (Noise)" by Malachy Walsh & Partners	It rejects the MAS Environmental criticisms of the 2020 Noise Assessment.
	KWFL submitted a response to the Wild Ireland Defence appeal – enclosing, inter alia, the Walsh "Response to Submissions (Noise)"	

[47] INIS Environmental Consultants Lt, Planning and Environmental Consultants.
[48] Natura Impact Statement for purposes of Appropriate Assessment within the meaning of the Habitats Directive.
[49] In proceedings entitled Reynolds & Ors v An Bord Pleanála [2021] 302 JR.

Date	Event	Comments[22]
	dated 22 March 2021.	
	Reid Associates made a submission to the Board. It enclosed an expert "Wildeye Report" as to risk to birds. It is not possible here to record its content in full, but that report: • Related primarily to another – the Lyrenacarriga – windfarm. • Did consider the potential for risk to Whooper Swans of collision with the Knocknamona Windfarm but did not include observation of the Knocknamona Windfarm Site. • Focussed on Whooper Swans from the Blackwater Callows SPA[50] and also on the largest flock on the Blackwater - at Camphire, which is outside the SPA "*for some unknown reason*". • Stated that it is not known how Whooper Swans move through the wider area or where they roost overnight. • Recorded a single day's "snapshot" survey. • Listed the Dungarvan Harbour SPA qualifying interests as not including the Whooper Swan, though they do appear there at times • Stated that "*it's difficult to any conclusions either away from a single survey*" and "*On the basis of this single survey collision risk with"* the Knocknamona Windfarm *"cannot be fully assessed".* • Stated that "*any movements*" of swans between the Blackwater Callows SPA and Dungarvan Bay "*could potentially result in conflict at the proposed development site at Knocknamona*".	
21 May 2021	KWFL, at the Board's direction, published public notices of the submission to the Board of the revised EIAR and NIS and invited submissions.	
4 June 2021	INIS response for KWFL to appeals as to, inter alia, collision risk to the Whooper Swan. It asserts the adequacy of its surveys as strictly in line with Best Practice and asserts that: • Its findings indicated no connectivity between the Blackwater Callows Whooper Swans and the Knocknamona Windfarm area. • Its data are supported by Wildeye, which did not record Whooper Swan movement towards or through the Knocknamona Windfarm area. • Collectively, these data indicate that the Whooper Swan flock resident in the River Blackwater area does not overfly the Knocknamona Windfarm area. • As a result, it was correctly concluded that there was unlikely to be negative impacts arising from the wind farm on Whooper Swans in relation to collision with rotors.	
8 June 2021	KWFL response to the Reid Associates submission dated 22 March 2021 • Enclosing, inter alia, the INIS report of 4 June 2021.	
23 June 2021	Ms Power[51] submitted an observation to the Board.	

[50] Though other birds were also considered.
[51] Together with Tom Power.

Date	Event	Comments[22]
12 September 2022	The Board's Inspector reported to the Board recommending the grant of a conditional planning permission.	
23[52], 26[53] & 28[54] September 2022	**The Board, by the Impugned Decision:** • Decided to grant planning permission "*generally in accordance with the Inspector's recommendation*". • Did an EIA of the Proposed Development – i.e. of the proposed amendments to the development permitted by the 2016 Permission. • Did an AA "*of the implications of the proposed development for [the Blackwater Callows Special Protection Area] in view of the site's Conservation Objectives*." • By Condition 2 required compliance with all conditions of the 2016 Permission save as otherwise required in order to comply with specific conditions of the Impugned Permission. • By Condition 4 required implementation "*in full*" of all mitigation measures identified in the 2021 EIAR and the 2021 NIS. • By Condition 5(a) required, o Turbine dimension detail in accordance with Drawing KWF-PLT-05, 'Typical Turbine Elevations'. o *"Specifically, the overall tip height shall be 155 meters, the hub height shall be 91.65 meters and the rotor diameter shall be 126.7 meters."*	Condition 2 ensures, inter alia, that the noise limits set by Condition 7 of the 2016 Permission continue to apply. Condition 5(a) precisely stipulates the relevant dimensions – in contrast to the 2016 Permission which stipulated maximum dimensions. The Applicants impugn as defective: • the EIA in failing to define the project as including the entire Knocknamona Windfarm – both as permitted in 2016 and as to be amended by way of the Proposed Development. • the AA on the basis that no site specific conservation objectives had been published for the Blackwater Callows SPA[55] such that the AA could not have been done "*in view of the conservation objectives*" for the SPA as required by Article 6(3) of the Habitats Directive.
November 2023	The Applicants sought leave to seek judicial review of the Impugned Decision.	

[52] Board meeting.
[53] Board Direction.
[54] Board Order.
[55] Special Protection Area within the meaning of the Birds Directive.

Date	Event	Comments[22]
30 January 2023	The High Court granted the Applicants leave to seek judicial review of the Impugned Decision – hence these proceedings.	
February 2023	In Reynolds & Ors v An Bord Pleanála[56] the grid connection permission was quashed by the High Court.	Ms Power was a co-applicant in those proceedings.

10. While it is no great insight, it bears noting that a relatively small increase in rotor length can greatly increase the circular area swept by wind turbine rotors. The relationship between rotor length and swept area is determined by the well-known formula: $A = \pi r^2$. The relationship can be illustrated as follows:

Rotor Length (m)	Swept Circular area (m^2)	Area % increase vs 42m
42	5,542	
45	6,361	15%
50	7,854	42%

So, as between 42 and 50 metres, a rotor length increase of 19% produces an area increase of 42%.

11. I would like to particularly convey my gratitude to all counsel for all parties for their great assistance in this case and for their patience in regards in responding to my many questions at trial.

MATTERS NO LONGER IN ISSUE

12. Following argument and during the trial, and as to Ground 6, the State conceded a declaration in the following terms:

> *"A Declaration that the Second and or Third and Fourth Respondents failed to fulfil their obligations under Articles 3, 4(1) and 4(2) Birds Directive and Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive'), as implemented by SI 477 of 2011 and in particular Article 26 thereof, by failing to establish the necessary site specific conservation objectives and conservation measures in the Blackwater Callows Special Protection Area."*

13. Given the concession, it is unnecessary – indeed would not be proper – to enter here into a detailed account of the arguments on the issue addressed in this declaration. However, I may mention that, before the concession and despite their differing views, the parties were even then agreed that the most relevant caselaw on the issue of the necessary terms of and validity of conservation objectives and measures consisted of a trio

[56] [2021] 302 JR.

of judgments of the CJEU in Commission actions against, successively, Greece,[57] Ireland[58] and Germany.[59] I also consider it proper to append to this judgment a copy of the Blackwater Callows SPC Conservation Objectives, dated 26 January 2022, which the Applicants impugned in these proceedings.

14. In light of that concession, the Applicants advised that they would not pursue their claim for mandamus compelling the State to adopt proper conservation objectives for the Blackwater Callows SPA. A further complaint, against the State only,[60] of failure to adopt conservation measures in reality lost prominence also in light of that concession and I do not propose to address it.

15. The Applicants did not pursue their pleaded Grounds 3 and 4. Ground 3 alleged the substantive inadequacy of the AA. That it was not pursued has the effect that there remains no challenge to the Board's finding that the Proposed Development will not adversely affect the integrity of the SPA – including by way of collision risk to the Whooper Swan.

16. That, in turn, has the consequence that Grounds 5 and 6, which assert the absence of conservation objectives for the SPA as undermining the AA, which by Article 6.3 of the Habitats Directive must be done "*in view of*" those conservation objectives, are reduced to a jurisdictional point. The Applicants say that, absent conservation objectives, the Board has no jurisdiction to embark on AA as to the risk of effect on the SPA and at trial accepted that their challenge is limited to that jurisdictional point.

17. At trial, Ground 1 was abandoned only as to alleged failure in EIA to consider alternatives.

GROUND 2 (PUBLIC PARTICIPATION)

18. At trial also, Counsel for the Applicants, after a brave attempt, ultimately agreed that Ground 2 was not seriously pursued.[61] The Applicants plead that:

- the EIA of the whole of the Knocknamona Windfarm and Grid Connection was conducted over several discrete development consent processes – i.e. as to, respectively, the Knocknamona Windfarm, the Grid Connection and the Knocknamona Windfarm amendment (the Proposed Development).
- the combination of those processes was unfair, inequitable, untimely, prohibitively expensive and contrary to both Article 11(4) of the EIA Directive and the Aarhus Convention.

Notably, no particulars are pleaded nor do the grounding affidavits elaborate on any actual prejudice allegedly incurred by the Applicants by reason of the unfairness alleged.

[57] Case C-849/19, Judgment of 17 December 2020. The judgment is in French. A reliable translation was not to hand at trial. While I gave the parties liberty to submit one after trial and none has been submitted, on the view I take and given the two later cases as to Ireland and Germany, I consider that I can proceed without it.
[58] Case C-444/21, Judgment of 29 June 2023.
[59] Case C-116/22, Judgment of 21 September 2023.
[60] Transcript Day 2 p93.
[61] Transcript Day 2 p9.

19. The Applicants' written submissions assert that breaking the Knocknamona Windfarm development into three separate applications required the public to participate in multiple processes – including multiple appeals – for a single development. This meant duplicate fees and, allegedly, increased obligations to fund professional planners and other advisors to assist. This, it was submitted, is such an obstacle to the attainment of the aim of the EU legislature to ensure that the public plays an active role in such processes as to justify invalidating the Impugned Permission.

20. The Board submitted in reply that certain of the Applicants' submissions as to fees go beyond their pleaded case. I need not decide that point.

21. As I have noted, while this ground was not formally conceded it was ultimately pressed at trial with no force at all. It suffices to say that I dismiss this ground as, though grounded in unfairness and interference in public participation, it was supported by no evidence of either. The Applicants adduced no evidence of their funding "*professional planners and other advisors*". Nor is there any evidence that the amount and number of fees payable in fact represented an excessive burden on or obstacle to participation by the Applicants or, for that matter, anyone else or the public generally. Further, the EIA Directive, Annex II §13, explicitly envisages development consent for a change or extension to a permitted project – which implies multiple processes as to a single development. Neither amendment applications nor participation fees are contrary to the EIA Directive and/or the Aarhus Convention. As to the latter, the principle is not that participation must be free of expense: it is that participation must not be prohibitively expensive. There is no evidence on that issue.

22. Accordingly, I dismiss Ground 2.

GROUND 1 (EIA)

G1 – EIA – The Central Facts

23. The most important facts as to this Ground are agreed:

- The EIA which informed the Impugned Decision ("the EIA") identified the project to be assessed in EIA as consisting of the Proposed Development only – i.e. the amendments to the Knocknamona Windfarm as permitted in 2016. It did not include those elements of the Knocknamona Windfarm as permitted in 2016 left unamended by the Impugned Permission.

- That EIA, in its assessment of the environmental effects of the Proposed Development cumulatively with other projects, incorporated as such other projects the unamended elements of the Knocknamona Windfarm as permitted in 2016 and its Grid Connection to the Woodhouse Substation and the Woodhouse Windfarm.

- The Knocknamona Windfarm as permitted in 2016, the Woodhouse Windfarm and the Grid Connection had each been subjected to EIA.

G1 – EIA – The Inspector's Report, the 2021 EIAR, the 2020 Nose Assessment, the MAS Environmental Report & the Malachy Walsh Reply.

24. In conducting its EIA, the Board adopted its Inspector's report. It is no criticism of that report to observe that it considers the proper identification of the "proposed development" or "project" to be subjected to EIA at both §7.0 Assessment[62] and §8.0 Environmental Impact Assessment. Of course, the content of both must be read together. The inspector concluded[63] that the Proposed Development would not have any unacceptable direct, indirect, or cumulative impacts on the environment. The Inspector noted submissions that,

- a new planning application and EIA were required for the windfarm and grid connection.[64] This is clearly a reference to a submission that both a new planning application and a new EIA were required for a project consisting of the entire windfarm, including its grid connection, as proposed to be amended by the Proposed Development, as opposed to the present planning application for permission for and EIA of the Proposed Development discretely.

- The noise assessment was inadequate for want of a proper background assessment.[65]

25. The Inspector's planning assessment said as follows as to the submission that a de novo application to include the totality of the development was essential to a valid EIA:[66]

- That the EIA done in the planning application of the grid connection to Woodhouse Substation considered its environmental effects in combination with those of the Knocknamona Windfarm permitted in 2016. It is not clear that the full range of cumulative impacts of the Proposed Development and the grid connection has been assessed in the current EIAR and it could be considered that there is a gap in the assessment. The current EIAR does however consider the cumulative impact of the proposed amended development in combination with other permitted plans and projects, specifically the Grid Connection project. Given this it is not considered that any gap in the overall assessment arises.
  - I confess to finding this passage confusing but only in the sense that I cannot see where the gap is thought to possibly be. In any event, the conclusion is clear that there is no gap in the cumulative assessment and the Applicants did not assert such a gap.

[62] i.e. The Inspector's planning assessment. See in particular §7.3 Approach to Application and Legal Issues, § 7.3.2. Requirement for a New Application.
[63] Inspector's report §8.7.1.
[64] Inspector's report p74.
[65] Inspector's report p75.
[66] Inspector's report §7.3.2 et seq. I have edited some text without altering meaning.

- That a de novo single application for the overall project consisting of the amended Knocknamona Windfarm and its grid connection would have given more clarity to the EIA and AA. But it is not clear that such a new application is legally required as:
  - The South-West Regional Shopping Centre case[67] establishes the validity of planning permissions for amendments to planning permissions. Though that case related to the reduction[68] rather than the increase of the permitted development.
  - Article 3 of the EIA Directive requires EIA of the 'project'. S.172 PDA 2000, as to the requirement for EIA, refers to an application for consent for 'proposed development' which would appear to clearly encompass alterations or modifications to an extant permission. I would add that the phrase "proposed development" in Irish planning law identifies the project for purposes of EIA – see **FitzPatrick**.[69]
  - In the South-West Regional Shopping Centre case, EIA was done for the originally permitted development and screened out in the amendment application having regard to Schedule 5, Part 2, §13(a) PDR 2001[70] – which conclusion was upheld.
  - Schedule 5, Part 2, §13(a) PDR 2001 is specifically a class identifying as a discrete project for which EIA can be done, "*any change or extension of development already authorised, …"*
  - The alterations to the permitted windfarm are consistent with the definition of "project" in Article 1 of the EIA Directive.[71]
  - It is therefore reasonable that the proposed alterations constitute a project for the purpose of the EIA Directive.

26. The Inspector's planning assessment said as follows as to the identification in EIA of baseline environmental conditions:[72]

- The EIA Directive requires assessment of the likely significant effects of the project relative to a baseline scenario. The Directive does not define what constitutes the baseline, but Recital 31 describes it as '*the likely evolution of the current state of the environment without implementation of the project*'. Thus, the identification of the baseline depends on identification of the 'project' for the purposes of EIA.
- If, as concluded above, the project is the alterations or amendments to the existing permission, then the baseline would be the state of environment including the originally permitted windfarm but not the proposed alterations.[73]
- Annex IV(3) of the EIA Directive requires a description in EIA of two levels of baseline: a current baseline and a future baseline accounting for predicted natural changes and known projects – a likely future receiving environment.
- The 2021 EIAR, while not providing a full written description of the baseline environment with the permitted Knocknamona Windfarm, does evaluate its impacts on the environment and so enables assessment of the impacts of the proposed amendments. It is therefore my opinion that the 2021 EIAR is consistent with the requirements of the EIA Directive.[74]

[67] South-West Regional Shopping Centre Promotion Association Limited & Anor v An Bord Pleanála [2016] IEHC 84. See below.
[68] In floor area.
[69] Case cited below.
[70] As to EIA of "any change or extension to", inter alia, a permitted project – see further below.
[71] 'the execution of construction works or other installations or schemes and other interventions in the natural surroundings' and 'landscape including those involving the extraction of mineral resource'.
[72] i.e. the environmental conditions preceding the execution of the project and upon which the environmental effects of the project will be superimposed.
[73] Inspector's report §7.3.2 et seq. I have edited some text without altering meaning.
[74] And Article 94 PDR, 2001.

27. The Inspector's planning assessment considered the issue of the grid connection as related to the argument for a de novo application, and concluded generally as to that argument as follows:[75]

- The submission of a new self-contained application that would cover the windfarm inclusive of the proposed amendments and the revised grid connection to Woodhouse would be beneficial from the perspective of clarity. But I do not consider that there is a clear legal requirement that this would be the case. Rather, the 2014 EIA Directive and the Fifth Schedule of the PDR, 2001 explicitly provides for a class of development (Class 13 of Part 2) relating to any change or extension to a project requiring EIA.
- The third party appellants contend that, as the Proposed Development is of a class (wind energy) that exceeds the relevant threshold, a separate application is required. However, the wording of Class 13 of Part 2 clearly states that changes or extensions included in Class 13 can relate to development '…. *already authorised, executed or in the process of being executed',* indicating that it applies to developments authorised but not yet constructed.
- I therefore consider that the principle of the submission of an amendment application is acceptable.

28. The Inspector's EIA,[76]

- Expresses satisfaction that the 2021 EIAR was prepared by competent experts.[77]
- Calculates the total maximum rated power output of the Knocknamona Windfarm, if amended, at up to 36 MW such that, considered as a whole, it would exceed the threshold for EIA.[78]
- Calculates the total maximum rated increased power output of the Knocknamona Windfarm, if amended, as compared to the Knocknamona Windfarm permitted in 2016 at 11MW – which increase would exceed the threshold for EIA, of a "*change or extension*" within Annex II §13(a) of the EIA Directive/Schedule 5, Part 2, Class 13(a) PDR 2001.[79]
- Notes that enclosed copies of the 2015 Knocknamona Windfarm EIS and the 2019 Grid Connection EIAR contain detail on the assessment of the environmental impact of the permitted Knocknamona Windfarm and the Grid Connection.
- Notes that the EIAR is in the "grouped format" – each environmental factor is assessed in a separate chapter. Each contains a clear description, compliant with the EIA Directive of,
  - the relevant baseline without any Knocknamona Windfarm – no windfarm, no amendments and no grid connection.
  - changes to this baseline since the EIAs of the Knocknamona Windfarm as permitted in 2016 (2015 EIS) and the Grid Connection (2019 EIAR).
  - the evolution of the baseline over time by way of tables identifying each potential impact and source of impact - leading to an overall whole project cumulative impact.

[75] Inspector's report §7.3.5 et seq. I have edited some text without altering meaning.
[76] Inspector's report §8 (p72). Note that the Report contains a paragraph numbering error in that §8.2 and sub-paragraphs are duplicated. It contains both §8.2 "Structure and Content of EIARs" and §8.2 "Population and Human Health". As I consider it would add to rather than reduce confusion to do otherwise, I have simply cited the paragraph numbers as in the report despite the duplication, and have included the page number on which the paragraph can be found in the Inspector's report where necessary to distinguish between two duplicated paragraph numbers.
[77] Inspector's report §8.2.1 & §8.2.10.
[78] Class 3(i) of Part 2 of the Fifth Schedule PDR, 2001. The threshold is 5MW. See below.
[79] Being more than 50% of the 5MW threshold set by Class 3(i) of Part 2 of the Fifth Schedule PDR, 2001.

- Considers that the approach of the 2021 EIAR to presenting the evolution of the baseline environment to reflect the permitted Knocknamona Windfarm and Grid Connection, including the 2015 Knocknamona Windfarm EIS and the 2019 Grid Connection EIAR, is acceptable.
- Expressly concludes that the 2021 EIAR has been prepared by competent experts to ensure its completeness and quality, and that the information contained in the EIAR, and supplementary information provided by the developer, adequately identifies and describes the direct, indirect and cumulative effects of the Proposed Development on the environment and complies with Article 94 PDR 2001 in that respect.[80]

29. One may add that the 2021 EIAR states that "*Passage of Time was considered for each environmental factor topic. The Revised Knocknamona Windfarm EIS 2015 and KWF[81] Grid Connection EIAR 2019 were reviewed in the context of the current baseline conditions to determine whether there have been any relevant or material changes in the baseline environment since these documents were prepared*."[82] It is clear from his report that the Inspector accepted this assertion.

30. The Inspector's EIA,[83] specifically as to noise[84] states that:

- Noise is one of the two most significant potential environmental impacts of the Proposed Development – with potential to impact on human health.[85]
- Appendix 6.1 to the 2021 EIAR was the 2020 Noise Assessment.[86]
- The 2021 EIAR provides a clear comparison between the results of the noise assessments for the Knocknamona Windfarm as permitted in 2016 and those for the amended Knocknamona Windfarm.[87]
- As to baseline noise environment.
  - The baseline assessment was done in 2014 – before the Woodhouse Windfarm was commissioned. The 2020 Noise Assessment[88] states that the 2014 baseline assessment is still representative.[89]
  - the 2021 EIAR refers to the 2015 EIS for the Knocknamona Windfarm as permitted in 2016 and the 2019 Grid Connection EIAR. Their noise assessments concluded that neither the windfarm nor the grid connection including the Woodhouse Substation would have a significant negative noise impact.
- The output of the operational Woodhouse Windfarm is assessed in terms of cumulative impacts.[90]
- The Proposed Development is not considered likely to have significant effects on the noise levels at noise sensitive locations in the vicinity of the Site. I do not consider that the proposed amendments would have any significant negative impact on human health due to noise. [91]
- Given the nature of the development comprising an amendment to an existing permitted windfarm and to the limited predicted impacts of this amendment that could impact significantly on this factor of the

[80] Inspector's report §8.2.12 & §8.1.3 (p81).
[81] Knocknamona Windfarm.
[82] 2021 EIAR §3.1.4.
[83] Inspector's report §8 (p72). As edited by me without amending meaning.
[84] Addressed primarily at §8.4.3 under the heading "Air".
[85] Inspector's report §8.2.5.
[86] "Proposed Larger Turbines at Knocknamona Windfarm - Noise & Vibration Impact Assessment" by Malachy Walsh & Partners, August 2020.
[87] Inspector's report §8.2.5.
[88] §2.3
[89] Inspector's report §8.4.3.7.
[90] Inspector's report §8.4.3.6 (p95).
[91] Inspector's report §8.1.3 (p81) & §8.4.

environment, I do not consider that significant cumulative impacts are likely to arise when the Proposed Development is considered together with other permitted plans and projects in the vicinity.[92]

- Condition 7 of the 2016 permission for Knocknamona Windfarm will continue to control noise emissions from the Knocknamona Windfarm as amended by the Proposed Development.[93] The 2020 Noise Assessment aims to show that the Windfarm as so amended will be able to operate within Condition 7. The Inspector sets out an account of that explanation.[94]

31. I add the observations that the 2021 EIAR,

- As to the fact that the 2014 baseline assessment preceded the operation of the Woodhouse Windfarm, asserts that *"it is best practice however to exclude any existing operational wind farm noise from the baseline, therefore the original baseline measurements are still considered valid."* As I understand, and whatever about the general question of the continuing validity of the 2014 baseline measurements, that the baseline should exclude operational windfarm noise is not in dispute.[95]
- Specifically as to noise, records that *"The Revised Knocknamona Windfarm EIS 2015 and KWF[96] Grid Connection EIAR 2019 were reviewed in the context of the current baseline conditions. The passage of time was considered during this review ….. Noise and shadow flicker from operational Woodhouse Windfarm turbines were taken into account for the Revised Knocknamona Windfarm EIS 2015. There have been no changes or additions to the Woodhouse Windfarm turbines since 2015*."[97]

32. The Inspector notes[98] the noise modelling results,[99] illustrating the predicted noise produced by the cumulation of the amended Knocknamona Windfarm and the Woodhouse Windfarm[100] at downwind[101] Noise Sensitive Locations within 2km of the turbines, indicate that the Condition 7 limit of 43 dB would not be exceeded for any windspeed at any location.[102] Of some note is that predicted Woodhouse Windfarm noise alone at Ms Power's family home[103] is modelled at 42.4 dBA at winds above 9 m/s[104] and the predicted cumulative Woodhouse Windfarm noise with noise from the amended Knocknamona Windfarm is modelled at 42.6 dBA at winds above 8 m/s.[105] I observe that decibels are calculated on a logarithmic, not an arithmetic scale and "A" rating of sound levels (hence "dB(A)") attempts to approximate measurements to the sensitivities of human hearing. So the 2020 Noise Assessment asserts that *"In general an increase/ decrease in noise level up to 3dB is not perceivable and the long term impact classification is negligible."* In other words, the expert prediction is that Ms Power and her family will notice no difference as to windfarm noise by reason

[92] Inspector's report §8.1.6.
[93] See chronology above. Condition 7 attached requires that wind turbine noise from the development by itself or in combination with any other permitted wind energy developments in the vicinity must not exceed the greater of 5dB(A) above background levels or 43dB(A)L90 10mins when measured externally at dwellings or other sensitive receptors.
[94] Inspector's report §8.4.3.6 (p95).
[95] 2021 EIAR §6.1.2.
[96] Knocknamona WindFarm.
[97] 2021 EIAR §6.2.1.
[98] Inspector's report §8.4.3.8.
[99] Tables 7 to 9 of the 2020 Noise Assessment: Table 7 Predicted Noise Levels Knocknamona Alone; Table 8 Predicted Noise Levels Woodhouse Alone; Table 9 Predicted Cumulative Noise Levels (Knocknamona and Woodhouse).
[100] The Woodhouse Windfarm was modelled as installed - assuming the 100m rotor diameters to which Ms Power objects in her s.160 action – see the 2020 Noise Assessment Table 4 Mix of Woodhouse Windfarm Turbines.
[101] And hence in that respect a worst-case conservative assessment.
[102] Save H15 and H16 which are properties in the centre of the Woodhouse Windfarm site and are connected with it.
[103] Identified as H59 in the 2020 Noise Assessment.
[104] Only slightly less down to 6m/s.
[105] Only slightly less down to 6m/s.

of the operation of the amended Knocknamona Windfarm in addition to the current permitted noise of the Woodhouse Windfarm and that the noise level will be within the 43 dBA limit set by Condition 7 of the 2016 Permission. I should note that there is expert disagreement on this issue but, as against a disputed threshold of 3dBA, the modelled increase is of around 0.2 dBA.

33. The 2021 EIAR as to noise impact of the Proposed Development as compared to that of the Knocknamona Windfarm permitted in 2016, citing the 2020 Noise Assessment, asserts[106] that the passage of time since the Revised Knocknamona Windfarm EIS 2015 was taken into consideration and the evaluation which follows includes the impact of the whole Knocknamona Windfarm project and its cumulative impact with other projects – notably Woodhouse Windfarm[107]. It asserts,[108] that

- Noise emissions from the proposed larger turbines will not cause significant effects.
- There would be no material change to the magnitude of noise impacts at the nearest dwellings.
- Larger modern turbines have similar noise levels as the authorised turbines.
- The proposed larger turbines can be controlled, via reduced noise operating modes, to stay within the noise limits already permitted.

34. Further the 2021 EIAR[109] confirms that the proposed larger turbines not merely can but will be fitted with noise reduction modules which will control noise to ensure that the noise emissions remain within the authorised limits. I note in this regard that Condition 4 of the Impugned Permission requires implementation "in full" of all mitigation measures identified in the 2021 EIAR. (The limits in question are those described above as set by Condition 7 of the 2016 Permission.)

35. I would add that if there will be no material change to the magnitude of noise impacts at the nearest dwellings – i.e. within the 2014 baseline envelope of 1km – it does not seem apparently unreasonable to infer that there will be no material change as to dwellings further away, such as that of Ms Power. However, the possibility of noise impact on dwellings out to 2km, including Ms Power's, is modelled.

36. The Inspector notes[110] also that

- the 2021 EIAR[111] clarifies that '*the proposed larger turbines can be controlled, via reduced noise operating modes to stay within the noise limits …*'
- Condition 7 of the 2016 Knocknamona Windfarm Permission requires that the developer agree a noise compliance monitoring programme with the Planning Authority that would include noise mitigation measures '*such as the de rating of particular turbines*'.

[106] 2021 EIAR §6.4.
[107] 2021 EIAR p93.
[108] 2021 EIAR §6.4.2 – Table.
[109] 2021 EIAR §6.4.2 – p93.
[110] Inspector's report §8.4.3.8.
[111] Inspector's report §6.4.2.

37. I observe that on this basis, it seems that, regardless of any potential for the amended turbines to make greater noise, the operators of the Knocknamona Windfarm are limited to the noise limits imposed by Condition 7 of the 2016 Knocknamona Windfarm Permission and the matter becomes one of planning enforcement, as to which the Board has no role.

38. The Inspector concludes[112] on the basis of the 2020 Noise Assessment in the 2021 EIAR that

- the predicted noise levels generated by the Proposed Development at identified noise sensitive locations in the vicinity of the Site would be within the noise limits specified in Condition 7 of the 2016 Knocknamona Windfarm Permission.
- these findings are consistent with the Sound Pressure Level information provided as to the Vestas V126 turbines modelled as incorporated in the Proposed Development as compared to the Nordex N100 turbines modelled in the 2016 Knocknamona Windfarm Permission.
- no significant increase in noise level from the Proposed Development is anticipated.
- so, the operational phase noise impact of the Proposed Development is not likely to be significant and would be within conditioned limits.
- the information as to cumulative impacts is also consistent with the conclusion that the cumulative impact of the proposed amended Knocknamona Windfarm with the Woodhouse Windfarm would not be significant and would be within conditioned limits.

39. The Inspector then turns[113] to the noise assessment report by MAS Environmental submitted to the Board by another objector[114] which he records as contending that,

- the 2020 Noise Assessment is not based on new background survey.
- the noise environment has changed significantly since the 2015 Knocknamona Windfarm EIS.
- noise assessment techniques have moved on significantly since the 2015 Knocknamona Windfarm EIS.
- the predictive technique used the 2020 Noise Assessment is inappropriate.

40. I have been referred to the exhibited MAS Environmental noise assessment report. While the arcane discipline of acoustics is inevitably beyond me, it can only be described as making swingeing criticisms of the 2020 Noise Assessment in a variety of specific aspects – including the failure to measure the Woodhouse Windfarm Noise and including that the 2020 Noise Assessment "*seriously misdirects and misleads … in many respects*" for reasons listed in some detail.[115] They include, allegedly,

- the use of rudimentary predictive methods using ISO9613-2, which looks only at averages and ignores and cannot assess the majority of the elements that lead to actual impact – of which impact due to the Woodhouse Windfarm there is already clear evidence.
- The application of the predictive methods of ISO9613 substantially outside their parameters.

MAS concludes that the 2020 Noise Assessment "*is so fundamentally flawed that it is not fit for purpose*." It is also highly critical of the current content of relevant Irish guidelines.

[112] Inspector's report §8.4.3.9. As edited by me without amending meaning.
[113] Inspector's report §8.4.3.10. As edited by me without amending meaning.
[114] Not party to these proceedings.
[115] See MAS Environmental report – in particular §3 Conclusions on inadequate NIA and minimum requirements.

41. KWFL's response, dated 22 March 2021, to the MAS Report incorporated a response by Malachy Walsh & Partners dated 22 March 2021 to the MAS Report. Malachy Walsh & Partners explain why, in their view, the swingeing criticisms in the MAS Report of the 2020 Noise Assessment are wrong. The Inspector records[116] KWFL's response to the MAS Report – stating that that the use of the predictive technique is in accordance with ISO 9613-2-1996[117] of the IoA GPG.[118] He observes that the significant time lapse since the 2014 baseline[119] noise survey and the fact that the Woodhouse Windfarm has since become operational suggest a new baseline survey, the inspector's reading of ISO-9613 does not indicate that KWFL's use of predictive techniques is unacceptable. Nor does he consider that KWFL's approach *"is clearly inconsistent with the requirements of the 2006 Wind Energy Guidelines."* The Inspector observes[120] that

- regard must also be had to the circumstance that the application relates to an amendment to an existing permission.
- any permitted amendment will be required to operate within the conditioned noise limit of 43dB(A).
- for most receptors the predicted noise level is very significantly below this limit.
- mechanisms are available to de-rate the turbines to ensure compliance with the conditioned noise limit.
- The modelling uses a number of worst-case assumptions which will not be realised in practice – for example that receptors are downwind of turbines – and particularly at higher windspeeds, background noise will largely obscure turbine noise

42. I pause here to make two observations in in passing. First, while, in general terms, disagreement between them is no surprise and entirely proper, it is a surprise to find such fundamental disagreement between reputable experts in the same professional discipline. As I say, the arcane discipline of acoustics is inevitably beyond me and decision on their disagreement is for the expert decision of the Board. But even I can see that, alarmingly it seems to me, these reputable experts do not even agree on basic assumptions and ground rules for the prediction of windfarm noise and its effects on local residents. If such expert disagreement is general, it can only be detrimental to stakeholder acceptance of whatever decisions the Board may make as to windfarm planning applications. In turn that, at least generally, amplifies the risk of litigation of such decisions. And windfarm litigation is by no means rare. More specifically, it is reasonable to infer that such fundamental disagreement between reputable experts has significantly informed decisions on all sides of the present litigation.

43. Second, I observe that reliance in EIA – or indeed in any analysis - on worst-case assumptions, and reference in an inspector's report or decision in EIA to the fact that assumptions made are worst-case assumptions is proper as lending confidence to the assessment of risk. But, as discussed at trial, care should be taken to avoid any impression that one can discount risks because the assumptions made in their assessment are worst case assumptions.[121] The distinction is perhaps fine but is important. Such reasoning is often seen but it is flawed – as giving with one hand and taking away with the other. The whole point of worst

[116] Inspector's report §8.4.3.10.
[117] Attenuation of sound during propagation outdoors – Part 2: General method of calculation, ISO 9613-2-1996 - Acoustics – See 2020 Noise Assessment, §8, References.
[118] UK Institute of Acoustics, Good Practice Guide to the Application of ETSU-R-97 for the Assessment and Rating of Wind Turbine Noise 2013 (IoA GPG) – See 2020 Noise Assessment, §8, References.
[119] The Inspector uses the word "Background" but at least in this context that seems to equate to "baseline".
[120] Inspector's report §8.4.3.11.
[121] Transcript Day 3 p24.

case assumptions is that they are in fact assumed. Observing that they will not be realised in practice – an "ah sure" type of reasoning – undermines the point of making those worst case assumptions. However, I accept the Board's argument that it would be disproportionate in the present case, reading the Inspector's report generally on the noise issue, to isolate this observation from its context and see it as undermining the validity of the EIA.

44. The Inspector continues[122] by considering objectors' assertions of deficiencies in the 2020 Noise assessment – including as to model inputs, the potential impact of amplitude modulation, low frequency noise (infrasound) and tonal emissions, and the use of L_{den} as opposed to $L_{90dB(A)}$. He concludes that KWFL's noise assessment method is acceptable and its results and analysis indicate that the Proposed Development

- "*would not be likely to have a significant increase in noise to surrounding noise sensitive locations."*[123]
- *"in conjunction with the operational Woodhouse Windfarm would not have an adverse cumulative impact on the environment*" as to noise.

45. In his overall Conclusion[124] the Inspector states:

> *"A significant part of the third party objections received relate to the approach to the application as an amendment to the existing grant of permission for KWF, the relationship with other extant and proposed developments (Woodhouse windfarm and KWF Grid Connection) and the adequacy of the environmental and habitat assessments undertaken. A common theme in the submissions is that there is a need to revert to consider the proposal from fist*[125] *principles and that a new application is required that would encompass the amended windfarm and the KWF grid connection project. However, as set out in the assessment above, while I consider that the submission of a new application would potentially be clearer in terms of the presentation and assessment of cumulative impacts and in combination effects, I do not consider that there is any obligation on the first party to follow this approach.*
>
> *Fundamentally, the application the subject of appeal is for the amendment of a permitted development and the assessment relates to the environmental implications arising from these proposed amendments. The issue of the structure of the EIAR submitted and the degree to which these documents clearly describe the existing environment, act as stand alone assessments and comply with the requirements of the EIA Directive and Planning and Development Regulations is highlighted. As detailed in my assessment, on balance, I consider that the description of the background environment provided in the 2021 EIAR under each environmental heading, combined with the provision of the 2015 KWF EIS and KWF Grid Connection Project EIAR as reference documents provides an adequate baseline for "the full accurate assessment of likely significant direct and indirect effects arising from the proposed amendments. In the sections of the EIAR most relevant to the assessment of this case, namely Landscape and Visual Impacts and Air (noise and*

[122] Inspector's report §8.4.3.12 et seq.
[123] Sic.
[124] Inspector's report §10.
[125] Sic.

vibration) the information presented in the EIAR gives more descriptive information with regard to the background environment or baseline scenario with the permitted KWF in place.

The nature of the proposed amendments to the permitted KWF, specifically the fact that turbine numbers and locations are remaining the same and that no additional excavations over and above those indicated and assessed under the original application are proposed, are such that the potential environmental impacts arising from the proposed development under most headings are assessed as negligible.

…. the proposed amendment to the permitted KWF has significant policy support in the form of European and national policy regarding renewable energy, emissions reductions and climate change. This, together with the limited environmental impacts assessed as arising from the proposed development mean that notwithstanding the location of the appeal site in an area identified in the landscape character assessment as being of high sensitivity and no longer benefiting from a designation of strategic for wind energy development, the proposed development is considered overall to be acceptable and in accordance with the proper planning and sustainable development of the area."

46. It is clear from the foregoing that there was considerable expert dispute as to the noise assessment. It is also clear that the Inspector recognised that dispute, considered its main features and resolved it in favour of KWFL. One may – no doubt some will vehemently – disagree with the Inspector as to the merits of his view, but judicial review is not an appeal on the merits and, to succeed, must demonstrate legal defect in the Impugned Decision.

47. It is also clear that the Inspector carefully considered the issue of identification of the project for purposes of EIA and identified it as the Proposed Development. That is, of course, an issue of law for the Court and if the Board misidentified the project, the Impugned Decision falls.

G1 – EIA – The Pleadings

48. In this case, it is particularly useful to identify the core ground before considering the particulars of that ground. The pleaded core ground[126] is that the Board, contrary to Articles 2(1)[127], 3(1)[128], 4(3)[129] and 5(1)[130] of the EIA Directive failed to properly consider the class of project under the EIA Directive that was being assessed and so failed to subject the project to development consent and EIA and require an EIAR accordingly.

[126] As edited by me without amending meaning.
[127] Obligation to subject to EIA, "before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location … Those projects are defined in Article 4."
[128] EIA "shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project" on a list of factors set out in Article 3(1).
[129] Article 4(2) permits that for projects listed in Annex II, Member States shall determine by case-by-case examination, or by thresholds or criteria set by the Member State, or by both, whether the project shall be subjected to EIA
Article 4(4) requires that in applying Article 4(2) the criteria set out in Annex III be taken into account.
[130] Information to be contained in an EIAR.

49. It is important to understand the Applicants' pleaded particulars as particulars of that core ground rather than as grounds of judicial review in themselves. The particulars, as advanced in submissions in writing and at trial,[131] plead that the Board erred,

- in determining that the project requiring EIA was a "*change or extension*" within Annex II §13(a) of the EIA Directive/Schedule 5, Part 2, Class 13 (a) PDR 2001 without conducting an EIA screening.[132]
- in failing to do an EIA of the whole Knocknamona Windfarm project, and in purporting to do an EIA of part only of the proposed turbines and/or part of the proposed new windfarm project and/or a part of the whole windfarm project.

50. The practical essence of this Ground is well expressed in the agreed Statement of Case as follows:

> *"… the Board wrongly decided that the extension in size of the unbuilt turbines was[133] the project to be assessed, rather than the entire windfarm."*

Put another way, the Applicants' essential point was that the EIA was defective in failing to define the project to be assessed in EIA as consisting of the entire Knocknamona Windfarm – both as permitted in 2016 and as to be amended by way of the Proposed Development.

51. The pleaded alleged results and significance <u>of this alleged misidentification of the project</u> to be subjected to EIA were that

- the noise impacts were assessed using 2014 baseline data which was
  - not a current baseline.
  - not a relevant baseline for Ms Power's home, which lies outside the 1km envelope around the Site within which the noise baseline was established in 2014.

- the Board erred in failing to ensure that the EIAR properly described the cumulation of environmental effects of the project with other existing and/or approved projects, including the Woodhouse Windfarm and other windfarms.

52. However, the only pleaded particulars of failure to assess cumulative effect was as to effect on the Whooper Swan and other bird species. As the risks to those birds were addressed as to AA under Grounds 5 and 6 and as, in reality, a determination of those grounds would determine the adequacy of assessment as to those birds, the issue of cumulative assessment as it related to birds was, in my view sensibly, pursued only as to Grounds 5 and 6. That left no live particulars of the plea of inadequate cumulative assessment.

[131] I omit reference to pleas not pursued.
[132] In accordance with Annex III of the EIA Directive as transposed by Schedule 7 PDR 2001, as amended.
[133] The Statement says "as" but the typo and its correction are obvious.

53. The issue of cumulative assessment in EIA was at trial argued by the Applicants somewhat differently: that cumulative assessment of the effects of the Proposed Development with those of the Knocknamona Windfarm permitted in 2016 was not an adequate substitute for the failure to identify both together as the project to be subjected to EIA.

G1 – EIA – Article 4(2), Annex II §13(a) & Annex II §4(i) of the EIA Directive

54. Article 4(2) of the EIA Directive identifies the projects listed in Annex II of the EIA Directive as projects as to which Member States may determine the need for EIA. So, some such projects will, and others will not, need EIA.

55. The caselaw establishes that such determination is made essentially by reference to the answer to the question whether the project in question is likely to have significant effect on the environment. Importantly, every project of a class listed in Annex II of the EIA Directive must be subjected to EIA unless it can be said, without doing EIA, that it is unlikely to have significant effect on the environment. The Directive allows that such determination can be made by the application of thresholds or criteria set by the Member State and automatically triggering a requirement for EIA. Such projects are deemed likely to have significant environmental effect. At least in the system adopted by Ireland, where the thresholds or criteria are not triggered, what are known as "sub-threshold" projects must be "screened" for EIA by case-by-case examination done by reference to that standard of likelihood of significant environmental effect of the project. This two-tier system – thresholds and screening - ensures that all projects of a class listed in Annex II which are likely to have significant environmental effect are subjected to EIA.

56. However, it seems to me important to understand the role of thresholds and criteria – not least in light of the fact that Member States can set different – higher or lower – thresholds and criteria for the same type of project. Articles 4(2) and 4(3) of the EIA Directive permit two types of thresholds and criteria. The first may be used to rule out both EIA and EIA screening. The second may be used to rule out EIA screening by requiring EIA. We are concerned here with only the second. As to that type, and given that the application of such thresholds or criteria can require EIA but cannot determine that EIA is not needed, at least where the Member State adopts (as Ireland has) a system of both thresholds and criteria and sub-threshold case-by-case examination, thresholds and criteria function in the end and in reality, where they are exceeded, as a somewhat crude and non-project-specific administrative convenience – a trip-wire - absolving competent authorities, by automatically requiring EIA when they are triggered, of going through the project-specific EIA screening process. This will be relevant in due course in considering an argument by the Applicants grounded in the Irish thresholds as applicable to windfarms.

57. The obvious difficulty facing the Applicants is that Annex II §13(a) of the EIA Directive explicitly contemplates that a "project", for purposes of EIA – and requiring EIA – may consist in an amendment of a project which has already received development consent. Annex II §13(a) reads:

> *"Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment,"*

58. Ireland has set the following thresholds for Annex II §13(a) projects.[134] EIA is automatically required where the change or extension would,

> *"(i) result in the development being of a class listed in Part 1[135] or paragraphs 1 to 12 of Part 2[136] of this Schedule,*
> *and*
> *(ii) result in an increase in size greater than –*
> *- 25 per cent, or*
> *- an amount equal to 50 per cent of the appropriate threshold,*
> *whichever is the greater."*

59. Annex II §3(i) lists "*Installations for the harnessing of wind power for energy production (wind farms)*". Ireland's thresholds, for purposes of Article 4(2) of the EIA Directive, for Annex II §3(i) windfarms are *"more than 5 turbines or having a total output greater than 5 megawatts."*[137]

60. Of the text of Annex II §13(a), the following can be said,

a. The words "*projects listed in … this Annex*" encompass windfarms given Annex II §3(i) lists them.[138]

b. The words "*already authorised, executed or in the process of being executed"* clearly include a project which has development consent (planning permission) but has not yet been executed. That is the position as to the Knocknamona Windfarm as permitted in 2016 but as yet unbuilt.

c. The words "*any change or extension"* are clearly intended to be broad in their scope. They are not limited to extensions to projects but include changes to the projects.. The word "any" emphasises the breadth of the scope of Annex II §13(a).

d. That Annex II §13(a) should have a broad scope is entirely consistent with the "*wide scope and a broad purpose"* of the EIA Directive repeatedly cited by the CJEU – most notably in **Kraaijeveld**.[139]

e. That purpose, informing a purposive interpretation of the EIA Directive, including that of Annex II §13(a), is reflected in Article 2(1) of the EIA Directive which lays down its "*fundamental obligation*" – **Inter-**

[134] Set by Schedule 5 Part 2 §13 PDR 2001.
[135] The counterpart of Annex I of the EIA Directive which lists projects automatically requiring EIA.
[136] The counterpart of Annex II of the EIA Directive.
[137] Set by Schedule 5 Part 2 §3 PDR 2001.
[138] See above.
[139] Case C-72/95 Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland, Judgment of 24 October 1996.

Environnement Wallonie[140] **–** to ensure that, before development consent is given, projects likely to have significant effects on the environment are subjected to EIA.

f. The premise of Annex II §13(a) is that certain changes and extensions to permitted projects will, in their own right, be likely to have significant effects on the environment. Viewed thus and speaking very generally, it follows from this premise that the greater the change or extension the more likely it is to have significant effects on the environment and the more likely it is that such change or extension will require EIA and to that end be considered a project in its own right. And it is the very purpose of Annex II §13(a) to ensure EIA of such projects considered as projects in themselves.

g. Importantly, such a definition of a change or extension as a project will inevitably in practice[141] result in an EIA of that project as to its effects cumulatively with those of the project of which it is a change or amendment.

61. One might very arguably criticise Annex II §13(a) as not providing the environmentally optimal solution as compared to requiring EIA of the underlying project as amended as opposed to of the amendment viewed discretely. Clearly, as the Applicants emphasise, the Inspector considered that greater clarity – perhaps a better EIA – would have been facilitated by definition of the project as consisting of the Knocknamona Windfarm as amended rather than just the amendments themselves. But he also clearly took the view that:

- sufficient clarity had nonetheless been achieved by the EIA in fact done. Short of irrationality, that was a matter for his and the Board's expert judgment.

- the question was not whether the best possible EIA had been done but was whether KWFL had complied with its legal obligations as to performance of EIA. This formulation of the question, unsurprisingly, reflects my view also.

62. I imagine that, in an imperfect world, it can be said of most EIARs that they could benefit from more clarity. Counsel for Ms Power properly agreed that that does not mean they are necessarily legally deficient. It does not logically follow from an acceptance that a document could have been clearer that it is, in law, inadequately clear. As was remarked at trial, "could do better" does not, per se, imply failure. And the Inspector clearly concluded that he had adequate clarity to conclude an EIA – which was an expert judgment he was entitled to make and which I may not second-guess save for irrationality – which has not been shown.

63. At a fundamental level of principle, Annex II §13(a) represents a legislative choice to permit identification of changes or extensions as the "project" to which EIA is to be applied rather than to stipulate, which the EU legislature could have chosen to do, that changes or extensions to a project would require EIA of the entire project as so changed or extended.

[140] Case C-411/17 Inter-Environnement Wallonie ASBL v Conseil des ministres, & Electrabel SA, Opinion of Kokott AG of 29 November 2018.
[141] I have been unable to conceive of an exception.

64. It might well be that in many cases the latter choice would have represented a better solution from the perspective of the "*high level of environmental protection*" identified in Article 3 TEU and Article 191 TFEU as an "aim" of the EU. But, as the CJEU has said, the requirements of the EIA Directive are "*minimum requirements*" for achieving a high level of protection – **Namur-Est**.[142] And in a recent **Ballyboden case**,[143] the following observations appear:

> *"As Gulmann AG observed in a **Bund Naturschutz in Bayern** case in 1994,[144] in effect observing that even purposive interpretation of EU legislation in light of the general principle of a high level of environmental protection has its limits, Member States are not always bound to choose the environmentally optimal solution in implementing a directive which gives them choice as to its implementation. A fortiori, the EU is not bound to choose the environmentally optimal solution when legislating by directive. Directives, like any legal instrument, derive from political action and represent, in varying degrees, the compromises between differing political views, interests and priorities, policy choices and pragmatic choices. As to specifically environmental legislation, I would add that the aim of Article 191 TFEU - a high level of environmental protection - while it is of very considerable importance in purposively interpreting EU environmental protection legislation, is not a trump card playable to crack open the proper boundaries of such legislation.*

That a high level of environmental protection is an "aim" is significant. **Kingston et al**,[145] while recording its considerable influence, nonetheless observe:

> *"Despite its frequent appearance throughout the text of the TEU, TFEU and Charter, the aim of achieving a "high level of environmental protection" remains profoundly ambiguous in character. Indeed, as with many of the broad aims of the Union, this is perhaps the key to its success as an aim with which all Member States can agree, despite significant ongoing differences in opinion as to the relative importance of environmental policy as compared to, say, economic policy. It is clear, for instance, that the aim does not require Member States to strive for the "highest" level of environmental protection. ….. The need for a certain flexibility of environmental aims is also inherent in the wording of Article 191(2) TFEU itself: the aim is to achieve a high level of protection taking into account the diversity of situations in the various regions of the Union."*
>
> *Second, the starting point of interpretation of EU legislation must be that such legislation is the legitimate expression of the chosen means of achieving that aim. There may be some analogy here with the presumption of constitutionality of Irish legislation. Third, such a trump card would degrade the achievement of legal certainty."*

65. I would add that there it seems likely that a view was taken by the EU legislature in adopting Annex II §13(a) that, as is argued by the Board in this case, where EIA is done of a project and an amendment to it is later proposed, it is acceptable to do an EIA of the amendment, including of its cumulative effects with the

[142] Case C-463/20 Namur-Est Environnement ASBL v Région Wallonne, Judgment of 24 February 2022 §64.
[143] Ballyboden TTG v An Bord Pleanála & Ardstone [2023] IEHC 722 §231 et seq.
[144] Case C-396/92 Bund Naturschutz In Bayern v Freistaat Bayern, Opinion of Gulmann AG of 3 May 1994, §§66, 67.
[145] European Environmental Law, Cambridge, 2017 p10.

original project (thereby having regard to the EIA of the original project and, if it has been developed, the actual effects of that project), rather than start with a blank sheet by way of an EIA of the project as amended. To require the proposer of the amendment to reinvent the wheel of the earlier EIA would be burdensome, duplicatory, wasteful, and disproportionate to the purpose of EIA. That is true generally but will be especially so as to those elements of environmental effect of the original project on which the proposed amendment will have no effect. For example, in the present case the Inspector observed, understandably given the nature and scope of the proposed amendments, that they "*… will have a very minimal impact under the heading of land and soils ….[and] will not require any changes to the permitted KWF grid connection and haul route to the site."*[146]

FitzPatrick 2019 & Bund Naturschutz 1994

66. The Board correctly identifies the Supreme Court's decision in **FitzPatrick**,[147] not least in its reliance on the opinion of Gulmann AG in that Bund Naturschutz case,[148] as the starting point of analysis of the question how to define and delimit a "project" as the subject of an EIA. **FitzPatrick** held that the "project" required to be subjected to EIA pursuant to the EIA Directive, as implemented in Irish law (which substitutes "proposed development" for "project"), consisted in the data centre hall[149] for which Apple had sought planning permission. It did not consist of Apple's masterplan[150] for that data hall and further data halls it intended to build in future pursuant to planning permissions not yet sought. Finlay Geoghegan J gave a detailed judgment the detail of which need not be repeated here. It suffices to record that she:

- Identified that the proposed development for which planning permission had been granted comprised the single data hall.

- Noted that Gulmann AG,
  - Had been concerned with a challenge to an EIA of an early phase of a road link in Germany for which development consent had been sought and which formed part of an overall plan for the construction of a federal highway. The challenge asserted that the project subjected to EIA should have been the entire road link.
  - Accepted that the optimal solution is presumably for EIA both in connection with decisions on the routing of the entire length of road and on decisions for the specific construction projects for sections of it.
  - Said that was not a solution that the Member States are bound to choose under the EIA Directive. A proper interpretation of the EIA Directive does not require EIA "*for anything other than the specific*

[146] Inspector's report §8.4.1.4: "…. The proposed amendment will not require any additional land take, and no additional excavations over and above those which are already permitted are proposed. No additional forestry felling will be required. In terms of direct construction impacts on soil and land, the information submitted with the application and appeal clarifies that there will not be any additional construction materials in terms of foundations required and there is not proposed to be any additional plant or machinery utilised or storage of fuels or other construction materials on the site which could impact on land or soils."
§8.4.1.5: "In terms of cumulative impacts, given the fact that the impact on land and soils arising from the proposed amendment is assessed as being imperceptible or neutral, I do not consider that any significant cumulative impacts when assessed in conjunction with other permitted plans and projects including the KWF, the KWF grid connection and Woodhouse windfarm are likely to arise."
[147] FitzPatrick v An Bord Pleanála, Galway County Council & Apple Distribution International [2019] IESC 23, [2019] 3 IR 617.
[148] Case C-396/92 Bund Naturschutz in Bayern v Freistaat Bayeran, Judgment of 9 August 1994, E.C.R. I-3717.
[149] For present purposes I will ignore the ancillary works and grid connection.
[150] Which it had submitted with the planning application.

projects submitted by developers" for development consent – "*even if the actual application relates to only one part of a longer road link which, as normally happens in practice, is to be constructed in stages.*"

- Had, in the view of Finlay Geoghegan J, correctly distinguished between what might be considered environmentally desirable and the option chosen by the EIA Directive.[151]

- Considered that "*The principle underlying the directive is unambiguous*": EIA is required for projects for which the developer is seeking development consent. So "*unambiguous*" was the principle that, though the Supreme Court is an apex court and so bears a heightened obligation to refer questions of law to the CJEU, Finlay Geoghegan J declined to do so as the position was "*so obvious as to leave no scope for any reasonable doubt*".
- Considered, however, that as far as practically possible account should also be taken in the EIA of any current plans to extend the specific project in hand.

67. In short, Finlay Geoghegan J concluded that the "*unambiguous*" position is that the EIA Directive requires EIA of specifically the project or proposed development for which the planning permission is sought by the developer. As observed at trial in these proceedings, that puts the developer somewhat in the driving seat as to the determination of the scope of the project requiring EIA and hence, to some degree, of the scope of the EIA. The Board did not shy away from that proposition and I accept that it is the logic of the decision in FitzPatrick. However, the effect should not be overstated as tending to undermine the comprehensiveness of EIA or the aim underlying EIA – a high level of environmental protection. First, it is very considerably mitigated by a properly demanding approach to assessment of the effects of the project as defined by the developer cumulatively with the effects of other projects. Second, there is the law as to project-splitting which applies where a project is artificially split with a view to allowing one or more of its parts to escape EIA – for an example, see **Ó Grianna**.[152] But, as counsel for the Board pointed out, the cure for Ó Grianna was not a single planning application and a single EIA covering the windfarm and the grid connection. The cure for Ó Grianna was that there had to be a cumulative assessment which took into account the grid connection.[153] As was said as to **Ó Grianna** in **Coyne**: "*In truth, once one stands back from the matter to take an overview of the requirement of comprehensive EIA, at least sometimes, little may turn on whether two or more "bits" are separate projects or parts of the same project - as long as their effect is considered cumulatively. In reality, the concept of cumulation is applied in both instances."*[154]

68. Clearly, FitzPatrick strongly supports the identification in this case as the project requiring EIA the Proposed Development for which KWFL sought development consent – i.e. the proposed amendment to the Knocknamona Windfarm as permitted in 2016.

[151] See above as to the consideration of this issue in Ballyboden TTG v An Bord Pleanála & Ardstone [2023] IEHC 722 §231 et seq.
[152] Ó Grianna & Ors v An Bord Pleanála [2014] IEHC 632.
[153] Transcript Day 2, p108.
[154] Coyne v. An Bord Pleanála [2023] IEHC 412 §177.

Commission v Spain 2004

69. The Applicants cite this case[155] as to the proper identification of the project to be subjected to EIA. No EIA had been done of a project consisting of:

- the doubling of an existing railway track along a 13.2km stretch between Las Palmas and Oropesa, which was part of a part of a long distance – 251km – line between Valencia and Tarragona.
- a new 7.64 km line to bypass Benicassim.
- upgrading the tracks to take high-speed trains[156] – i.e. they were intended for long-distance traffic.[157]

Spain argued that no EIA was required.[158] The Commission successfully argued the contrary and the CJEU found that Spain had failed to fulfil its obligation to do an EIA. In the present case, the Applicants argue, in effect, that the Commission's victory demonstrates that not all projects which might be generally called "modifications" (the word used in the 1985 EIA Directive), were in law modifications within the meaning of the 1985 EIA Directive or are in law "changes or extensions" within the meaning of the 2011 EIA Directive.

70. The question, as between Spain and the Commission, was whether the railway track project,

- as the Commission argued, fell within Annex I §7 of the 1985 EIA Directive which required EIA of the construction of long distance railway tracks or,
- as Spain argued, fell within Annex II §12 of the 1985 EIA Directive as a "modification" of an Annex I project.

If it fell within Annex II §12, Spain was free not to do an EIA as, in those days under Article 4(2) of the 1985 EIA Directive, EIA of Annex II projects was required only *"where Member States consider that their characteristics so require."* As Poiares Maduro AG observed

> *"For the second class, listed in Annex II to the Directive, the Member States have a discretion to decide whether to carry out a prior assessment of their environmental effects.*
> *Therefore classifying a project as falling within class I has important consequences as to the need to carry out a prior assessment of the environmental effects. "*

71. Viewed purposively as to ensuring EIA of projects likely to have significant environmental effects, there was an appreciable impetus under the 1985 Directive towards ensuring that projects properly in Annex I were not categorised as Annex II projects. As Poiares Maduro AG observed, the general *"objective of the Directive is that no project likely to have significant effects on the environment should be exempt from assessment"* – the attainment of which objective the Directive seeks to ensure.[159] It is fair to say that later iterations of the EIA Directive and developments in the caselaw, strengthening the obligation to do EIA of Annex II projects, have considerably diluted the risk that projects will escape EIA by being miscategorised as Annex II projects when they are in fact Annex I projects and so have diluted the requirement, at least in this respect, of purposive interpretation of the 2011/2014 EIA Directive.

[155] Case C-227/01 Commission v Spain, Judgment of 16 September 2004.
[156] Suitable for a speed of 200-220 km/h, whereas previously trains travelled at only 90 km/h.
[157] Opinion of Poiares Maduro AG §§30, 40, 43, 49.
[158] §36.
[159] Citing Case C-435/97 WWF and Others, Judgment of 16 September 1999, ECR I-5613, §45 and Case C-287/98 Linster Judgment of 19 September 2000, ECR I-6917, §52.

72. Poiares Maduro AG opined that *"The length of the lines when completed is not a relevant criterion for determining whether the Directive is applicable to the project in question. The classification of the project is determined by the use of the line for long-distance traffic."*[160] Consistently with that view, the CJEU considered Spain's argument to be without substance as the project was part of a 251-km-long railway line.[161]

73. For the following reasons, I do not consider that this case helps the Applicants:

a. First, Spain's argument that the project was a modification of an Annex I project within Annex II §2 and was not a project within Annex I §7 implied that no EIA was required. The reason is not very relevant – but it seems likely that was because under the 1985 EIA Directive the Member States had (or perhaps were understood pro tem to have had) much greater discretion than they now have as to whether to do EIA of Annex II projects. As just stated, Article 4(2) of the 1985 Directive required EIA of Annex II projects *"where Member States consider that their characteristics so require. …'* By Spain's argument the classification of the project would have allowed it to escape EIA in the exercise of Spain's discretion. But in the present case, there is no question of EIA not being required. EIA was done. No purposive deficiency arises by reference to the EIA Directive.

b. Second, it is very clear that the Court was motivated by a purposive intent to ensure that all projects of a type identified in the Directive and "*likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a mandatory assessment with regard to their effects*". It held that[162]
    - it was "*obvious*" that the project in question was "*likely to have significant effects on the environment*".[163]
    - "*The objective of Directive 85/337 would be seriously undermined if that type of project for the construction of new railway track, even parallel to existing track, could be excluded from the obligation to carry out an assessment of its effects on the environment. Accordingly, a project of that sort cannot be considered a mere modification to an earlier project within the meaning of point 12 of Annex II to the Directive*."

c. Third, and in similar vein, the CJEU was motivated by the avoidance of a project-splitting issue which does not arise here. As to Spain's argument that the 13.2km stretch was not "long-distance" within Annex I §7, Poiares Maduro AG observed that "*a railway line 251 km long is constructed in stages*". The Court held that if Spain's argument were upheld, the effectiveness of the EIA Directive *"could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the*

[160] §49.
[161] §§51 & 52.
[162] §§49 & 50.
[163] For example at §59 the CJEU considered it "indisputable that a project of this type is such as to create significant new nuisances, even if only as the result of the adaptation of the railway line with a view to traffic which can attain a speed of 220 km/h."

Directive both the project as a whole and the sections resulting from that division."[164] As I have said, there is no question here of EIA not being required. EIA was done.

d. Fourth, whereas the 1985 Directive, Annex II §12 related to "*Modifications to development projects included in Annex I*", its present equivalent is Annex II §13 as to, inter alia, "*(a) Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment*." This wording seems designed to spread the net wider in terms of requiring EIA of changes or extensions and the requirement of even sub-threshold EIA appears to have strengthened since the older cases so to diminish any purposive impetus seen in those cases under the 1985 Directive to avoid classifying projects as a modification whereby it could, in practice, escape EIA.

I do not see, therefore, that the Spanish case really helps the Applicants.

Bund Naturschutz 2016

74. The Applicants rely on another **Bund Naturschutz in Bayern** case[165] as to a road-upgrading project of which no EIA was done.[166] §7(b) of Annex I to the 2011 EIA Directive required EIA of projects consisting of "*Construction of … express roads*". The CJEU held that §7(b) was to be interpreted broadly, that 'construction' referred to the carrying-out of works not previously existing or to the physical alteration of existing installations and refurbishment in substance equivalent, by its scale and the manner in which it is carried out, to construction may constitute "construction". To determine whether the physical alteration of existing installations is equivalent to construction, the national court must take account of all the characteristics of the work concerned and not only of its length or of the fact that its initial route is retained.

75. Again, I do not see that this decision helps the Applicants. §13 of Annex II of the 2011 Directive was not in issue and so the concept of "*change or extension*" was not in issue. True, analogous concept of "*the physical alteration of existing installations"* was in issue, but the premise of the case seems to have been that even if that alteration constituted construction within the meaning §7(b) of Annex I to the 2011 EIA Directive the project requiring EIA was the alteration – not the alteration plus the underlying road. At that point, any analogy with the Applicant's argument breaks down.

[164] §53.
[165] Case C-645/15 Bund Naturschutz in Bayern e.V and Harald Wilde v Freistaat Bayern, Judgment of 24 November 2016.
[166] The road had two lanes in each direction. It was to be upgraded in two sections. On the first, 1.8 km, section, the plan was to add a third lane on one side of the road and to erect noise barriers over a stretch of around 1.3 km. On the second, 2.6 km, section, a 1.8 km road tunnel was to be built, existing 'flat junctions' were to be turned into 'split-level junctions' and a new access road is to be provided from Nuremberg city centre.

Save Cork City 2021

76. The Applicants cite **Save Cork City**[167] for a "*necessary interaction with the wider works*" test for identifying a project. They say that "test" is clearly met as to the Impugned Decision as "*the increased height depends on the lower height being constructed*". The proposition seems to be that meeting such a test requires that the project to be subjected to EIA must be both the change or extension and the underlying project of which it is a change or extension. The further and necessary implication is that identification of the project as consisting only of the change or extension, such that EIA will consider its interaction with the underlying project by way of cumulative assessment, is unlawful. Humphreys J rejected that proposition in that very case.[168]

77. I do not see that **Save Cork City** helps the Applicants. The applicants in that case sought to have quashed the Board's approval[169] of Cork City Council's project of flood defence works along a 553-metre stretch of the River Lee at Morrison's Island. Those works were the first and a small fragment of an overall grand design/masterplan. No development consent application had been made as to the masterplan works other than those planned for Morrison's Island. The applicants argued that any EIA must assess the masterplan. Humphreys J disagreed. In his primary finding, he cited FitzPatrick – which, as we have seen, upheld the "unambiguous" rule that the "project" to be subjected to EIA is limited to that for which development consent is sought. That clearly does not assist the present applicants.

78. Humphreys J continued: "*In any event, the present project does not seem to have the sort of necessary interaction with the wider works that would render full EIA mandatory*."[170] On this slim reed, plucked from a case entirely explicable on the FitzPatrick rationale as to the place of masterplans for future work in the EIA of a project for which development consent is sought, the Applicants here seek to support an argument which would eviscerate Annex II §13(a) of the EIA Directive of any practical effect. It is difficult – at least I have failed – to conceive of a "change or extension" of which it could not be said that it had an "*interaction with the wider works*" being the underlying project of which it is a change or extension. On the Applicants' proposed test therefore, very few indeed – if, indeed, any – changes or extensions would ever constitute a "project" for EIA purposes. In every case the "project" would have to encompass both the change or extension and the underlying project of which it is a change or extension. On the Applicants' argument, Annex II §13(a) is more or less a dead letter. Yet the EU Legislature chose to enact Annex II §13(a) rather than a provision requiring that the "project" subjected to EIA encompass both the change or extension and the underlying project.

[167] Save Cork City v An Bord Pleanála [2021] IEHC 509 §79.
[168] §81.
[169] Pursuant to s.177AE PDA 2000.
[170] Citing Fitzpatrick v An Bord Pleanála, Ó Grianna v. Framore Ltd. [2014] IEHC 632, [2014] 12 JIC 1208 (Unreported, Peart J., 12th December, 2014).

Commission Guidance on EIA – Change & Extension – 2021

79. In 2021 the EU Commission published an Information Notice[171] on the EIA concept of "*changes and extensions of projects*". Its introduction self-describes it as a guidance document to provide clarification focussing on changes and extensions in light of caselaw of the CJEU and in light of "*numerous requests for information regarding their application from the competent national authorities and other stakeholders."* It states that "*The correct application of the EIA Directive to changes and extensions of projects is key for the overall implementation of the EIA Directive.*" The specific content of the Notice relates largely to changes and extensions to nuclear power plants – not least in light of **Case C-411/17 Doel**.[172] Beyond describing Annex II §13(a) it does not elucidate it in a practical way. It observes that:

- Annex II §13(a) "*refers to any change or extension, which may have significant adverse effects on the environment*".
- The EIA Directive does not define the terms 'change or extension' and does not provide examples.
- What exactly constitutes a change or extension depends on the type of project.
- As the EIA Directive applies to a great variety of sectors and types of projects, there are numerous, often complex, practical situations, such that it is not possible to provide an exhaustive list of examples of changes and extensions and competent national authorities may have to apply the requirements on a case-by-case basis and to evaluate each case, taking into account the specific circumstances.
- Screening changes or extensions for EIA should take into account the wide scope and broad purpose of the EIA Directive and its fundamental objective that, before development consent is given, projects likely to have significant effects on the environment be subjected to EIA.

80. I do not find the content of the Commission Notice of much direct assistance in the present case as to, specifically Annex II §13(a). Not merely is an exhaustive list of examples not given – no examples are given. On the other hand, the Notice could be understood as not elaborating on the concept of "any change or extension" on the basis that the meaning of the phrase is obvious and obviously broad. **Doel**[173] does assist somewhat. However, it does not appear to me that the Notice casts doubt on the approach to this issue set out in the foregoing or subsequent parts of this judgment on this issue.

<u>G1 – EIA – The Applicants' Replacement Theory</u>

81. The Applicants seek to get over the difficulty posed to their case by the law as analysed above by positing that what is at issue in the Proposed Development is not a "change or extension" of the Knocknamona Windfarm within Annex II §13 of the EIA Directive, but is, rather, the "replacement" of the Knocknamona Windfarm as permitted in 2016 by a different windfarm such that EIA of that entire replacement windfarm is required under Annex II §3(i) of the EIA Directive. In the end, that was the Applicants' main argument on the EIA issue – as counsel put it when pressed, it was the mast to which he pinned his colours.

[171] Commission Notice regarding application of the Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU) to changes and extension of projects - Annex I.24 and Annex II.13(a), including main concepts and principles related to these (2021/C 486/01).
[172] Case C-411/17, Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen, Judgment of 29 July 2019, ECLI:EU:C:2019:622.
[173] Case C-411/17, Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen, Judgment of 29 July 2019, ECLI:EU:C:2019:622.

82. A considerable difficulty with this argument is that the Knocknamona Windfarm as amended by the Impugned Permission, as compared to that permitted in 2016, while it will produce much more electricity by higher turbines with a considerably greater area swept by its longer rotors, will be of the same number of wind turbines, in the same places, on the same footprints, on the same Site, served by the same ancillary works such as access roads, and producing the same product by the same means. The Applicants have cited no authority for their posited distinction between "change or extension" and "replacement" – though I accept that in principle it is a valid distinction. The application of that distinction must be decided by purposive reference to the text of Annex II §13 and will necessarily require a fact-specific consideration. Viewed from the purposive perspective of ensuring EIA of the entire project, I cannot see that the Applicants have shown that that project as permitted in 2016 is, by the amendments consisting of the Proposed Development, to be replaced, as opposed to changed or extended. In the end it seems to me that, on any sensible view, Knocknamona Windfarm as amended by the Impugned Permission is a bigger and more powerful version of the Knocknamona Windfarm as permitted in 2016 and so falls within the concept of "change or extension". However I will consider the specifics of the Applicants' argument in this regard.

Quantum of Power Output Increase – 1

83. In support of its 'replacement theory' the Applicants contrast, on the one hand, the anticipated increase of the power output of the Knocknamona Windfarm and, on the other, the power output of the Knocknamona Windfarm. On a simple view, the increase in maximum power output of the Knocknamona Windfarm by reason of the Proposed Development would be in the order of 11MW – from 23MW under the 2016 Permission to 35MW.

84. In my view, the Applicants tried to gild their lily (assuming, for argument's sake, it is a lily) by their argument that the increase could be much greater than 11MW on the bases that,

- the 2016 Permission was "open ended" in that the effective permitted output of 23MW was a maximum as the permitted tip height of 126 metres was a maximum. As built in reliance on 2016 Permission, both could have been less. So, the Applicants plead, the 2016 Permission permitted development having a power output of anywhere between 0MW and 23MW.

- accordingly, and as to power output, the potential difference between the unbuilt windfarm permitted in 2016 and the windfarm which may be built on of the Impugned Permission is much greater than from 126 metres tip height to 155 metres and from 23MW to 34MW.

85. Pedantically I admit, I observe that the phrase "open ended" seems inaccurate. The "ends" were closed by the maxima – not left open. However, the substance of the point is apparent. It is that the potential quantitative difference between the power outputs of the Knocknamona Windfarm permitted by the 2016 Permission and that which would result from the Impugned Permission is appreciably greater than the 11MW

difference between 23MW and 35MW because the Knocknamona Windfarm permitted by the 2016 Permission could have been built at much lower power output than 23MW. The argument lacks reality. To postulate development of a 0MW windfarm reduces it to the absurd. It seems to me fanciful to suggest that there was ever any real prospect that the 2016 Permission would have been built at a lower power output than 23MW in any degree which could have mattered. Certainly, no such prospect has been shown. And even if it was, no argument was tendered to show how this greater quantitative difference affected any legal principle as to the identification of the project for EIA purposes.

86. So, taking the difference as 11MW, the Applicant put their argument as follows.

- The Irish threshold for EIA of windfarms is 5MW.
- The 11MW anticipated increase of the power output of the Knocknamona Windfarm due to the Proposed Development is, taken by itself, over double that 5MW threshold.
- So, a standalone windfarm with the power output of the Proposed Development would automatically require EIA as having a power output double the 5MW threshold.

Indeed, one could take the argument further. The Irish threshold for the application of Annex II §13 as to changes and extensions of projects is hit at an "*increase in size greater than 25%, or 50% of the appropriate threshold, whichever is the greater."* Though by reference to the 25% size threshold, the 11MW increase is 33%, one could suggest that it is striking that by refence to the 50% criterion – 50% of 5MW is 2.5MW – 11MW is over 4 times the Annex II §13(a) threshold.

Given the basis of the argument that the difference in power output takes the Proposed Development out of the Annex II §13 category of "change or extension" and put it in a category of "replacement" it seems to me that it does no disservice to the Applicants' argument to proceed on the basis, which I consider realistic and sufficient to their argument, that the difference in power output is 11MW. I will return to this argument in due course.

Martin 2022

87. In **Martin 2022**[174] an application for permission to relocate a windfarm meteorological mast (which mast had been the subject of the original planning permission and EIA for the windfarm) was not subjected to EIA. Mr Martin argued that the application to relocate the mast triggered a requirement of a fresh EIA to assess the cumulative effects of the whole. The planning application to relocate the mast was screened by the Board for EIA and it had found that the proposed amendment was not "*likely to have significant effects on the environment, so a sub-threshold environmental impact assessment would not be warranted".*

88. Ferriter J held that the fundamental flaw in the applicant's case was that the EIA regime permits a change or extension to a project which has already been authorised and subjected to EIA, "*where that change or extension does not exceed certain thresholds or, if sub-threshold, the change or extension would not be likely to have significant effects on the environment*." He rejected the applicant's case that any change to an EIA project, "*irrespective of the impact of that change on the project as a whole, must of itself lead to a fresh EIA,*

[174] Martin v An Bord Pleanála [2022] IEHC 256 – as distinct from, inter alia, Martin v An Bord Pleanála [2008] 1 I.R. 336.

including the lodging of a fresh EIAR, absent which the developer is engaged in unlawful project splitting." He said that *"If any change to the original project/development was to be considered as a fresh entire project irrespective of the potential effect on the environment of the change itself, the provisions of paragraph 13 of Annex II of the EIA Directive and classes 13 and 15 of Part 2 of Schedule 5 of the 2001 Regulations would be otiose and would make no sense."*

89. For the avoidance of doubt, it is clear that Ferriter J was not suggesting what might on a loose reading have been thought a corollary of his decision – that where a change or extension to a project was likely to have a significant effect on the environment, EIA of the entire project as amended must ensue. Annex II §13 is clear that EIA only of the change or extension itself suffices.

90. Of some note for present purposes, Ferriter J rejected the contention that a change in location of an element of the original EIA-assessed project renders the resulting changed development a new project. This finding falls to be understood in the context of his approval of the Inspector's observation that "*The proposed development, which modifies the development by relocating the permitted meteorological mast, provides no increase in wind energy production or increase in size of the development. Consequently, there is no statutory requirement for environmental impact assessment*". Such a view will be fact-specific. In the present case, the Proposed Development will increase both the power output of the Knocknamona Windfarm and its size in particular respects but, unlike in Martin, it does not follow in the present case that there is no requirement for EIA.[175] Indeed all agree that EIA was required – if only as the Annex II §13 thresholds are exceeded.

91. Martin does not advance the present Applicant's case that what is proposed is not merely a change or extension within Annex II §13 but is a replacement requiring EIA under Annex II §3(i) of the entire project as amended. Martin does, however, as the Board says, illustrate the validity of amending planning permissions – an issue I will consider when considering the adequacy of cumulative assessment.

Wells 2004

92. In **Wells**[176] the facts, briefly and simplified,[177] were that Conygar Quarry in the UK, operated pursuant to statutory authorisation[178] from 1947 but had long been dormant when Ms Wells bought her house nearby in 1984. The quarry was recognised to be environmentally extremely sensitive as the area in or adjacent to it lay was subject to several designations of nature and environmental conservation importance. In 1991 quarrying briefly resumed. In 1992 a decision registering the quarry prohibited quarrying unless and until a decision, pursuant to a special set of rules,[179] determining the conditions under which quarrying could be

[175] Hub height, rotor length, tip height and swept area.
[176] Case C-201/02 R(Wells) v Secretary of State for Transport, Local Government and the Regions, Judgment of 7 January 2004.
[177] The facts and legal context were very complicated and the decision addressed various other legal issues not here relevant.
[178] Interim Development Orders authorising mineral extraction were adopted from 1946 to meet post-war construction needs.
[179] S.22 of the Planning and Compensation Act 1991 applied to old mining permissions granted under an IDO. The Quarry owners were obliged, if they wished to resume quarrying. To have the old mining permission registered (which occurred in 1992) and to seek decisions (made in 1997 and 1999) determining new planning conditions and approving matters reserved by those conditions. Had they not done so, the permission to quarry would have ceased to have effect.

resumed. By decisions in 1997 and 1999, the competent authorities established those conditions, enabling resumption of quarrying. No EIA was done.

93. Ms Wells brought judicial review and a reference to the CJEU ensued. She successfully objected that the 1997 and 1999 decisions combined to constitute a development consent within the meaning of the 1985 EIA Directive such that the competent authorities were required to consider whether EIA was required. The issue in the case was not the meaning of "project": it was the meaning of "development consent". The rationale of the CJEU includes a passage on which the Applicants rely in their argument that the Proposed Development is not a "*change or extension*" of, but is a replacement of, the Knocknamona Windfarm as permitted in 2016 such that the "project" requiring EIA is not the amendment constituted in the Proposed Development but is the entire Knocknamona Windfarm. That passage in the rationale of the CJEU is:

> *"46. It would undermine the effectiveness of that directive to regard as mere modification of an existing 'consent' the adoption of decisions which, in circumstances such as those of the main proceedings, replace not only the terms but the very substance of a prior consent, such as the old mining permission."*

94. The Applicants submit that this passage as to replacing "*not only the terms but the very substance of a prior consent*" applies in the present case on the basis that "*A turbine with a tip-height of 155 metres is not a turbine with a tip-height of 126 metres plus 19 metres. "The very substance" is different*."[180]

95. I respectfully do not see that Wells assists the Applicants.

a. Wells was not concerned with the identification of projects in Annex II of the EIA Directive as including modifications[181] or changes and extensions[182] to projects. It was concerned with the resumption of operation of a long-dormant project the development consent for which had, in effect, withered and expired such that no quarrying even within the scope of the original development consent was permissible absent a further development consent.[183] In Wells the project was not replaced – it was granted a new development consent without which quarrying could not resume. That is not so here – the 2016 Permission remains effective and the Impugned Permission is not to revive development consent for the project it permits.

b. I asked counsel for the Applicants' proposition of law that the Proposed Development was not an extension within Annex II §13a. He replied that the very substance of the project has changed – it is a case of replacement – and, therefore, it has to be assessed in EIA as a new project.[184] But Wells was not concerned with replacement of the "*very substance"* of a project. It is not apparent that the quarry was going to change at all. Rather, Wells was concerned with replacement of the "*very substance"* of a development consent. Wells turned on the legal nature and effect of the consent rather than the legal nature and effect of the

[180] Applicants' written submissions §44.
[181] Annex II §12 of the 1985 EIA Directive.
[182] Annex II §13 of the 1985 EIA Directive as amended in 1997 and as repeated in iterations since.
[183] It is not apparent that there was any issue as to the extension of the scope or location of the operation of the quarry or the intensification of its use as sometimes arises in quarrying cases.
[184] Transcript Day 1 p97.

development to which consent was given. The Applicants' submissions purport to respect that distinction. But their identification of the "very substance" as differing on the basis that *"A turbine with a tip-height of 155 metres is not a turbine with a tip-height of 126 metres plus 19 metres"* belies that respect.

c. I accept that the line between the counterparts of that distinction – the project and the development consent - may not always be clear, depending on the facts. But it was clear in Wells as what was in issue in that case was the loss of the authorisation to quarry unless the decisions impugned in that case were made. As the CJEU said: *"Without new decisions such as those referred to in the previous paragraph, there would no longer have been consent, within the meaning of Article 2(1) of Directive 85/337, to work the quarry."* So the decision determining new conditions and the decision approving matters reserved by the new conditions for the working of Conygar Quarry constitutes, "*as a whole, a <u>new consent</u>*" within the meaning of the EIA Directive.

d. The purposive context was also different in Wells. The UK Government had argued that no EIA was required as the 1997 and 1999 decisions[185] did not constitute a development consent within the meaning of the 1985 EIA Directive and that the development consent likely to affect the environment had been given in 1947 at a time when EIA was not required by law. There is no question in the present case that EIA was not required. EIA was done.

Commission v Germany 1995 & the Power Output Point.

96. The Applicants' 'replacement theory' stressed this case,[186] in which Germany had granted development consent for a new block of a thermal power station without an EIA. The heat output of the new block, considered discretely, was 500MW. As to categorising that project, the Commission said the new block fell within Article 4(1) and Annex I §2 of the 1985 EIA Directive and so required EIA as a *"Thermal power station ... with a heat output of 300 megawatts or more".* Germany said the new block fell within Article 4(2) and Annex II §12 – the category of "*Modifications to development projects included in Annex I*". That would have, as the 1985 Directive was then phrased, given Germany considerable discretion whether or not to do EIA, on its exercise of which discretion it intended to stand. The CJEU held for the Commission. It held that:

- For the purposes of Article 4(1) and Annex I §2 thermal power stations with a heat output of 300MW or more must be subjected to EIA "*irrespective of whether they are separate constructions, are added to a pre-existing construction or even have close functional links with a pre-existing construction."*

- Links with an existing construction do not prevent the project from being a *"thermal power station with a heat output of 300 megawatts or more"* so as to bring it within Annex II §12 as a modification.

97. The ratio here was clearly that the new block, viewed discretely, was itself a *"thermal power station with a heat output of 300 megawatts or more".* That ratio does not apply to the present case as the Proposed

[185] Which it characterised as involving merely the detailed regulation of activities for which the principal consent has already been given.
[186] Case C-431/92 Commission v Germany, Judgment of 11 August 1995.

Development – essentially a higher hub and longer rotors – cannot, considered discretely, be described as a windfarm. Nor is there any purposive incentive to so regard it by means of some form of extrapolation of literal meaning as there is no question of its escaping EIA. Unlike the German power station block, the Proposed Development was subjected to EIA.

Quantum of Power Output Increase – 2

98. I return to the argument that the extent of the 11MW increase in the power output of the Proposed Development as over 4 times the Annex II §13(a) threshold of 2.5MW or as a 33% increase as compared to the Annex II §13(a) threshold of 25% or as over twice the Annex II 3(i) threshold of 5% for standalone windfarms. These seem to me to be various difficulties with this from the Applicants' point of view.

99. The first is that while the figures are superficially impressive, they are in an appreciable sense arbitrary in that they reflect Ireland's choices of thresholds below which screening is needed. The thresholds for the same projects could have been set appreciably higher in other Member States, or indeed in Ireland, at only the administrative cost of doing a greater number of sub-threshold EIA screenings. Despite any such differences in thresholds, the net result required by the EIA Directive is the same – EIA of all projects likely to have significant effect on the environment. So, in my view, the quantitative exceedance of Ireland's thresholds is not a convincing reason to regard as a "replacement" what would, if the quantitative exceedance was smaller, be regarded as "a change or extension".

100. The second is that it is necessary to recollect what, viewed purposively, is at stake here. It is not that no EIA will be done. The very purpose of the thresholds is to ensure that EIA is done. They cannot not rule out EIA. That they may be set lower or higher in various member states (and that with essentially administrative consequences) does not speak to any proposition that, above whatever threshold may be set, there is a further upper quantitative limit beyond which the very nature of the project is deemed to alter from a "change or extension" to a replacement - even though the very fact of exceedance of the threshold will ensure EIA.

101. The third difficulty for the Applicants arises on foot of the reasoning of the CJEU in **Case C-411/17 Doel**[187] – which is cited extensively in the Commission Guidance cited above and by the Board and KWFL. That was a case as to works to extend the life of an Annex 1 project – a nuclear power plant. The issue was the application of the Annex I analogue to Annex II §13(a) – *"Annex I.24 - Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex."* The CJEU held that:

> *"As regards point 24 of Annex I to the EIA Directive, it is evident from the wording and general scheme of that provision that it applies to any change or extension to a project, which by virtue of,*

[187] Case C-411/17, Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen, Judgment of 29 July 2019, ECLI:EU:C:2019:622.

inter alia, its nature or scale, presents risks that are similar, in terms of their effects on the environment, to those posed by the project itself.

The measures at issue in the main proceedings, which have the effect of extending, by a significant period of 10 years, the duration of consents to produce electricity for industrial purposes with respect to both power stations in question, which had up until then been limited to 40 years by the Law of 31 January 2003, combined with major renovation works necessary due to the ageing of those power stations and the obligation to bring them into line with safety standards, must be found to be of a scale that is comparable, in terms of the risk of environmental effects, to that when those power stations were first put into service."

102. In other words, the concept of a change or extension encompassed even a project to extend the life of a nuclear power station by 10 years – 25% – and a project accompanied by risks of a "*scale that is comparable, in terms of the risk of environmental effects, to that when those power stations were first put into service."* According to the Commission Notice of 2021,[188] the very fact that "*the risk carried by the change or extension of the project is comparable to risk presented by the original project category itself*" seems to be the "*decisive element*" requiring EIA – but not of the project as changed or extended but of the "*change or extension*" itself. On a purely factual comparison, it is difficult to see that a concept of change or extension broad enough to encompass a project to extend the life of a nuclear power station by 10 years could not encompass the Proposed Development in the present case.

103. I should note that counsel for the Applicants, I think correctly, shrank from any proposition that, as a matter of law, any extension of an Annex II project by more than the relevant threshold for such project as set domestically by Ireland, must be deemed a replacement of the original project rather than a change or extension within Annex II §13(a) and so result in a definition of the project to be subjected to EIA as the entire extended project. But he was unable to substitute another generally stateable proposition of law in its place. He was essentially left with a proposition that whether the Board was faced with a change or extension within Annex II §13(a) or, on the other hand, a replacement not covered by Annex II §13(a), was to be decided by the Board on a case-by-case basis. The unsurmounted problem with that, from the Applicants' point of view, is that such a decision must be a matter of planning judgment reviewable as to merit only for irrationality.

104. Finally, and in light of the foregoing, I agree with counsel for the Board[189] that the argument that if a change would increase power output by more than 5MW it ceases to be a change and becomes a new windfarm, is an argument which confuses threshold (and, at that a threshold which may properly vary widely between member states) with project description.

[188] p21.
[189] Transcript Day 2 p129.

Salzburger Flughafen 2013 & Abraham 2008

105. **Salzburger Flughafen**[190] concerned a project at Salzburg airport comprising an additional terminal, 90,000m^2 of ancillary buildings, in particular warehouses, and the extension of vehicle parking areas and aircraft standing areas, further areas of almost 120,000m^2 for general aviation, the construction of hangars and vehicle parking and aircraft standing areas and the alteration of taxiways. The airport appealed the decision of the Environmental Tribunal to require an EIA. The case came to the CJEU in a reference from the appellate court. The CJEU considered[191] that works to change the infrastructure of an existing airport, without extension of the runway, are likely to be covered by Annex II §13 of the EIA Directive, (which relates to changes or extensions) "*where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself*". Again, on a purely factual comparison of scale, if works of the order just described fall within Annex II §13 of the EIA Directive, it is difficult to see that the Proposed Development in the present case is too large to be accommodated by Annex II §13.

106. **Abraham**[192] considered works to airport infrastructure to enable it to be used 24 hours per day and 365 days per year. In particular, the runways were restructured and widened and a control tower, new runway exits and aprons were constructed. At issue was the concept of "modifications" under Annex II §12 of the original version of the 1985 EIA Directive. But the CJEU held that the new wording of Annex II §13 – "change or extension" merely sets out with greater clarity the meaning of the original wording. The CJEU held that works to modify an airport comprise *"all works relating to the buildings, installations or equipment of that airport where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic."* That last sentence suggests that the greater the size of the works the more likely, rather than the less likely, they require EIA as a "modification" – or, in the updated wording, a "change or extension". That make sense as, ceteris paribus, the greater the size of the works the more likely they will have significant environmental effects and so require EIA. Again, a factual comparison of the works at issue in Abraham with the Proposed Development in the present case makes it difficult to see that the Proposed Development is too large to be accommodated by Annex II §13.

Commission v Ireland (Derrybrien Windfarm) 2008

107. The Derrybrien Windfarm case[193] related in part[194] to an "*application for consent to alter the first two originally authorised phases*" – of 23 turbines each. The alteration was in the type of wind turbines and was to increase the production of electricity – just as in the present case. Ireland sought to defend a development consent granted without an EIA being done. The CJEU said:

[190] Case C-244/12 Salzburger Flughafen v Umweltsenat, Judgment of 21 March 2013, [2013] PTSR 910.
[191] §28.
[192] Case C-2/07 Abraham v Region of Wallonia, Judgment of 28 February 2008.
[193] C-215/06 Commission v Ireland, Judgment of 3 July 2008.
[194] There were many other issues and developments at issue. The account I give here is highly edited to focus on content relevant to this case.

- "However" Annex II §13 of the EIA Directive refers to any change or extension of projects listed in Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment. And by Annex II §3 windfarms were listed in Annex II.[195]
- Since the change in the type of wind turbines initially authorised is a project referred to in Annex II, and was likely, to have significant effects on the environment, it should have been subjected to EIA.[196]

108. The CJEU in Derrybrien Windfarm clearly proceeded on the footing that alteration in the type of wind turbines to increase the production of electricity of a windfarm was a "change or extension" of that windfarm and hence a project within Annex II §13 of the EIA Directive. It is unclear from the judgment whether or how that issue of Annex II §13 was argued by Ireland but is clear that the decision of the CJEU was premised on the application of Annex II §13.

109. Given its factual analogy to the present case this decision is highly persuasive that the Board is correct in arguing that the Proposed Development is, in its own right, a project within Annex II §13.

G1 – EIA – Alleged Inadequacy of Cumulative Assessment and of Multiple Planning Permission and EIA Processes

110. Their difficulties as described above, to my mind, drove the Applicants to the proposition that what was fundamentally at issue was that cumulative assessment of the effects of the Proposed Development with those of the Knocknamona Windfarm permitted in 2016 was not an adequate substitute for the failure to identify both together as the project to be subjected to EIA. In essence, the proposition was that cumulative assessment of two projects (inter-project cumulative assessment) is inferior to cumulative assessment of the same proposed developments considered as a single project (intra-project cumulative assessment).

111. It is common case[197] that all relevant elements of all relevant projects were considered by way of cumulative assessment in the EIA of the Proposed Development. The cumulative assessment encompassed all of the Woodhouse Windfarm, the Woodhouse Substation, the Grid Connection to the Woodhouse Substation and the Knocknamona Windfarm as permitted in 2016. The Applicant's only complaint is, in essence, that the Knocknamona Windfarm as permitted in 2016 ought not to have been considered in that EIA as a project other than the project subjected to EIA and by way of cumulative assessment, but ought to have been considered as part of the project – together with the Proposed Development – to be subjected to EIA. Looking at the matter purposively, it bears recalling that the Knocknamona Windfarm as permitted in 2016 had itself been subjected to EIA. And the 2015 Knocknamona Windfarm Revised EIS informed the cumulative impact assessment of the Proposed Development.[198]

[195] §108.
[196] §110.
[197] Once the birds issue was extracted from the EIA ground.
[198] 2021 EIAR §6.1.2

112. The 2021 EIAR records:

> *"Whole project evaluation and cumulative evaluation: The authorised Knocknamona Windfarm is part of the whole Knocknamona Windfarm Project which also includes KWF Grid Connection (currently under appeal to An Bord Pleanála) and Haul Route Works for turbine component deliveries (application to be submitted). The effects of the proposed larger turbines and meteorological mast amendment on its own, on the authorised windfarm and as part of the whole project, are evaluated in this revised EIAR 2021. An evaluation of the cumulative impact of the whole Knocknamona Windfarm project with other projects is also carried out."*[199]

113. No respect has been identified by the Applicants in which the EIA suffered in substance by reason of the project being identified as the Proposed Development rather than as the entire Knocknamona Windfarm as permitted in 2016 and as to be amended by the Impugned Permission. The two effects postulated related to the use of the 2014 noise baseline in the EIA. As will be seen I reject those arguments.

114. However, here it is important to say that it in no way follows that definition of the project as consisting of the entire Knocknamona Windfarm as permitted in 2016 and as to be amended by the Impugned Permission would have cured the supposed defects identified in the use of the 2014 noise baseline in the EIA. That 2014 baseline, or for that matter, an updated baseline as the Applicants suggest, might just as well have been used on either definition of the project. Indeed, the 2014 noise baseline had the advantage of having been conducted before the Woodhouse Windfarm started operations and so would have excluded its noise in accordance with the HSE advice and the 2006 Guidelines, while still permitting the incorporation of the Woodhouse Windfarm noise in the EIA as part of the cumulative assessment in fact done. The 2006 Guidelines state that *"Any existing turbines should not be considered as part of the prevailing background noise."*[200] To my mind, the Applicants have not discharged the onus of demonstrating in this respect that their posited definition of the project would have improved the EIA in a manner or a degree required by law. The Inspector essentially, in my view correctly, reached the same conclusion.

115. I do not understand the assessment of the effect of a project subjected to EIA, cumulatively with other projects, to be, in law and ordinarily in practice, a lesser form or degree of assessment than assessment of that project in isolation. That must be especially so where those other projects have, as here, themselves got development consent only after EIA. Is there any good reason to abandon that EIA and start again? None has been demonstrated. This seems to me a situation in which the view of McGovern J, expressed in **Ó Grianna #2**[201] and approved by Barniville J in **Eoin Kelly**[202] applies: "*The principle of effectiveness is not a mandate for construing the Directive in the most onerous manner possible. This involves the courts being astute to ensure the objectives of the Directive are met but not in an overly pedantic way."* McGovern J also stated that *"the EIA Directive should be given a purposive interpretation and should not be used to strike down consents where*

[199] 2021 EIAR §3.1.4.
[200] p30.
[201] Ó Grianna v. An Bord Pleanála (No. 2) [2017] IEHC 7.
[202] Kelly v An Bord Pleanála & Aldi [2019] IEHC 84.

there has, in reality, been substantial compliance with its requirements, having identified with precision what those requirements are."

Coyne 2023

116. In **Coyne**[203] permission applications for a data centre and is grid connection were sought separately. In each process EIA was done and in each EIA the effect of the project in question was assessed as to its effect cumulatively with the other. The Coynes argued that the data centre and grid connection together were a single project and required a single EIA. The court accepted that they were a single project but rejected the argument that they required a single EIA. As was said in **Coyne**, in terms applicable here:

> *"391. I note in particular Browne's concluding view,[204] citing Scannell[205] and which seems applicable to this case, that*
>
> > *"… it is legitimate to seek a series of development consents, and for there to be a series of separate EIAs in this regard. Of course, each individual EIAR would have to include some information on the cumulative effect of the project with other projects. The mischief of project-splitting really only arises where development is carved up in such a way as to avoid any requirement for EIA; for example, application might be made for a series of sub-threshold development consents.*
> > *This is notable not merely in its focus on cumulative effect and on the mischief of project-splitting as being that of avoiding EIA, but for its acknowledgement that "it is legitimate … for there to be a series of separate EIAs".*
>
> *392. Notably in the present case, no element of the Data Centre and Grid Connection has evaded EIA …..*
>
> *393. The only conceivable complaint, which is made by the Coynes, is that the EIA of the Data Centre and Grid Connection taken together is in some way deficient because their interaction was considered by way of consideration of their cumulative effects as distinct projects as opposed to consideration as a single project. Perhaps in another case, on other and particular facts, such an argument could be more forcefully mounted. But here, no flesh has been put on the bones of that assertion – by way either of evidence or argument. The assertion is of deficiency of form not of substance. Borrowing, I think legitimately, a concept of interpretation of EU law, and putting it to work as to the application of EU law, I cannot see, from a purposive point of view, that the obligation imposed by Article 2.1 of the EIA Directive has been in any way undermined in this case."*
>
> *"403 …. There seems to me no reason why, where different parts of a project are subjected (as the EIA Directive permits) to distinct development consent processes, perhaps by different*

[203] Coyne v ABP, Ireland & EngineNode [2023] IEHC 412.
[204] Simons on Planning Law (3rd Ed'n, Browne) §14-375.
[205] Scannell on Environmental Law, 2006, §5-61 et seq.

competent authorities, and hence distinct EIAs, the concept of cumulation should not also be deployed as the tool to ensure that the whole project has been subjected to EIA. One might say that, as to EIA of the whole project, the concept of cumulation – cumulative effect – is deployed in a context or manner different to that explicitly envisaged by the Directive. But I don't see that as a useful objection if the concept is put to good use as an effective tool for achieving the purposes of the Directive. It seems to me that the European and Irish cases I have cited amply and Tromans[206] consistently confirm the usefulness and the adequacy of that tool to that end. …. [The judgment then considers the concepts of intra-project and inter-project cumulative effect.] … At least usually,[207] by a combination of EIAs considering discretely each part of a project and considering also the cumulative effects of those parts, EIA of the whole project is achieved, and the fundamental requirement of the EIA Directive is satisfied. The Coynes have not demonstrated any unusual particulars of this case as requiring disapplication of that usual approach to EIA."

117. **Coyne**, cites Finlay Geoghegan J in the Supreme Court in FitzPatrick as having concluded that data centre and grid connection were a single project for EIA purposes and as having observed that

412. ……. "The environmental impacts of those two applications were correctly considered together in a cumulative assessment. No objection has been taken in the proceedings to the manner in which that was done." The case focussed on other issues and a point not argued is a point not decided. Nonetheless, it is notable that there was no suggestion that the separate development consent procedures and EIAs considering cumulative effect of each part of the project on the other were insufficient in that case and that Finlay Geoghegan J was content to observe that the "two applications were correctly considered together". Indeed, the High Court had noted, in expressing its satisfaction with the EIA, that "The Inspector considered that an assessment had been made of the cumulative impacts which were likely to arise from the development of the datacentre application and the power supply development in combination". And "The documentation clearly establishes that the Inspector and the Board assessed the cumulative impacts which were likely to arise from the completion of the two projects under consideration in combination …"

413. Taking the foregoing cases together, it seems to me that, far from asserting the insufficiency of cumulative assessment for EIA purposes, it is the very avoidance of cumulative assessment which is the mischief which the rule against project-splitting seeks to address. On the facts in the present case, that mischief does not arise."

118. Indeed, though not explicitly so-called, it is clear that the concept of intra-project cumulative effect underlies the analysis in **Ó Grianna**[208] in which the conclusion was that the windfarm and grid connection were, on the facts and not least given their functional interdependence, a single project for EIA purposes. The applicants' case in project-splitting was that the cumulative effect of the entire development on the environment should have been the subject of the EIA – that the two stages should have been considered as a

[206] EIA, 2nd ed'n 2012, p201.
[207] By which phrase I am allowing for the possibility of, rather than suggesting the existence of, exceptions.
[208] Ó Grianna v Framore Ltd [2014] IEHC 632.

single project and be assessed as such on a cumulative basis. The court held that "*in principle at least the cumulative effect of both must be assessed*" and Clarke J in **Arklow Holidays**[209] was cited to the effect, inter alia, that "*what is required to be assessed is the totality of the impact of the project taken as a whole"* and it sufficed to grant leave in that case that it was arguable that *"aspects of a project which might not have impacts which would be significant in themselves might, when taken on a cumulative basis,"* have significant effects. Peart J in Ó Grianna repeatedly deployed[210] the concept of cumulative assessment of the effects of the parts – the windfarm and the grid connection, of what he considered a single project. And his conclusion quashing the permission and EIA which had been confined to the windfarm and excluded the grid connection was based on a requirement that "*an EIS for the entire project can be completed and submitted, and so that a cumulative assessment of the likely impact on the environment can be carried out in order to comply with both the letter and spirit of the Directive*". But Peart J is also clear that as to the means whereby such cumulative assessment of the entire project can be achieved "*at the earliest stage*". "*Each case will have to be considered in the light of its own specific facts*". And the EIA Directive has made express and specific provision, by Annex II §13, for change to or extension of an EIA project in terms which require EIA of a project defined as the change or extension only and not of the underlying project as amended. And in **Salzburger Flughafen**,[211] cumulative assessment was seen as the requirement which necessitated ruling out project splitting.

119. I accept the view expressed in **Daly**[212] that "*The general principle must be that the project must be considered as a whole ..".* But is not authority and I do not accept that this must be achieved by a single EIA as opposed to an EIA for part of the project succeeded by an EIA for another part which considers the cumulative effect of both parts. That is essentially what happened here.

120. **Coyne**[213] cites two **Harrington** cases[214] as to the Corrib Gas field, in turn citing the Supreme Court in **Martin 2008**[215] and the CJEU in **Commission v Ireland**[216] as making it "*very clear*" that it is not required that the entire project be the subject of a single, integrated EIA and that Member States may entrust the task of EIA to several competent authorities if they consider it appropriate. McGrath J in Harrington cited those cases to the effect that: *"… nowhere in the directive is it in any sense suggested that one competent body must carry out a 'global assessment' nor a 'single assessment' of the relevant environmental factors and the interaction between them. Those terms simply do not appear in it.".* Those cases related to distinct EIAs of a single project by different competent authorities. But Coyne concluded in terms applicable here:

> *"407. Of course, the issue described above can take various forms: it may be that the entirety of a project requires multiple development consents; it may be that (as in the present case) discrete physical elements of a project require separate development consents. I see no reason why the principles described above should not apply equally in such cases."*

[209] Arklow Holidays Limited v An Bord Pleanála and others [2006] IESC 15.
[210] e.g. §28 et seq.
[211] §37.
[212] Daly v Kilronan Windfarm Ltd [2017] IEHC 308 (High Court, Baker J, 11 May 2017).
[213] §406.
[214] Harrington v Minister for Communications [2018] IEHC 821 (MacGrath J); Harrington v Environmental Protection Agency [2017] IEHC 767 (Binchy J)).
[215] Martin v An Bord Pleanála [2008] 1 I.R. 336.
[216] Case C-50/09 Commission v Ireland, Judgment of 3 March 2011, ECLI:EU:C:2011:109.

121. It is clear that while the EIA Directive requires EIA of certain projects before they can be given development consent, it does not otherwise interfere in national development consent procedures. Indeed, the integration of EIA into national development consent procedures, as opposed to being done in a stand-alone procedure, is optional under the EIA Directive. In light of Article 2(2) of the EIA Directive, which expressly acknowledged that the EIA *"may be integrated into the existing procedures for consent to projects in the Member States",* it was noted in **Coyne** that,

> *"409. Martin, importantly, draws attention to the fact that the EIA Directive does not in any general way seek to supplant or alter domestic development consent processes. It requires that EIA precede, and be taken account of in, those processes and as an option (generally taken in Ireland) allows that EIA be integrated in the development consent processes."*

South-West Regional Shopping Centre 2016

122. Accordingly, I think the Board was entitled to rely on **South-West Regional Shopping Centre**[217] as establishing that it is possible to amend a planning permission by a later, amending, planning permission. I refer also to **Shadowmill**[218] in this regard. Further, in South-West Regional Shopping Centre, the inspector's conclusion that the proposed amendment was a sub-threshold project within Schedule 5, Part 2, §13(a) PDR 2001 – that is to say a "change or extension" of a permitted project and did not require EIA – was challenged on the footing that, properly, the proposed amendment required EIA as a project within Schedule 5, Part 2, §10(b) (infrastructure) or §14 (demolition). The Court held that,

> *"…… the correct basis upon which to assess an application to amend existing planning permissions is to assess the proposed changes, variations and amendments in the light of all applicable current development plans and ministerial guidelines and other planning policies. In light of those matters, the proposed amendments should be assessed to see whether they meet the requirements of proper planning and sustainable development for the area. Matters that are the subject of an extant grant of planning permission ought not to be reassessed. Accordingly, I hold that the Board was required to assess only the modifications to the Development in the application to amend the existing planning permissions for the Development."*[219]

> *"…… the application is not for planning permission to develop a shopping centre of more than 10,000 m². It is to make alterations to a shopping centre of more than 70,000 m² in respect of which an EIA has already been conducted. In my opinion therefore the application simply does not fall in class 10 and to simplistically state that it does because the proposed floor space is set out as 63,712 m² is to ignore the essence of the application for planning permission and to focus on the form."*[220]

[217] South-West Regional Shopping Centre Promotion Association Limited and Stapleyside Company, v An Bord Pleanála, Limerick City and County Council and Regional Retail Property Development and Trading Limited [2016] IEHC 84, [2016] 2 IR 481.
[218] Shadowmill v ABP & Lilacstone [2023] IEHC 157 §275.
[219] §71.
[220] §122 – The amendment application involved a reduction in floor area.

> *"The applicants' argument is predicated on the submission that every application for planning permission, where what is sought is permission merely to modify existing grants of planning permission ….. must be assessed from first principles and subject on each and every occasion either to an EIA or to an assessment as to whether or not an EIA is required as appropriate. As I have rejected this premise earlier in my judgment, it follows that I reject this argument based upon the premise. Furthermore, it is inconsistent with class 13 of the Regulations. Class 13 applies, inter alia, to changes and extensions to development in the process of being executed. The 2014 application was an application to change a development in the process of being executed. It is common case that it did not satisfy the requirements of class 13(a)*[221] *and therefore, it seems to me, that the 2014 application did not require to be further assessed for EIA.*
>
> *This is entirely sensible and consistent with the overall objectives of the Environmental Impact Assessment Directive which is to ensure that development projects which are likely to have significant effects on the environment are subject to EIA prior to any decision being made to grant development consent."*[222]

123. It follows that if, as is the case, the EIA Directive refrains from interference in domestic development consent procedures – such that it does not impugn the decision in South-West Regional Shopping Centre that amendment applications are permissible – but allows incorporation of EIA in those procedures, the Applicants' proposition is that, whereas for planning purposes only the amendment is to be assessed, for EIA purposes different and greater project comprising both the amendment and the project amended must be assessed. That proposition is directly and unambiguously contradicted by **FitzPatrick**. Assuming I could adopt it, I would not adopt it unless a purposive need to do so was demonstrated. I has not been demonstrated. Indeed, as the Board observed, the Applicants' logic went further – it was that it is not competent to apply for an amendment development consent – what the law required was a new planning application for the entire project and a new single EIA.[223] I see no basis for a rule in EIA law prohibiting amendment development consent – especially when Annex II §13(a) explicitly contemplates such consents and EIA accordingly.

124. Further, in light of the Supreme Court's judgment in Martin 2008 and of that of McGrath J in Harrington, and of Coyne, it follows that as a matter of domestic law there is nothing wrong with successive EIAs, first for the main project and later for its amendment.

125. As importantly, indeed more fundamentally, the same conclusion necessarily follows as a matter of EU EIA law from the mere fact that Annex II §13(a) of the EIA Directive specifically identifies a "*change or extension*" to a project as, discretely from the project changed or extended, a project in its own right for which EIA may be done – indeed, required. So to say that a posited "change or extension" is likely to have significant environmental effects in no way undermines its classification as a "change or extension" within Annex II §13(a). Rather, to subject such changes and extensions to EIA is the whole point of Annex II §13(a). And an EIA of such a "change or extension" will inevitably include an assessment of its effects considered cumulatively

[221] i.e. the amendment did not trigger the thresholds of Class 13.
[222] §§123 & 124.
[223] Transcript Day 2 p121.

with the effects of the project thereby to be changed or extended. That is exactly what has occurred in this case.

Conclusion as to Cumulative Assessment

126. The Applicants neither pleaded, nor particularised nor identified any substantive gap or inadequacy in the EIA. They confirmed their agreement that:

- all elements of the entire project were in fact considered by way of consideration of cumulative effect in EIA.
- their case was that cumulative assessment in EIA of two projects in an EIA of one of them is not an adequate substitute for a single comprehensive EIA of them where they should properly be considered together as a single project.[224]

127. I agree with the Board that:

- in this case the cumulative effects of the overall whole project were considered as part of the cumulative assessment

- Coyne, and the authorities cited therein, makes clear that this approach is acceptable.

G1 – EIA – Use of 2014 Noise Baseline Defective

128. Essentially, the Applicants argue that the EIA of the Proposed Development was legally defective in using the 2014 Noise Baseline because that baseline:

- was out of date by the time of the Board's EIA done in September 2022.
- was based on measurements done within a 1km envelope[225] of the Knocknamona Windfarm for the purpose of a noise assessment in the Revised EIS of 2015, of effects within that envelope, whereas the Revised EIAR 2021 and the Board's EIA purported to perform a noise assessment extending to a 2km envelope of the Knocknamona Windfarm.
- given the 2020 Noise Assessment predicts 42.6 dB(A) of cumulative windfarm noise at Ms Power's home when it is downwind of the windfarms at higher wind speeds, "*just below*" the Condition 7 limit of 43dB(A). The Applicants plead that *"Had an assessment of background noise been made for her home, the noise at that location could be in excess of the limits conditioned in the Impugned Decision."*

[224] Transcript Day 3 p37. I have expanded the precise terms of the Applicants' agreement for clarity – I think fairly.
[225] By which I understand that the boundary of the envelope was, at all points, 1km from the nearest turbine. See Figure 10-1 Noise Impact & Vibration Assessment, August 2015.

129. The Board pleads, and I agree that this last plea is purely speculative and hypothetical and based on no evidence. It does not seem to me that it raised a duty of inquiry in the Board beyond its consideration of the materials, including the expert noise assessments, before it. In **Heather Hill #2**[226] the following was said:

> *"I do not think the caselaw is directed at licensing applicants to simply point to a hypothetical risk not addressed in an AA and thereby impose a "Johnson" burden on the Board. I bear in mind the observations of O'Neill J. in* ***Harrington***[227] *– a case of allegedly inadequate AA – in which he recognised both the onus of proof of illegality is on the Applicant and the duty on the Board to conduct appropriate enquiries in AA and continued:*
>
> > *"But there has to be a reason for those enquiries. In my opinion, such reason must be based on credible evidence. It is not sufficient for an objector to a planning permission merely to make a bald assertion, and no more, and thereby place on the respondent a duty to carry out such enquiries as would be necessary to counter that assertion. It would be unfair to applicants for planning permission if they were put to the considerable expense in meeting an objection to their application for planning permission, in an appeal before the respondents, of having to assemble expert evidence to counter mere assertion by an objector.*
> >
> > *I am quite satisfied that the duty of the respondent to make appropriate enquiries does not go so far as to require them to respond to assertions unsupported by any credible evidence.*
> >
> > *The making of a bald assertion without any evidence to support it could not be said to give rise to "a scientific doubt" which would require, in the case of a site potentially qualifying as a priority habitat, the respondents to do, by way of enquiry, whatever was necessary to eliminate that doubt. Thus, in my view, the applicant's reliance upon the extensive line of authority open to the court relating to the obligations of public authority, when confronted with a situation of "scientific doubt" relating to the status of either a "European site" or a site in the process of consideration for such status, is misconceived."*
>
> *The foregoing is a description of the process before the Board. And if a "bald assertion" does not suffice before the Board, a fortiori it should not suffice in judicial review."*

If the foregoing is the position as to AA it is equally, perhaps a fortiori, the position as to EIA.

130. In any event, while I understand the substantive complaint as to the baseline, I cannot see its alleged legal significance. It is clearly a matter of expert judgment whether noise baseline measurements done in 2014 within a 1km envelope of the Windfarm remain valid for an envelope extended to 2km in 2022. It is certainly not self-evident to a layperson such as me that they are invalid for that purpose – much less that factors, if any, increasing the baseline in 2022 as compared to 2014 and as between the 1km and 2km envelope boundaries, eliminate or overpower the analysis such that it will be impossible for the turbines to operate within the noise limits set by Condition 7 of the 2016 Permission.

[226] Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146 §277.
[227] Harrington v An Bord Pleanála [2014] IEHC 232.

131. Indeed, and notably, when the Applicants attempted to identify expert dispute as to the use of the 2014 baseline, counsel cited the Alen-Buckley submission (per Reid Associates) to the Board which, rather than complain of KWFL's recourse to the 2014 baseline turned out to assert: *"There is a need to revert to the 2014 pre any wind farm development baseline conditions."* That presumably reflected the 2006 Wind Energy Guidelines prescription that existing windfarms (Woodhouse) be excluded from the noise baseline.

132. It is clearly the law that the adequacy of the information before the Board to the task of informing its EIA is a matter within the expert judgment of the Board and its decision in this regard is reviewable as to merit only for irrationality – see in this regard and for example, **Coyne**,[228] **Heather Hill #2**,[229] **Kemper,**[230] **M28**[231] **Kelly**,[232] **Holohan**,[233] and **People Over Wind**.[234] The Applicants did not plead such irrationality and their counsel disavowed such a case. In my view he did so correctly given the content of the Inspector's report as recited above and given the high bar facing a party asserting irrationality. Irrationality is neither pleaded (which is the end of the matter in that regard) nor made out on the evidence.

133. Counsel appeared to rely, rather, on these factors as to noise as supportive of his assertion that the project, for EIA purposes, had been misidentified as the amendment to the Knocknamona Windfarm. He submitted that had the project been identified as the entire Knocknamona Windfarm as amended, a different – the legally correct – baseline would have been identified. But even that argument is, in the end, premised on an implicit assertion that the information in the 2014 baseline assessment is inadequate – an assertion reviewable only for irrationality.

134. However, that argument is unsound for another reason. Even if the ground of challenge to which the argument is a supplement succeeded and the project to be subjected to EIA was defined as to the entire Knocknamona Windfarm as permitted in 2016 and as amended in 2022, it does not follow that the 2014 baseline assessment would not have been deployed as it in fact was. However the project was defined it would have been just as possible for the developer to adopt exactly the same approach by using the 2014 baseline by updating it and by extending the envelope. Whether that was acceptable would remain an issue for expert judgment and the Board's decision – which decision would remain reviewable only for irrationality.

135. So, there is no necessary relationship between those two alleged errors as to, respectively, definition of the project and use of the 2014 noise baseline. I agree with the Board therefore in its submission[235] that the Noise issues were, in the end, a red herring to Ground 1 as to the definition of the project.

[228] Coyne v An Bord Pleanála [2023] IEHC 412 §414.
[229] Heather Hill v An Bord Pleanála [2022] IEHC 146 §232.
[230] Joyce Kemper v. An Bord Pleanála [2020] IEHC 601 §7.
[231] M28 Steering Group v. An Bord Pleanála [2019] IEHC 929.
[232] Kelly v. An Bord Pleanála [2019] IEHC 84.
[233] Holohan v An Bord Pleanála [2017] IEHC 268 §91.
[234] People Over Wind v. An Bord Pleanála [2015] IEHC 271 §76 et seq.
[235] Transcript Day 3 p16.

136. One may add, though it is not determinative of my view, that the 2014 baseline assessment has the advantage of preceding the operation of the Woodhouse Windfarm the noise of which, all parties agree,[236] fell to be excluded from the baseline.

G1 – EIA – Modelling Rather than Measuring the Woodhouse Windfarm Noise

137. This was not a pleaded issue but was raised by me in discussion at trial rather than by the Applicants themselves.[237] I address it in that very limited context. For purposes of the 2021 EIA, the Woodhouse Windfarm noise was modelled rather than measured – even though by then the Woodhouse Windfarm was long-since in operation. I confess to finding it very puzzling indeed that, even if modelling were permissible by standards (the Inspector mentioned ISO-9613 but it was not exhibited), one would choose to model what one can empirically measure. As I observed at trial – the Woodhouse rotors are turning, the noise is being made, it is there to be measured. I may of course be quite wrong. Perhaps there were good technical or other reasons for modelling rather than measuring the Woodhouse Windfarm noise. But they are not stated. Counsel for the Board observed that the Inspector may have been similarly puzzled, when he (the Inspector) observed that:

> *"While the significant time period between the original background survey information for KWF and the fact that the Woodhouse windfarm has become operational in the intervening period would suggest that a new background survey should be undertaken for the assessment of a new development, my reading of ISO-9613 does not indicate that predictive techniques such as that utilised by the first party in this case are not acceptable."*

138. I reject the suggestion by counsel for KWFL that the prediction (i.e. modelling), as opposed to the measurement, of Woodhouse Windfarm noise, derived from HSE advice. The HSE, correctly having regard to the 1996 Windfarm Guidelines, advised that the Woodhouse Windfarm noise be excluded from the noise baseline. That left it to be included instead in the cumulative assessment. The HSE said nothing as to how the quantum of Woodhouse Windfarm noise should be ascertained for the purpose of its inclusion in the cumulative assessment.

139. All that said, I agree with counsel for the Board that the issue was, in the end, a red herring to Ground 1 as to the definition of the project. The choice of method, including predictive method, used to assess Woodhouse Windfarm noise (or, for that matter, to ascertain the baseline noise environment) was independent of how the project to be subjected to EIA was defined.[238]

[236] As to the Applicants, see e.g. Transcript Day 1 p120.
[237] Transcript Day 1 p19 et seq.
[238] Transcript Day 2 p154.

G1 – EIA – The "Open-Ended" Argument

140. I have rejected the argument that the power increase is appreciably greater than 11MW. I should mention that the Applicants cite **Sweetman v An Bord Pleanála & Bord na Mona**[239] for the proposition that "open ended" planning permissions are invalid. Mr Sweetman asserted inter alia that the permission for a windfarm in that case was defective in specifying only maximum turbine dimensions – that it was equivalent to applying for planning permission for a house on the basis that it could be anything from a one-storey bungalow to a ten-storey mansion, and contending that proper details have been furnished as long as a maximum dimension is provided. Humphreys J noted that the planning application was for a "design envelope" rather than for a construction of specified dimensions and in the planning application and EIAR *"all that is specified that the application is for is for an envelope of up to 185 metres blade tip height, three bladed horizontal access type. It is made clear that no possible configuration of hub height, rota diameter, ground blade height is being ruled out."* He held, as to the "plans and particulars" required in planning application, that

> *"While the concept of "plans and particulars" isn't defined by the regulation, it must mean something specific – in particular something specifically measured and capable of being drawn on a plan. That can't include a widely variable design envelope. Otherwise one wouldn't be talking about a plan, still less particulars."*

141. First, as applied to its complaint in submissions that the 2016 Permission contravenes this principle and that the inadequacy of the Impugned EIA is to be viewed in that light, in it must and need only be replied that judicial review of the 2016 Permission and EIA failed.[240] The 2016 Permission and EIA are unassailably valid whether or not they contravene this principle. Second, the point was not pleaded as invalidating the Impugned Permission. Third, it is very difficult to see how such a point could have invalidated the Impugned Permission and I note that the Impugned Permission does not contain an "up to" condition as to turbine dimensions. Fourth, and I imagine by reason of the first three and wisely, the point was not argued at trial. To any extent the argument remains in the case, I reject it.

G1 – EIA – The Duration Point

142. There was no plea that the Impugned Permission was invalid as impermissibly extending the duration of the 2016 Permission. That disposes of the point. Nor did it feature in written submissions. The suggestion was floated at trial.[241] By condition of the Impugned Permission, the Board stipulated that the "*development hereby permitted"* be effected within 10 years from the date of the Impugned Decision of 28 September 2022. The Board submits and I agree that the reference to the "*development hereby permitted"* refers only to the "Proposed Development" – that is, the amendments to the turbine tip heights and the meteorological mast. All other elements of the Knocknamona Windfarm remain to be effected pursuant to the earlier planning permission and within its 10-year duration from 2016. As to amending planning permissions, this issue was

[239] Sweetman v ABP & Bord na Mona [2021] IEHC 390.
[240] See Alen-Buckley v An Bord Pleanála [2017] IEHC 541.
[241] Transcript Day 3 p174.

considered in the **South-West Regional Shopping Centre case**[242] in which Costello J professed herself "*satisfied that the possible prolongation of the duration of a particular planning permission by the granting of an amendment to an extant permission is not invalid or impermissible as a matter of principle."* I respectfully reject the argument belatedly made by the Applicants.

G1 – EIA – The Screening Point

143. I reject the plea that the Board erred in determining that the project requiring EIA was a "*change or extension*" within Annex II §13(a) "*without conducting an EIA screening*". For annex III projects screening is one route to EIA. Exceedance of thresholds is another. As the project exceeded the Annex II §13(a) thresholds set by the Fifth Schedule, Part 2 §13(a) PDR 2001, screening was unnecessary as the requirement of EIA was clearly apparent. If the project to be subjected to EIA was in law correctly identified and EIA of that project was done – both of which I find – any absence of screening is irrelevant. In any event, the correct identification of the project as possibly requiring EIA must precede screening in order that the correct project may be screened. Accordingly, the alleged absence of EIA screening is another red herring as to correct identification of the project for EIA purposes.

G1 – EIA – Conclusion

144. For the reasons set out above, I hold that the Board correctly identified the project requiring and subjected to EIA as the Proposed Development consisting of a "change or extension" of the Knocknamona Windfarm – as opposed to the Knocknamona Windfarm as amended by the Proposed Development. I do so not least as:

- FitzPatrick and Bund Naturschutz 1994 are "unambiguous" authority that the project to be subjected to EIA is the Proposed Development for which planning permission is sought.

- Coyne is merely a recent authority of many that different elements of a project may be subjected to separate EIAs as long as their cumulative effect is assessed.

- Leaving aside the fact that I am bound by them, there is in my view, and by reference to the fundamental objective of the EIA Directive, to ensure EIA of all projects likely to have a significant effect on the environment, no purposive deficit in the approaches taken in those authorities and no purposive impetus to conduct EIA of the entire windfarm as amended, given that EIA was done and encompassed the cumulative effects of the entire windfarm.

[242] South-West Regional Shopping Centre Promotion Association Limited and Stapleyside v An Bord Pleanála and Limerick City and County Council and Regional Retail Property Development and Trading Limited, [2016] 2 IR 481.

- That such assessment of cumulative effects suffices in EIA is a very premise of Annex II §13(a) as all "changes or extensions" contemplated by Annex II §13(a) as requiring EIA will inevitably be assessed as to their cumulative effect with the project thus changed or extended.

- Indeed, the whole point of Annex II §13(a) is that
  - it will encompass and require EIA of "*changes or extensions*" so great and consequential that they are likely, considered as projects in themselves, to have significant effect on the environment
  - and will, in many cases, do so by way of "*changes or extensions"* to projects already subjected to EIA.

- There is no purposive need to adopt the Applicants replacement theory when categorisation of the Proposed Development as a change or extension within Annex II §13(a) both conforms to the natural, ordinary and literal meaning of "*any change or extension*" and achieves the purpose of ensuring that the Proposed Development is subjected to EIA.

- It is clear that Annex II §13(a) applies to changes or extensions to projects permitted but as yet unbuilt.

- The alleged deficits as to the use of the 2014 Noise Baseline, as to both its temporal validity and the physical extent of its study area, do not affect and are not affected by the identification of the project for EIA purposes. The 2014 Noise Baseline, whether or not deficient, could just as well have been used as to a project defined as consisting of the Knocknamona Windfarm as amended by the Proposed Development. For that matter, the same can be said of the resolution of the differences between the noise experts, the use of predictive techniques and the modelling rather than the measurement of the noise produced by the Woodhouse Windfarm. This is not to take a view of those alleged deficits – it is merely to say that any view thereon is irrelevant to the identification of the project for EIA purposes.

- For reasons set out above, the Derrybrien Windfarm case is highly persuasive that the Board is correct in arguing that the Proposed Development is, in its own right, a project within Annex II §13 of the EIA Directive.

145. Accordingly, I dismiss Ground 1 as to EIA.

146. However, it would be remiss of me to leave this issue without briefly observing that the alarmingly fundamental differences between reputable noise experts in this case, or at least the Board's resolution of those differences, would likely have been appreciably ameliorated by up-to-date, balanced and authoritative Wind Energy Development Guidelines. I can take judicial notice that these fundamental differences between reputable noise experts have subsisted for many years and remain unresolved. This is not the place for a detailed recitation of the dispiriting sequence of events – and non-events – which have led to the conspicuous failure to promulgate up-to-date Wind Energy Development Guidelines as to a type of development crucial to achieving GHG emission reduction in urgently[243] addressing the "*defining challenge of our generation*".[244] As

[243] Friends of the Irish Environment v Ireland, Supreme Court, [2020] 2 ILRM 233.
[244] Climate Action Plan 2019 First Progress Report Executive Summary.

long ago as 2013[245] the Government identified the requirement for updated Guidelines and it produced draft guidelines as long ago as 2019. As long as the 2006 Wind Energy Development Guidelines remain, the windfarm industry and the public are operating on, and the Board is obliged by law to have regard to,[246] guidelines the technical section of which is recognised by the Supreme Court as based on 1996 science in an "*area where knowledge was advancing considerably*" and as to which "*a senior local planner in an area with extensive wind turbine development, had considered that the guidelines were not fit for purpose*".[247] It is difficult to see how that can be considered a satisfactory state of affairs over a decade after the Government itself identified the need for new guidelines. I am not so naïve as to imagine that new Guidelines will be an uncontroversial panacea pleasing everyone or end windfarm litigation. But it is difficult to see that, without them, litigation of windfarm disputes will abate.

GROUNDS 5 & 6 (AA – NO CONSERVATION OBJECTIVES)

G5&6 – AA – Introduction, Integrity of Sites & Conservation Objectives

147. Article 7 of the Habitats Directive applies, inter alia, Article 6(3) of the Habitats Directive to SPAs and their qualifying interests designated under the Birds Directive. Article 6(3) of the Habitats Directive provides for Appropriate Assessment ("AA"). As relevant, it requires that:

> *"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 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 …. 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 …."*

In sum, for present purposes, the AA regime applies to applies to projects likely to have a significant effect on SPAs and/or on the species for which they are designated as SPAs.

148. In considering what follows in this judgment it is important to bear in mind that, as the trial ran, the Applicant's case as to the Habitats Directive boiled down to a single proposition – that, absent conservation objectives for the Blackwater Callows SPA, the Board had no jurisdiction to perform AA of the Proposed Development.

[245] In 2013, the Department of the Environment published a document inviting submissions by a closing date of February 2014 to a "Targeted Review in relation to Noise, Proximity and Shadow Flicker" with a view to Proposed Revisions to Wind Energy Development Guidelines 2006". The document stated that "Following consideration of the submissions made during this period of consultation, the revisions to the Guidelines will be finalised and issued to planning authorities under" s.28 PDA 2000.
[246] However light that burden.
[247] Balz v An Bord Pleanála and Cork County Council and Cleanrath Windfarms Ltd [2020] 1 I.L.R.M. 367.

149. Despite their importance, the obligation to set conservation objectives for Natura 2000 Sites[248] is somewhat obliquely laid down in the Habitats Directive. The CJEU has inferred the obligation to set conservation objectives from the requirement of Article 4(4) of the Habitats Directive that member states establish priorities for the maintenance or restoration, at a favourable conservation status, of Natura 2000 Sites and their qualifying species – **Commission v Germany**.[249] As has been seen, Article 6(3) refers to conservation objectives. The recitals to the Directive include the following:

> *"Whereas it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued;"*
>
> *"Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future;"*

150. The Board screened[250] in the Blackwater Callows SPA as requiring AA. AA is a process governed by Article 6(3) of the Habitats Directive.[251] That meant that valid planning permission could not be granted for the Proposed Development unless it was found in a comprehensive AA, on foot of complete, precise and definitive findings and conclusions and beyond every reasonable scientific doubt, that the Proposed Development would not adversely affect the integrity of the Blackwater Callows SPA – **Eco Advocacy**.[252]

151. Kokott AG and the CJEU in **Holohan**[253] state that:

- The integrity of a site consists in its lasting preservation at a favourable conservation status. It requires the preservation of its constitutive characteristics that are connected to the presence of the habitats and species whose preservation was the objective justifying the designation of that site.

- To allow a project to proceed, AA must clearly and unequivocally demonstrate why the protected habitats and species are not affected.

[248] Article 3 of the Habitats Directive mandates *a* coherent European ecological network of special areas of conservation so designated under the Habitats Directive and special protection areas so classified under the Birds Directive – that network to be known as "Natura 2000". As will be seen, it is more narrowly defined than the Irish concept of "European Sites" as it does not include such as SCIs./cSACs.
[249] Case C-116/22, Judgment of 21 September 2023, §§106 & 128.
[250] AA Screening is the process of determining whether AA is required.
[251] The tendency to refer to "stages" of AA is confusing. There is a practice in Ireland of referring to AA screening as "stage 1" and AA proper as "stage 2". However, the CJEU envisages the entire AA process as "stage 1" and the development consent or authorisation of the project as "stage 2" of the process prescribed by Article 6(3) of the Habitats Directive – e.g. Joined Cases C-387/15 and C-388/15, Orleans v Gewest, Judgment of 21 July 2016 §44 – 46 and Case C-461/17 Holohan v An Bord Pleanála, Judgment of 7 November 2018, [2019] PTSR 1054 §91. For its part, the Commission identifies three stages: AA screening; AA and Article 6(4) Derogation see Commission Notice Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC (2021/C 437/01) 28.10.2021 § 2.1. To reduce confusion (I hope) I prefer to simply refer to "AA Screening" and "AA" respectively and eschew reference to stages.
[252] Case C-721/21 Eco Advocacy CLG v An Bord Pleanála, & Keegan Land Holdings, Judgment of 15 June 2023, §38 citing Case C-411/17, Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen, Judgment of 29 July 2019, ECLI:EU:C:2019:622, §120 and the case law cited.
[253] Case C-461/17 Holohan v An Bord Pleanála, Opinion of Kokott AG of 7 August 2018; Judgment of 7 November 2018 [2019] PTSR 1054.

152. So, the net and fundamental criterion for allowing a project to proceed is certainty – in the sense of absence of reasonable scientific doubt - of the absence of adverse effect on the integrity of any Natura 2000 site.[254]

153. The EU Commission has given recent guidance[255] on the meaning of "*integrity of the site*". It says, inter alia, that

- 'integrity', relates to ecological integrity – "*a quality or condition of being whole or complete and having resilience and ability to evolve in ways favourable to conservation".*
- 'integrity of the site' can be usefully defined as the coherent sum of the Natura 2000 site's ecological structure, function and ecological processes, across its whole area, which enables it to sustain the habitats, complex of habitats and/or populations of species for which the site is designated.
- The integrity of a Natura 2000 site thus relates to the site's conservation objectives, its key natural features, ecological structure and function.
- Site integrity also concerns the main ecological processes and factors that sustain the long-term presence of the species and habitats in a Natura 2000 site. This will normally be covered by the conservation objectives for the site.
- In AA, "*The description of the site's integrity …. should be based on the parameters that determine the conservation objectives and that are specific to the habitats and species of the site and their ecological requirements*".
- If the site's conservation objectives are not undermined by the proposed plan or project (alone and in combination with other plans and projects) then the site's integrity is not considered to be adversely affected.
  - (However I would caution that one should not take an exaggerated view of the meaning of the word "undermined" here given the precautionary principle and the aim of a high level of environmental protection apply in AA)
- To assess the effects on the integrity of the site in a systematic and objective manner, it is important to have established thresholds and targets for each of the attributes that define the conservation objectives for the habitat types and species protected in the site.
- The conclusions of the AA must clearly relate to the integrity of the site and its conservation objectives.

154. It will be seen from this brief account of the Commission's 2021 guidance that the integrity of the site is closely related to its conservation objectives. The conservation objectives are an important means of discerning of what the integrity of the site consists. That is reflected in the requirement of Article 6(3) that AA – which essentially asks whether it is certain that the project will cause no adverse effect on the integrity of any Natura 2000 site – be conducted "*in view of the conservation objectives*" of the site in question. The CJEU has said that conservation objectives "*serve as an assessment criterion*" in AA – **Commission v Germany**.[256]

[254] Save where Article 6(4) exceptions apply – but they do not arise in the present case.
[255] Commission Notice Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC (2021/C 437/01) 28.10.2021 §3.2.3
[256] Case C-116/22, Judgment of 21 September 2023, §135.

155. To the drafters of Article 6(3), the requirement that AA be conducted "*in view of the conservation objectives*" must have seemed not merely obvious but uncontroversial from a practical point of view. That is because, as is established by the caselaw, the Habitats Directive requires that site specific and precise conservation objectives be established for each site by the time of its designation as an SAC or SPA. Member States were given at least 6 years prior to site designation in which to, inter alia, formulate conservation objectives.[257] With one significant caveat to which I will refer, it should not have arisen that AA would be required in the absence of conservation objectives and the Directive does not envisage such an eventuality. It is also fair to say that Ireland is far from the only Member State which fell short in this regard.

156. The Commission's 2001 Guidance records[258] that "*The Habitats Directive explicitly refers to the 'site's conservation objectives' as a basis for applying Article 6(3)*" – i.e. as a basis for conducting AA. As the Applicants understandably emphasise, the Guidance also states that the CJEU,

> *"… has repeatedly held that it is in the light of the conservation objectives that the scope of the obligation to carry out an appropriate assessment of the effects of a plan or a project on a protected site should be determined. In other words, the decision as to whether the plan or project is likely to have significant impact on a Natura 2000 site should be taken in view of the site's conservation objectives (see section 3.1 'Screening').* ***It is therefore essential that site-specific conservation objectives are set without delay for all Natura 2000 sites and that these are made publicly available."***[259]

That is undoubtedly accurate in law. But it does not quite say that an AA can never be done absent conservation objectives.

It is convenient here to mention the Applicants' understandable reliance also on earlier Commission guidance citing,

> *"…. the need for establishing site-related conservation objectives as a necessary reference for ….. carrying out appropriate assessments …."*[260]

157. However, despite those passages, and no doubt reflecting the reality that not all member states adopted conservation objectives in time, and despite its confirmation of the close association of the concepts of AA, integrity of the site and conservation objectives, the Commission's 2001 Guidance clearly envisages AA in the absence of conservation objectives. It contains the following:

[257] Ireland was obliged to nominate to the Commission a list of candidate Sites of Community Importance and enclose the relevant information as to each site. On considering that list and information and in consultation with Ireland, the Commission established for Ireland a list of Sites of Community Importance ("SCI") – also known as candidate Special Areas of Conservation (cSAC). The Commission Guidance of 2021 at fn25 records that Member States had 6 years from the time the site has been listed on the EU list to adopt site-specific conservation objectives and designate the SCI as an SAC. For SPAs, appropriate site-specific conservation objectives must be in place as from the date of their classification. See also Commission v Germany Case C-116/22, Judgment of 21 September 2023, §105 & 106.
[258] p6.
[259] p6 – emphasis in original.
[260] Commission Note On Setting Conservation Objectives For Natura 2000 Sites, 23 November 2012.

> *"The lack of site-specific conservation objectives or the establishment of conservation objectives, which are not in line with the standard described above,*[261] *jeopardises compliance with the requirements of Article 6(3)."*[262]
>
> *"In the absence of conservation objectives, the appropriate assessment should assume as a minimum that the objective is to ensure that the habitat types or habitats of species significantly present on the site do not deteriorate below the current level (at the time of the assessment) and that the species are not significantly disturbed …."*[263]

The second of these passages was by way of repeating earlier Commission Guidance.[264] Essentially, in the absence of conservation objectives, it requires a developer to show that it will do no harm to the integrity of the Natura 2000 site.

158. The foregoing excerpts of the Commission's 2001 Guidance seem to me notable in at least the following respects:

- They clearly envisage AA in the absence of conservation objectives.
- They clearly envisage that absence of conservation objectives may "jeopardise" AA. It seems to me that "jeopardy" connotes risk of inability to perform AA as opposed to formal and jurisdictional preclusion of AA.
- In stipulating its minimum assumption, the guidance reflects the fact that AA is required by Article 6(3) for projects "*not directly connected with or necessary to the management of the site*". In other words, they are not projects directed at the positive conservation of the site. In AA, all that is required of them is that they do no harm. That is very typically – though far from exclusively – the case of private sector projects whose developers bear no responsibility for the active management of a Natura 2000 site or active pursuit of its conservation objectives.
- The second paragraph is clearly and directly inconsistent with a jurisdictional preclusion of AA in the absence of conservation objectives.

159. Of course, as it explicitly records, the Commission's Guidance is not binding EU law or a binding interpretation of EU law. But such guidance has been authoritatively considered as being of "high importance" and has been described as worthy of consideration at least as a reputable view of the law, akin to that to be found in a legal textbook or learned article – see generally **FIE**,[265] **MRRA**[266] and **Coyne**.[267] I also bear in mind that the Commissions' Guidance of 2021 preceded two of the trio of judgments of the CJEU in Commission actions against, successively, Greece,[268] Ireland[269] and Germany.[270] Though the Commission cited Article 6(3)

[261] Briefly, that conservation objectives must be: specific measurable and reportable, realistic, consistent in approach, comprehensive and specify whether they aim to 'restore' or 'maintain' the conservation status of the given feature of the site.
[262] p24.
[263] p26.
[264] Managing Natura 2000 sites — The provisions of Article 6 of the Habitats Directive 92/43/EEC, Commission Notice C(2018) 7621 final, Brussels, 21.11.2018.
[265] Friends of the Irish Environment CLG v Government of Ireland [2022] IESC 42.
[266] Monkstown Road Residents' Association v An Bord Pleanála & Lulani Dalguise [2022] IEHC 318.
[267] §121 et seq.
[268] Case C-849/19, Judgment of 17 December 2020.
[269] Case C-444/21, Judgment of 29 June 2023.
[270] Case C-116/22, Judgment of 21 September 2023.

for the proposition that AA "*must be*" carried out in view of the conservation objectives and it seems the CJEU agreed,[271] that trio of judgments did not address the specific question whether AA could proceed absent conservation objectives.

160. It seems from counsels' researches that there is no authority directly on point of the question whether AA can proceed absent conservation objectives. The State's concession of the declaration spares us a detailed consideration of that trio of judgments as they relate to the necessary content of conservation objectives. As now relevant,[272] from those cases, the propositions can be derived that conservation objectives for a site must:

- be explicitly adopted at latest by the time of designation of the site as an SAC or SPA. The State's concession of the declaration concedes that that did not occur as to the Blackwater Callows SPA.
- be established having regard to information based on a scientific examination of the situation of the species and their habitats on the site.
- be detailed, precise and specific to the site concerned. Only detailed, precise and specific objectives may be regarded as 'conservation objectives' for the purposes of the Habitats Directive.
- enable the setting of priorities for the maintenance or restoration of favourable conservation status of the site.
- enable the adoption of complete, clear and precise conservation measures to attain those objectives.
- allow for verification of whether those conservation measures are appropriate for attaining the desired conservation status of the site – though whether the objectives will be need to be in qualitative or in quantitative and measurable terms will depend on the circumstances of the site.[273] As long as one bears in mind the possibility of qualitative as opposed to quantitative objectives, this seems consistent with the Commission's view that conservation objectives for a site must "*specify targets to be achieved for each of the attributes or parameters that determine the conservation condition of the protected features*". [274]
- be implemented effectively.

161. Nonetheless, as the State points out, Ćapeta AG in **Commission v Germany**[275] takes the view that, as its conservation objectives reflect the reasons why a site is designated, before specific conservation objectives are expressly established they are in at least some degree "*evident from all the habitats and species for which the site has been protected …*'.[276] So,

> *"In reality, the conservation objectives for which a particular site was selected to be protected as an SAC already existed prior to its formal designation, at least to a certain degree .."*

[271] Case C-444/21, Commission v Ireland, Judgment of 29 June 2023 §97. The text is a little unclear whether the CJEU is merely citing or is agreeing with the Commission.
[272] The cases had a wider scope than is now relevant here.
[273] The CJEU said that the quantitative and measurable approach to determining conservation objectives can prove ill-suited to some complex habitats and some conservation areas with a dynamic character, whose features vary considerably depending on external environmental factors or interact significantly with other habitats and areas of conservation.
[274] Commission Notice Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC (2021/C 437/01) 28.10.2021 p6.
[275] Case C-116/22, Opinion of Ćapeta AG of 20 April 2023 §31.
[276] See also Joined Cases C-43/18 and C-321/18, Opinion of Kokott AG of 24 January 2019, (EU:C:2019:56, §76).

162. To illustrate that formally adopted conservation objectives are, at least jurisdictionally, inessential to AA, the State points out that, while conservation objectives need not be established until designation of an SAC, in the interim between the Site's being placed on the Commissions' list of Sites of Community Importance ("SCI") and its designation as an SAC the requirement of AA is in operation. It cites the opinion of Kokott AG in **CFE and Terre Wallonne.**[277] She observed as to AA that "*The criteria on which the necessary assessment is based are the conservation objectives established for the site*."[278] However, she noted that, as soon as a site is put on the Commissions' list of SCIs it is, by Article 4(5) of the Habitats Directive, subject to Article 6(3) of the Directive which requires AA. This is the caveat to which I referred earlier. Kokott AG stated that *"The protection afforded by Article 6(3) .. thus covers the Natura 2000 sites, as a rule, for a long time before they have the status of a special area of conservation."*[279]

163. I observe that it may, within the scheme of the Directive, be up to 6 years from listing as an SCI to designation as an SAC and the adoption of conservation objectives at the time of such designation. If conservation objectives were a jurisdictional prerequisite of AA, Article 4(5) of the Habitats Directive would make no sense and be impossible to carry into reliable effect, with consequent and potentially very harmful weakening in that interim of the high level of environmental protection which is the treaty-based aim of EU environmental law in general and is also the general objective of the Habitats Directive as regards the sites protected under it – **Holohan**.[280] The State argues that Kokott AG solved the problem by observing that:

> *"When sites are placed on the Community list, specific conservation objectives are not yet expressly established, but they are evident from all the habitats and species for which the site has been protected according to the information provided by the Member State in the proposal for the site.*[281] *The framework for development consent of projects set by the establishment of the area of conservation is thus generally created long before the designation of the special area of conservation."*[282]

164. I accept the State's submission – but within bounds. Indeed the State, in considering the Commission's guidance of 2021, appeared to accept that that, in at least some cases, absence of conservation objectives may jeopardise AA.[283] That is what the Commission's guidance of 2021 says. And Kokott AG's reference to a "*framework*" and Ćapeta AG's phrase "*at least to a certain degree* .." imply that these observations are not intended to dilute Member States' obligation to formally adopt valid and site-specific conservation objectives or to doubt that doing so is necessary to achieving the purposes of the Habitats Directive. That is illustrated, indeed, by the fact that Greece, Ireland and Germany have been found in default of EU law in that regard. The obligation to adopt detailed site-specific conservation objectives is presumed not to be pointless – as it would be if they could invariably, or even generally, be inferred in site-specific detail merely from designation of Natura 2000 sites and their qualifying interests. And clearly, by Article 6(3) of the Habitats Directive, an express purpose of conservation objectives, and hence of their adoption, is to inform AA. In my view, Kokott AG and

[277] Cases C-43/18 and C-321/18 CFE and Terre Wallonne, Opinion of Advocate General Kokott of 24 January 2019.
[278] §72.
[279] §75.
[280] Case C-461/17 Holohan, Judgment of 7 November 2018, EU:C:2018:883, §33 (reported at [2019] PTSR 1054).
[281] Citing Case C-461/17 Holohan, Judgment of 7 November 2018, EU:C:2018:883, §37) (reported at [2019] PTSR 1054), and her own Opinion in Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging, Delivered on 29 January 2004, EU:C:2004:60, §97.
[282] §76.
[283] Transcript Day 3 p134.

Ćapeta AG are merely observing that, as to some Natura 2000 sites, in some respects and in either general or specific terms depending on circumstance, it may be possible to infer from the site designation the content of all or part of its conservation objectives. Indeed, it may be purposively desirable to do so as enabling, and enabling audit of, Member States' performance of their obligation of active conservation of natura 2000 suites and their qualifying interests and the attainment of favourable conservation status. It follows that in some such circumstances and depending on the facts of the individual case, AA may prove possible despite an absence of formally adopted conservation objectives. But I do not read Kokott AG and Ćapeta AG to the effect that such a possibility of AA in the absence of properly adopted conservation objectives will be general.

G5&6 – AA in the Impugned Decision

165. Given the now-limited scope of these grounds, a full account of the Board's AA is unnecessary here. We are concerned only with its consideration of the Blackwater Callows SPA.[284] It was designated an SPA[285] for Special Conservation Interests (a.k.a. Qualifying Interests) being the Whooper Swan, the Wigeon, the Teal, the Black-Tailed Godwit and also the Wetland Habitats in the SPA and the waterbirds that use them. It was screened in for AA. The Inspector's screening[286] records that the nearest point of the SPA lies 13.5km from the nearest proposed turbine and the "Potential Connections (source-pathway-receptor)" is identified as *"Potential for flight paths of species that are QIs of this site through the appeal site. Potential loss of foraging habitat."*

166. The Inspector advised[287] the Board, which adopted his report as to AA, that "*Given the nature of the habitat on site and separation distance between the proposed development and the characteristics of the other species identified as qualifying interests there is no potential for significant effects to arise on other species identified as QIs"* than the Whooper Swan. As to the Whooper Swan, the only risk identified in AA Screening and the only risk for which the SPA was screened in for AA was as follows:

> *"Whooper swan populations have however been recorded on lands to the west of the site and, given the nature of the development incorporating larger rotor diameters, there is some potential for collision risk and impact on established flight paths."* [288]

167. Proceeding to AA, the Inspector summarised what he described as "*the objective scientific assessment of the implications of the project on the qualifying features of the European sites using the best scientific knowledge in the field*"[289] – thereby recording his correct understanding of the evidential requirements of a valid AA. He describes the SPA as comprising the east/west stretch of the River Blackwater between Fermoy, County Cork and Lismore, County Waterford – including the river channel and strips of seasonally-flooded

[284] No doubt incompletely but sufficiently for present purposes, I understand a "callows" to be a grassland floodplain of a river.
[285] By the European Communities (Conservation of Wild Birds (Blackwater Callows Special Protection Area 004094)) Regulations 2012. S.I. No. 191 of 2012.
[286] Inspector's report §1.6. European Sites, Table 1 – Screening Assessment Initial Summary.
[287] Inspector's report p136.
[288] Inspector's report p137.
[289] Inspector's report §9.2.5.

grassland in the flood plain.[290] He states that in the case of widgeon, teal and black tailed godwit, the Knocknamona Windfarm Site's habitats are not suitable for breeding or foraging so collision risk is "*very unlikely to arise"*. As to the Whooper Swan, he says:

> *"… there is a known flock of swans located at Clogh bog which is approximately 2.5km to the north west of the windfarm site. The significance of this flock has been raised by the third party appellants to this case who contend that it is an internationally important flock of birds and that inadequate information to demonstrate that the KWF site is not on a flight path to and from Clogh bog has been provided.*
> *The windfarm site is not located on a direct flightpath between this known flock and the SPA site further to the north west. Dawn and dusk surveys for whooper swan were undertaken at 5 no. locations in the vicinity of the windfarm site and at two vantage points. Survey area 5 approximates to the Clogh bog location and the results of the observations in this location show swan activity over the site in an east – west direction with swans observed moving west from the site and away from the windfarm site.*
> *Third party appellants contend that the extent of surveys undertaken remains inadequate and does not track flight movements of the Whooper Swan from the Blackwater Callow, or Cappoquin or Campshire.[291] It should be noted that the additional surveys contained in the February 2021 Appropriate Assessment Report postdate these points raised by the third party appellants. It should also be noted that the Whooper Swan survey contained at Appendix 2 of the February 2021 NIS include an analysis of recorded swan flightpaths in the Campshire area (Area 3 in the survey). These recorded flightpaths can be seen to predominately north and west away from the KWF site. Table 8.15 of the original EIAR (dated September 2020) further notes that there were no recorded observations of Whooper Swans within 500 metres of the KWF site in surveys undertaken between 2010 and 2020.*
> *The results of the 2021 surveys do not indicate any swan flightlines within the windfarm site and, on the basis of these surveys, it is considered that the additional height and rotor diameter proposed would not have an adverse effect on the integrity of this European site in light of its conservation objectives.*
>
> *The potential for in combination effects with the extant permitted KWF arising from collision risk of whooper swans is recognised, however the extant KWF has previously been the subject of screening for appropriate assessment by An Bord Pleanála as part of its assessment of Ref. PL93.244006 and a finding of no likely significant effects. Notwithstanding this, the survey results presented as part of the revised Appropriate Assessment dated February 2021 do not indicate that collision risk is likely to be associated with the extant KWF project and therefore that in combination effects that would impact on the overall integrity of the site are likely to arise."*[292]

Recording that "*Survey results, including from Jan/Feb 2021 do not indicate the presence of whooper swan within or close to the KWF site*", he concludes that adverse effects on site integrity can be excluded.[293]

[290] Inspector's report §9.2.6.2.
[291] It seems, properly "Camphire".
[292] Inspector's report pp155 – 157.
[293] Inspector's report p156, Table 3 – Appropriate Assessment - Blackwater Callows SPA.

168. The Inspector's report, in its more general AA conclusion,[294] again displays his understanding of the requirements of AA and of the standards and conclusions it requires. It reads:

> *"Following an appropriate assessment, it has been ascertained that the proposed development, individually or in combination with other plans or projects, would not adversely affect the integrity of any of the above European sites in view of their conservation objectives.*
> *This conclusion is based on a complete assessment of all aspects of the proposed project, including an assessment of in combination effects with other plans and projects, and there is no reasonable scientific doubt as to the absence of adverse effects."*[295]

G5&6 – AA – Discussion and Decision

169. It is important to state that the Board's determination in AA, set out above, is not impugned as to the scope of the AA determined by the AA Screening or as to the factual conclusion that there was no scientific doubt but that the risk of Whooper Swan collisions with the turbine rotors could properly be discounted. Though I bear in mind that in AA the onus is of demonstrating the absence of risk to site integrity, it bears observing in this case that there is no pleading, suggestion or evidence that in fact the Proposed Development poses any danger to the Whooper Swan. AA is not concerned with mere assertion of or merely hypothetical, conceivable or theoretical risks – **Waddenzee**,[296] **Sliabh Luachra,**[297] **ETI**[298] **and Foley**.[299] And given the pleadings, I must credit counsel for the Applicants for properly resisting temptation by politely declining my invitation to say how, even theoretically, the Proposed Development could affect the Whooper Swan.

170. As has been seen, the State concedes the invalidity of the promulgated Blackwater Callows SPA conservation objectives – expressly designated as "Generic Conservation Objectives" – as not site-specific. It is clear law that conservation objectives must be site-specific detailed and precise to be valid and to be considered as conservation objectives within the meaning of Article 6(3). However, as I have said, the Applicants did not point to any substantive deficit in the AA done by the Board as it related to the qualifying interests of the Blackwater Callows SPA. So, ultimately at trial the Applicants stood solely on a jurisdictional ground: that it was incompetent in the Board to embark on, much less purport to complete, an AA as, by Article 6(3) of the Habitats Directive, AA of the implications of a project for an SPA must be done "*in view of the Site's conservation objectives*" and that was impossible in the absence of such objectives. So, the Applicants say, AA could not be done in the Impugned Decision as there were no valid conservation objectives - there was no jurisdiction in the Board to do an AA.

[294] i.e. incorporating the other screened in Natura 2000 sites not here relevant.
[295] Inspector's report §9.2.7.
[296] Case C-127/02 – Opinion of Kokott AG 29/1/4.
[297] Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019) § 96 et seq.
[298] Environmental Trust Ireland v. An Bord Pleanála [2022] IEHC 540.
[299] Foley v Environmental Protection Agency [2022] IEHC 470.

171. I should say that, properly in my view given the State's concession of the declaration, the Board did not rely on the absence of certiorari of the promulgated Blackwater Callows SPA conservation objectives to argue their formal validity unless and until quashed. It properly met the case on the basis that the promulgated Blackwater Callows SPA conservation objectives were not conservation objectives within the contemplation of Article 6(3) of the Habitats Directive.

172. The Impugned Decision records that the Board carried out an AA of the implications of the Proposed Development for five identified European Sites, "*in view of the site's Conservation Objectives*". That remains so as to other listed Natura 2000 sites but not as to the Blackwater Callows SPA.

173. What remains in Grounds 5 and 6 therefore is whether it was competent in the Board to complete an AA – whether it had jurisdiction to do so – absent conservation objectives for the Blackwater Callows SPA.

174. The view expressed by Sharpston AG in **Boxus**[300] that the EIA Directive is about substance not formalism – is concerned with providing effective EIAs – has become something of a staple of the defence of environmental litigation. That is so for good reason as it is complementary to the CJEU's purposive approach to the interpretation and application of EU environmental law. It has been cited in many Irish cases[301] and has been applied to the Habitats Directive also. In **Kelly**[302] Barniville J rejected "*excessive formalism*" and pedantry in a Habitats Directive context. He concentrated on the substance of the developer's and the inspector's AA screening reports. The Court of Appeal in **FIE**[303] cited Boxus and Kelly in observing that "*Excessive formalism in the context of the Habitats Directive is inconsistent with the spirit and purpose of EU environmental law*." However, I also bear in mind that care must be taken not to mistake illegality for merely formalistic error.

175. I reject the submission of counsel for the Applicants that, in Article 6(3) of the Habitats Directive, the words "*in view of the site's conservation objectives*" represent the central requirement or element of AA. In my view these words represent an important – indeed, ordinarily essential – element of AA. But the vital issue in AA is clearly whether, as a matter of reasonable scientific certainty, the project *"will not adversely affect the integrity of the site concerned*". It may well be that as a general proposition and in all but rare cases it will be impossible to draw that conclusion in accordance with law without considering the content of valid conservation objectives. That general proposition is certainly consistent with the Commission's elucidation of the close relationship between site integrity, conservation objectives and the reasons for designating the site in question – i.e. its qualifying interests.

176. However, looking at the matter from a purposive point of view and in light of the opinions of Kokott AG and Ćapeta AG, set out above, as to the inference of conservation objectives in advance of their formal adoption, if on the particular facts of the case, having regard to the terms of the site designation, the reasons

[300] Case C-128/09, Antoine Boxus and Ors. v Région Wallonne, Opinion of Sharpston AG of 19 May 2011.
[301] Notably Ó Gríanna v An Bord Pleanála (No. 2)[2017] IEHC 7.
[302] Kelly v An Bord Pleanála [2019] IEHC 84.
[303] Friends of the Irish Environment CLG v The Government of Ireland, Minister of Housing, Planning and Local Government, Ireland and The Attorney General [2021] IECA 317, Costello J.

for its designation and the habitats and species of conservation interest for which it is designated, and despite the absence of valid conservation objectives, it is possible for the purposes of AA,

- to identify the substantive content of site integrity possibly at risk and
- to conclude as a matter of reasonable scientific certainty, that the project *"will not adversely affect the integrity of the site concerned*",

Is there in substance any reason to refuse permission for that project? What substantive end of the Habitats Directive would such a refusal serve? I cannot see any – nor did the Applicants suggest any. I was reminded by counsel at trial and am reminded here again of the old, apocryphal and doubtless unfair story about a certain cerebral Irish politician who allegedly responded to the suggestion of a particular course of action by saying "*Yes, yes, that is all very well in practice, but what about the theory*?"

177. I therefore reject the argument that the requirement of regard to valid conservation objectives is a precondition of the jurisdiction of the Board to conduct AA. I do so because such a view is unnecessary to the achievement of the purpose of the Habitats Directive:

- Where such absence prevents the formation of the view, as a matter of reasonable scientific certainty, that the project *"will not adversely affect the integrity of the site concerned*" a refusal of development consent will necessarily ensue and the purpose of the Habitats Directive will have been fully served.

- Where despite such absence, it can be and is nonetheless concluded as a matter of reasonable scientific certainty that the project *"will not adversely affect the integrity of the site concerned*", a refusal of development consent is unnecessary to the service of the purpose of the Habitats Directive.

178. Accordingly, it is unnecessary from a purposive point of view that the requirement to keep conservation objectives in view is a jurisdictional prerequisite of AA. However, I emphasise, albeit obiter, that I expect that cases in the second category above will be rare and that the norm of regard in AA to valid conservation objectives is a strong one.

179. I see no substantive purpose in considering the existence of conservation objectives to be a precondition to the Board's jurisdiction and competence to perform AA. Indeed, such a precondition could well prevent the development of projects which are highly desirable from one or more points of view – even environmental points of view – other than that of habitats protection and could well prevent their being effected, ostensibly for reasons of habitats or species protection, when in substance no such purpose is served by preventing such a project.

180. Indeed, on the view taken by the Board in light of its EIA, that any adverse environmental effects other than those relevant to the Habitats Directive are not such as to require refusal of development consent, the Proposed Development and the Knocknamona Windfarm more generally is such a desirable project – from the environmental point of view of its contribution to the move to renewable power generation and GHG emission reduction in the cause of addressing climate change.

181. I reject the Applicants' submission that Article 6(4)[304] meets any such difficulty of preventing desirable projects. First the application of Article 6(4) is predicated on a negative assessment in an AA the Applicants say the Board has no jurisdiction to perform. Second, its application is predicated on the adoption of compensatory measures when, ex hypothesi, there is in substance no adverse effect for which to compensate. Third, application of Article 6(4) requires the demonstration of *"imperative reasons of overriding public interest*". Not merely does that wording in its literal sense represent a very high bar, as an exception it is a criterion narrowly and strictly construed – **Orleans v Gewest.**[305] Inevitably, eminently desirable developments would fail such a test and be pointlessly prohibited as a result of the jurisdictional bar which the Applicants seek to set.

182. Nor do I see, from a textual point of view, that the wording of Article 6(3) requires that the existence of conservation objectives be a precondition to the Board's jurisdiction in AA. I also accept the State's submission that the fact that, by Article 4(5) of the Directive, AA was required as to projects likely to affect SCIs before their designation as SACs and hence before the time limit for the adoption of conservation objectives had expired implies that conservation objectives are not a jurisdictional prerequisite of AA and I respectfully agree with Kokott AG in her opinion in **CFE & Terre Wallone** as set out above.

183. However on the facts of the present case, it is not necessary to draw any inference that, once the time limit for adoption of conservation objectives has expired and even though those objectives may, in the words of Ćapeta AG[306] be nonetheless evident "*at least to a certain degree*," it will be possible to do AA in most cases absent formally adopted conservation objectives. I confess to the view, obiter, that cases in which that will be possible will not be the rule – though that will require case-by-case consideration. To make such a proposition the rule would be destructive of the clear scheme of the Directive and of the high level of environmental protection that scheme is intended to provide. That scheme requires that AA be conducted in view of detailed, precise and site-specific conservation objectives which should have been adopted at the time of designation of the Natura 2000 sites. There is at least some degree of dissonance in

- one arm of the State (the Board) taking the view that site-specific conservation objectives for a site are sufficiently obvious that they can be inferred from its designation as an SAC or SPA such as to permit of AA as to effect on the integrity of the site in view of those inferred conservation objectives
- while another arm (NPWS) takes the view, I must infer, as to the same site that the required conservation objectives are insufficiently obvious to be susceptible to timely formulation and adoption.

In other words, in my view, the Commission was correct in asserting as to AA that as "*the decision as to whether the plan or project is likely to have significant impact on a Natura 2000 site should be taken in view of the site's conservation objectives … **It is therefore essential that site-specific conservation objectives are set without delay.***"[307]

[304] 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

[305] Joined Cases C-387/15 and C-388/15 Orleans v Gewest §60, citing Case C-399/14, Grüne Liga Sachsen and Others, EU:C:2016:10, §73 and the case law in turn cited therein.

[306] Case C-116/22, Commission v Germany, Opinion of Ćapeta AG of 20 April 2023 §31.

[307] Emphasis in original Guidance of October 2021.

184. Returning to the specific facts of the present case, and though it is unnecessary as I have decided the jurisdictional point against the Applicants, it is useful to observe that this is a case which falls in the rare class I have identified. It has proved possible for the Board, without legal error and despite the absence of conservation objectives, to,

- identify the substantive content of site integrity possibly at risk – the Whooper Swan – by way of an off-site effect.[308]
- conclude as a matter of reasonable scientific certainty, that the project *"will not adversely affect the integrity of the site concerned*" – for the simple reason that the off-site effect in question would require the physical presence of the Whooper Swan on the Knocknamona Windfarm Site and that presence has been discounted.

185. To put it crudely, if the Whooper Swan is not on the Knocknamona Windfarm Site it is impossible that it will collide with the Knocknamona Windfarm turbine rotors. That is, of course, to put it crudely as, as to forecasting the presence or absence of the Whooper Swan on the Windfarm Site, what is required is stringent. What is required is reasonable scientific certainty – though not absolute certainty "*since that is almost impossible to attain"* – see **Waddenzee**[309] and **Sliabh Luachra**.[310] If the identified risk will not transpire, it is impossible that it will adversely affect the integrity of the site no matter in what terms site-specific conservation objectives are belatedly adopted. In their absence from the Knocknamona Windfarm Site there is no scenario in which, by reference to any such possible conservation objectives for the SPA, there could be a significant effect on the Whooper Swan. Also, I accept the Board's submission that the test proposed by the Commission for AA in the absence of adopted conservation objectives – whether it has been shown that the proposed development will not significantly disturb the QI species or cause its habitat to deteriorate below its current level – is satisfied. No doubt on other facts, more complex and subtle perhaps, that conclusion will be impossible to draw absent conservation objectives, but on these facts it was possible and was drawn in accordance with law.

186. For these reasons, I reject the Applicants' submission that the Board had no jurisdiction to conduct AA absent conservation objectives for the Blackwater Callows SPA. Within jurisdiction and ordinarily, conservation objectives will be essential to discerning whether the project under consideration will, as a matter of reasonable scientific certainty, not adversely affect the integrity of the Natura 2000 site in question. But that there will be some cases in which their absence will not prevent such a conclusion is illustrated by the facts and circumstances of this case.

187. For the foregoing reasons, and the conceded declaration apart, Grounds 5 and 6 are dismissed.

[308] i.e. off the SPA site.
[309] Case C-127/02 Waddenzee, Opinion of Kokott AG of 7 September 2004, ECR I-7448.
[310] Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 888.

CONCLUSION

188. Despite the Applicants' suggestion that I should do so, I do not find it necessary to refer any questions of EU law to the CJEU.

189. For the avoidance of doubt, I take no view on and do not intend to affect any other proceedings.

190. For the reasons stated above, I refuse the claim for certiorari of the Impugned Decision. I will make an order in terms of the declaration conceded by the State and will hear the parties as to final orders, including as to costs. Given the declaration, I am provisionally of the view that the Applicants should have some, but not full costs. I will list the case for mention on 11 March 2024.

David Holland
28/2/24

Appendix The Blackwater Callows SPC Conservation Objectives, 26 January 2022.

Conservation objectives for Blackwater Callows SPA [004094]

The overall aim of the Habitats Directive is to maintain or restore the favourable conservation status of habitats and species of community interest. These habitats and species are listed in the Habitats and Birds Directives and Special Areas of Conservation and Special Protection Areas are designated to afford protection to the most vulnerable of them. These two designations are collectively known as the Natura 2000 network.

European and national legislation places a collective obligation on Ireland and its citizens to maintain habitats and species in the Natura 2000 network at favourable conservation condition. The Government and its agencies are responsible for the implementation and enforcement of regulations that will ensure the ecological integrity of these sites.

The maintenance of habitats and species within Natura 2000 sites at favourable conservation condition will contribute to the overall maintenance of favourable conservation status of those habitats and species at a national level.

Favourable conservation status of a habitat is achieved when:

- its natural range, and area it covers within that range, are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable.

The favourable conservation status of a species is achieved when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

Objective: To maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interests for this SPA:

Bird Code	Common Name	Scientific Name
A038	Whooper Swan	*Cygnus cygnus*
A050	Wigeon	*Anas penelope*
A052	Teal	*Anas crecca*
A156	Black-tailed Godwit	*Limosa limosa*

To acknowledge the importance of Ireland's wetlands to wintering waterbirds, "Wetland and Waterbirds" may be included as a Special Conservation Interest for some SPAs that have been

designated for wintering waterbirds and that contain a wetland site of significant importance to one or more of the species of Special Conservation Interest. Thus, a second objective is included as follows:

Objective: To maintain or restore the favourable conservation condition of the wetland habitat at Blackwater Callows SPA as a resource for the regularly-occurring migratory waterbirds that utilise it.

Citation: *NPWS (2022) Conservation objectives for Blackwater Callows SPA [004094]. Generic Version 9.0. Department of Housing, Local Government and Heritage.*