[2024] IEHC 442

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2022.0000458]

BETWEEN

AN TAISCE - THE NATIONAL TRUST FOR IRELAND

APPLICANT

AND

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

RESPONDENTS

AND

THE MINISTER FOR AGRICULTURE FOOD AND THE MARINE, FEIRMEOIRÍ AONTUITHE NA HÉIREANN IONTAOBAITHE TEORANTA AS TRUSTEE OF THE IRISH FARMERS' ASSOCIATION AND FRANCIE GORMAN, TOM O'CONNOR, PATRICK MURPHY, JOHN MURPHY AND FRANK ALLEN AS TRUSTEES OF THE IRISH CREAMERY MILK SUPPLIERS ASSOCIATION (BY ORDER)

NOTICE PARTIES

(No. 3)

JUDGMENT of Humphreys J. delivered on Wednesday the 24th day of July, 2024

1. The present action is a challenge to the validity of domestic and European measures relating to the derogation for the use of nitrates above and beyond standard levels. That challenge raises significant issues of European law. To refer or not to refer is the primary question now, although it isn't a particularly difficult question, especially given that all contributing parties agree that almost all of the questions are not *acte clair*. The applicant has raised what are clearly novel, complex and important issues of EU law, culminating in a question regarding the validity of a Commission decision. The court doesn't have jurisdiction to determine the latter issue in favour of the applicant, and isn't particularly minded at the present time to determine it in favour of the respondents. While making a reference to the CJEU is generally optional apart from for apex courts, a case where the validity of an EU law measure is in issue can be an exception. Even a first instance court *must* refer such a question if it considers that the European law measure should be declared invalid by the CJEU.

Judgment history

2. In *An Taisce v. Minister for Housing (No. 1)* [2024] IEHC 129, [2024] 3 JIC 0603 I decided the preliminary pleading-type objections in Module I of the proceedings, and set out a revised issue paper for Module II.

3. In *An Taisce v. Minister for Housing (No. 2)* [2024] IEHC 248, [2024] 5 JIC 0102, I decided the preliminary evidential-type objections in Module II of the proceedings, and set out a revised issue paper for Module III.

4. I now deal with the substantive EU law questions and will deal with the questions on the basis of the latest issue paper.

5. While the judgments are getting shorter as we work through the issues (92,375 words + 65,318 words + 51,730 words) we are at a cumulative total of 209,423 words – exceeding *Crime and Punishment* but falling short of J.K. Rowling's *Harry Potter and the Order of the Phoenix*. There the analogy with great literature ends I'm afraid (except perhaps for the punishment bit).

6. We ended up with 78 questions on an issue paper and a further 23 additional sub-questions once further issues had been factored in, making a grand total of 101 issues, a definite record for this List. On that basis it feels like a bit of a collective achievement to have winnowed that down to single digits with only 9 questions for reference which will be set out in this judgment.

Procedural history

7. The proceedings were initiated in the judicial review list on 31st May 2022.

8. Under the procedures then operative, leave had not been granted in the judicial review list in the 6-month period between May and November 2022.

9. A motion to admit the case to what is now the Planning and Environment List was issued, returnable for 7th November 2022, and was granted on that date. Liberty to file an amended statement of grounds was also granted having regard to the pleading requirements in the List.

10. On 21st November 2022, representatives of the Irish Farmers Association were added as notice parties on the basis of being represented by a single legal team. The second named respondent (Ecological Assessment Unit) was struck out on the grounds of not being a legal entity and as being already covered by having named the relevant Minister. Relief 4 (*certiorari* of the appropriate assessment as distinct from the actual plan) was struck out on the basis that it was unnecessary to be claimed as a separate relief and would be deemed included in the overall claim for *certiorari.* The approach to be taken with the main relief was that a declaration of invalidity

would normally be the appropriate relief for a measure of general application (like a statute, statutory instrument, or policy document), but *certiorari* could be claimed as a fall-back (this principle is now reflected in Practice Direction HC126.)

11. On 5th December 2022 I granted leave on the basis of allowing a further minor amendment to the statement of grounds. The Irish Creamery Milk Suppliers Association was also added as a notice party through its trustees.

12. The substantive notice of motion was returnable for 19th December 2022, at which point directions were made for exchange of papers. The State's opposition was directed to be filed by 20th February 2023, but in fact was not filed until 8th March 2023. Opposition by the notice parties was filed on 31st March 2023 and 27th April 2023, and there were then further exchanges of affidavits which went on until 17th July 2023. A hearing date commencing on 12th December 2023 was fixed and the matter was heard beginning on that date.

13. The case was in effect modularised so that the initial module related primarily to the large number of pleading and evidential objections. The hearing concluded on 15th December 2023, following which the matter was adjourned to the following Monday 18th December 2023, to finalise the issue paper (that finalised version is set out in Schedule I to this judgment). The parties were permitted to file supplementary written submissions in a sequence (the State by 26th January 2024, notice parties by 2nd February 2024, and the applicant by 13th February 2024) to be completed by a mention date on 19th February 2024. The final submissions were in fact delivered on the morning of the latter date, at which point judgment was reserved. The No. 1 judgment was then delivered on 6th March 2024.

14. As envisaged in the No. 1 judgment, written submissions on Module II were invited from all parties on the issues in the updated issue paper. An oral hearing was then held on 9th April 2024 when judgment was reserved.

15. The No. 2 judgment was delivered on 1st May 2024.

16. Subsequent to the No. 2 judgment, the applicant, State and ICMSA delivered written submissions on the present module. The IFA decided not to make a written submission in this module but did helpfully attend and contributed economically to the hearing for the present module.

17. That oral hearing was held on Wednesday 26th June 2024, following which the parties asked for and were given liberty to file further submissions clarifying certain issues (the historical and current position regarding assignment of status to water bodies, and the extent to which mootness or pleading issues would be raised). Judgment was thus in essence reserved subject to receipt of these further clarifications, which were to be delivered by 3rd, 5th and 11th July respectively.

18. The State required further time for its response and a supporting affidavit, and delivered that response on 8th July 2024. That response sets out further important evidential material for present purposes. The IFA and ICMSA replied in line with the State's position. The applicant then outlined its position on 16th July 2024 in a submission to which I will refer later. That intimated a possible amendment but no formal application was made. I can only work off what I have at any given time.

19. Separately and to an extent simultaneously the court sought clarification from the parties on 12th July 2024 as to the extent, if any, of disagreement in relation to remedies and discretion. In response the State and ICMSA made further submissions on 17th July 2024, which was the deadline requested by the court. In the absence of a reply from the IFA, the court informed the parties that any further reply would need to be sent by 18th July 2024. The IFA indicated that they would do so but in fact nothing was received. The List Registrar then wrote on 19th July 2024 stating that "as nothing was received from the Irish Farmers Association (IFA) by the deadline set by the Court, the Court will assume that there are no further issues for determination and will proceed to give judgment, indicatively in the next week or so". In circumstances where judgment had already been reserved over 3 weeks previously subject to final clarifications, a court has to be allowed to proceed on the basis that if parties don't take up the opportunity to raise issues that there are no such issues. Silence is acquiescence in many contexts and this is one of them. For the avoidance of doubt there is no problem with the IFA not contributing, but I simply want to make clear that not contributing means the process moves on, not that a party can hypothetically lie doggo and keep their powder dry for some future unheralded skirmish. I have no doubt that the latter is not the IFA's intention and that the non-response is merely because they don't have any additional issue to add, which is of course totally legitimate, but best to be clear about the procedure *pour encourager les autres*. That procedure is particularly important where the court is considering a reference to the CJEU, in which context massive prejudice would be caused to all other participants if a given party hypothetically did not put its European propositions on the table so that the court could form a unitary view of the case on the basis of all relevant issues of EU law. The alternative is that new European points could be hoarded to be launched later on in the case with the possibility of a second or subsequent reference. That would be an inappropriate procedure.

Relief sought

20. The relief sought in the amended statement of grounds filed pursuant to an order of 5th December, 2022, is as follows (strike-throughs in original):

"1. An Order of Certiorari by way of application for judicial review quashing the Fifth Nitrates Action Programme in a decision taken by the First Respondent.

2. A Declaration that the Fifth Nitrates Action Programme prepared, published or adopted by the first named Respondent pursuant to the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017 is contrary to law and/or ultra vires and/or invalid.

~~An Order of Certiorari by way of application for judicial review quashing the decision of the Respondents to publish and adopt part or all of the Fifth Nitrates Action Programme pursuant to the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022.~~

2A In the alternative to Relief 2, an Order of Certiorari by way of application for judicial review quashing the Fifth Nitrates Action Programme prepared, published or adopted by the first named Respondent pursuant to the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017.

3. A Declaration that the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022 are contrary to law and/or ultra vires and/or invalid.

~~An Order of Certiorari by way of application for judicial review quashing the decision of the Respondent to promulgate the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022~~.

3A In the alternative to Relief 3, an Order of Certiorari by way of application for judicial review quashing the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022.

~~4. An order of Certiorari by way of application for judicial review quashing the Appropriate Assessment Determination of the Environmental Assessment Unit dated 4 March 2022.~~

5. A Reference to the Court of Justice of the European Union pursuant to Article 267 TFEU to determine the validity of Commission Implementing Decision (EU) 2022/696 granting a derogation requested by Ireland pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 129, 3.5.2022, p. 37–45).

~~6. A Declaration that the Respondents breached Articles 3(1), 5(1), 10 of the SEA Directive/SEA Regulations by adopting the Fifth Nitrates Action Programme without carrying out a lawful environmental assessment in accordance with Articles 4 to 9 of the SEA Directive.~~

~~7. A Declaration that the Respondents breached Article 6(3) of the Habitats Directive by adopting the Fifth Nitrates Action Programme, without first concluding that it would not adversely affect the integrity of European Site(s).~~

~~8. A Declaration that the Respondents breached Article 4(1) of the Water Framework Directive (Directive 2000/60/EC) and/or Regulations 4 and 5 of the European Communities Environmental Objectives (Surface Waters) Regulations 2009 (S.I. 272/2009) and/or Regulations 4 and 5 of the European Communities Environmental Objectives (Groundwater) Regulations 2010 (S.I. 9/2010) by adopting the Fifth Nitrates Action Program without establishing that the NAP would not cause a deterioration of the status of a body of surface water or would not jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status of a body of surface water, and/or would not cause a deterioration of the status of a body of groundwater or would not jeopardise the attainment of good groundwater status, and/or jeopardise the achievement and/or maintenance of the standards and objectives for all bodies of surface and groundwater comprising Protected Areas registered pursuant to Article 6 of the Water Framework Directive.~~

9. An Order providing for the costs of the application and, where appropriate, an Order pursuant to sections 3 and 7 of the Environment (Miscellaneous Provisions) Act 2011 in respect of the costs of this application and/or a Declaration that the costs of the application be Not Prohibitively Expensive pursuant to Article 9 of the Aarhus Convention.

10. Such further or other Order as this Honourable Court deems appropriate."

Grounds of challenge

21. The core grounds of challenge are as follows:

"1. The decision to prepare and publish ('the impugned decision') the Fifth Nitrates Action Program ('the NAP') is invalid because the NAP was authorised on the basis of an appropriate assessment determination which was made in breach of Regulation 42A(11) of the Birds and Natural Habitats Regulations 2011 and/or of Article 6(3) of the Habitats

Directive because it did not ensure that there was no reasonable scientific doubt as to the absence of adverse significant effects from the NAP on the integrity of European Sites which are likely to be affected by the NAP, further particulars of which are contained at Part B below.

2. The impugned decision is invalid because the NAP was prepared and published in breach of Article 4(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (the 'Water Framework Directive') and/or Article 5 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the 'SEA Directive') because the Respondents did not ensure that the NAP would not cause a deterioration of the status of a body of surface water or that it would not jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status and/or would not cause a deterioration of the status of a body of groundwater or would not jeopardise the attainment of good groundwater status, and/or jeopardise the achievement and/or maintenance of the standards and objectives for all bodies of surface and groundwater comprising Protected Areas registered pursuant to Article 6 of the Water Framework Directive by the date laid down in the Directive or at all, further particulars of which are contained at Part B below.

3. The decision to prepare and publish the NAP is invalid because the NAP was authorised in breach of Articles 3(1), 5(1), 10 of the SEA Directive without carrying out a lawful environmental assessment in accordance with Articles 4 to 9 of the SEA Directive. and or the transposing provisions in the SEA Regulations 2004 (S.I. 436 of 2004), further particulars of which are contained at Part B below.

4. As a consequence of the invalidity of the impugned decision Commission Implementing Decision (EU) 2022/696 of 29 April 2022 granting a derogation requested by Ireland pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 129, 3.5.2022, p. 37–45) is invalid, further particulars of which are contained at Part B below."

Issue 8(a) – first question – scope of assessment

22. Issue 8(a) is:

"8. (a) Does art. 6(3) of directive 92/43, art. 4(1) of directive 2000/60 and/or art. 3(1) of directive 2001/42 have the effect that an action programme under art. 5 of directive 91/676 that is assessed under or by reference to such directives is required to be assessed in relation to the effects on the environment of the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan, either generally or insofar as such effects are indirectly contributed to by the absence of more rigorous protective measures in the plan, as opposed to being assessed by reference to the protective measures the plan positively includes and those alone?"

23. The applicant submitted:

"Concise summary

Yes. The NAP is supposed to involve a global examination, at the level of the whole of the national territory, of the environmental issues linked to nitrate pollution from agricultural sources - Joined Cases C 105/09 and C 110/09 Terre Wallonne and Inter-Environnement Wallonie. Here, the NAP includes the derogation – in the words of the Directive, it 'allows' an amount higher than the 170 kg N in the Directive. So the environmental issues linked to nitrate pollution from the derogation fall within that examination. The assessments carried out under the Habitats Directive, the WFD and the SEA Directive must consider the effects on the environment of the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan. To confine such assessments to the protective measures the plan positively includes, and those alone, would be contrary to the nature of the NAP and the purpose of those assessments.

Acte Clair

The Applicant's position is supported by case-law of the CJEU but the Applicant does not go so far as to say it is Acte Clair, in the sense of precluding a reference.

Detailed answer

Introduction

1. The Court's question addresses the assessments of a Nitrates Action Programme carried out under the Habitats Directive, the WFD and the SEA Directive. The Court's question draws a distinction between:

- assessment of the effects on the environment of the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted

consequent on the plan, either generally or insofar as such effects are indirectly contributed to by the absence of more rigorous protective measures in the plan,

- assessment by reference to the protective measures the plan positively includes and those alone.

2. It will be recalled that the State submissions on the pleading issues contended (p.7) (emphasis added) '…the Respondents' position is that what is being assessed under Article 6(3) is the potential effects on the environment of the protective measures put in place by the NAP, not the underlying agricultural activities that are restricted by the NAP. In that respect, protective measures may, despite being beneficial with respect to the targeted environmental objective, still cause damage to another environmental objective. It is in that context that AA of a protective measure remains essential.'

3. The Applicant submits that this approach is incorrect. The derogation cannot be seen as a 'restriction' of agricultural activities; rather it is the facilitation of the application of increased amounts of livestock manure to the land - in the words of the Directive, it 'allows' an amount higher than the 170 kg N in the Directive. To confine the analysis under the relevant Directives to the effect of the allegedly protective measures on 'another environmental objective' is to incorrectly narrow the scope of that analysis.

Nitrates Action Programme – legal provisions and purpose

4. It is first necessary to consider what a Nitrates Action Programme is, and what it is supposed to do, especially in the context of a derogation.

5. By Recital 5 to the Nitrates Directive – '…the main cause of pollution from diffuse sources affecting the Community's waters in [sic] nitrates from agricultural sources;'

6. In this regard, Kingston, Heyvaert and Čavoški, European Environmental Law (2017) explain (p.371) that the Nitrates Directive 'marked the first concerted effort by the EU to control pollution from non-point sources. While point-sources, such as a pipe or a chimney, are generally straightforward to identify, non-point source pollution that contaminates water as a result of run-off (when soil is infiltrated to full capacity and excess water, from rain or melted snow, flows over the land) or where pollutants leach through the ground into the water below, have conventionally being harder to regulate (and even harder to enforce). Non-point source pollution is caused both by atmospheric-borne pollutants with the application of chemicals, particularly fertilizers, directly to the land surface… More recently, a further concern is that nitrate pollution contributes to the eutrophication of waterways leading both to the deterioration in ecological quality (due to the destruction of natural habitats because of oxygen depletion) and the impairment of aesthetic qualities of water.'

7. By Recital 10 (emphasis added) – '… it is necessary for Member States to identify vulnerable zones and to establish and implement action programmes in order to reduce water pollution from nitrogen compounds in vulnerable zones'.

8. By Recital 11 Nitrates Directive (emphasis added) '… such action programmes should include measures to limit the land-application of all nitrogen-containing fertilizers and in particular to set specific limits for the application of livestock manure'.

9. By Article 3(1) 'Waters affected by pollution and waters which could be affected by pollution if action pursuant Article 5 is not taken shall be identified by the Member States in accordance with the criteria set out in Annex I.'

10. So by Article 3(2), within the two-year period following notification of the Directive, Member States were required to 'designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution.' They were to notify the Commission of this initial designation within six months. Further designations might follow - Article 3(4).

11. However, Member States did not have to identify specific vulnerable zones, if instead they established and applied Article 5 action programmes 'throughout their national territory' - Article 3(5). Ireland has adopted a 'whole national territory approach'.

12. The whole territory approach is not an excuse to avoid identifying vulnerable zones, or to have a more limited assessment on the basis that the location of the vulnerable zones is not known or need not be identified.

13. Following enforcement action by the Commission - for inter alia failing to designate vulnerable zones pursuant to Article 3(2) and/or Article 3(4); and failing to establish action programmes in accordance with Article 5 - Ireland's first Nitrates Action Programme (NAP) came into force in 2006 .

14. By Article 5(1) – 'Within a two-year period following the initial designation referred to in Article 3 (2) or within one year of each additional designation referred to in Article 3 (4), Member States shall, for the purpose of realizing the objectives specified in Article 1, establish action programmes in respect of designated vulnerable zones.' (As Ireland applies a whole territory approach, Ireland's NAP applies throughout the 'national territory'.)

15. Following enforcement action by the Commission - for inter alia failing to designate vulnerable zones pursuant to Article 3(2) and/or Article 3(4); and failing to establish action programmes in accordance with Article 5 - Ireland's first Nitrates Action Programme (NAP) came into force in 2006 .

16. As already noted, by Recital 11 Nitrates Directive '… such action programmes should include measures to limit the land-application of all nitrogen-containing fertilizers and in particular to set specific limits for the application of livestock manure'.

17. Article 5(4) addresses the content of action programmes -

a. 'Action programmes shall be implemented within four years of their establishment and shall consist of the following mandatory measures:

(a) the measures in Annex III;

(b) those measures which Member States have prescribed in the code(s) of good agricultural practice established in accordance with Article 4, except those which have been superseded by the measures in Annex III.'

18. An action programme should be 'an organised and coherent system intended to meet a specific objective' – as the CJEU identified in Case C-396/01, Commission v Ireland:

' 59 It is clear that the measures cited by the Irish Government do not, viewed overall, meet the requirements of Article 5 of the Directive.

60 Such a series of measures, varying in scale and applicability from region to region and not constituting an organised and coherent system intended to meet a specific objective cannot be described as an 'action programme' within the meaning of Article 5 of the Directive.'

19. This supports the idea that any assessment must take into account the agricultural activities, in order to constitute 'an organised and coherent system intended to meet a specific objective', ie the objectives specified in Article 1.

20. Turning then to Annex III, it is headed 'MEASURES TO BE INCLUDED IN ACTION PROGRAMMES AS REFERRED TO IN ARTICLE 5(4)(a)'.

21. By Annex III(1), 'The measures shall include rules relating to' matters thereafter specified.

22. Crucially, Annex III(2) identifies what the measures are meant to achieve -

a. 'These measures will ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare.

b. The specified amount per hectare be the amount of manure containing 170 kg N. However:

(a) for the first four year action programme Member States may allow an amount of manure containing up to 210 kg N;

(b) during and after the first four-year action programme, Member States may fix different amounts from those referred to above. These amounts must be fixed so as not to prejudice the achievement of the objectives specified in Article 1 and must be justified on the basis of objective criteria...

c. If a Member State allows a different amount under point (b) of the second subparagraph, it shall inform the Commission, which shall examine the justification in accordance with the regulatory procedure referred to in Article 9(2).'

23. Thus the decision to 'allow' a different amount (in this case 250 kg N instead of 170) is itself part of the Nitrates Action Programme. Indeed, it changes what the measures in the NAP are intended to achieve. There is clearly no requirement to depart from the 170 kg N; on the contrary, any such departure must be justified.

24. Only by 'allowing' a different amount in this way can a Member State avoid the amount specified in the Directive, ie 170 kg N. Further, if allowing a different amount, there is no requirement to choose 250 kg N – that is the maximum amount.

25. The decision to 'allow' a different amount, and the amount so 'allowed' must therefore be assessed as part of the assessment of the NAP under the Directives cited in the question. That necessarily entails assessment of the underlying agricultural activities. To confine such an assessment to the protective measures would be contrary to the purposes of those Directives.

26. In Case C 237/12 Commission v. France, the CJEU observed §130 (emphasis added) –'As is apparent from the eleventh recital in the preamble of that directive, the fixing of specific limits for the land application of livestock manure is of particular importance to the achievement of the objectives of reduction and prevention of water pollution by nitrates of agricultural origin.'

27. In Case C 197/18 Wasserleitungsverband Nördliches Burgenland, the CJEU referred to the concept of 'nitrogen surplus' and observed (§63) 'Such a surplus is contrary to Article 5(4)(a) of Directive 91/676, read in conjunction with Annex III, point 1(3) to that directive. Those provisions establish the principle of balanced fertilisation and require the foreseeable nitrogen needs of crops and the amount of nitrogen supplied to those crops from the soil and fertilisers to be brought into balance with one another. Therefore, they impose an obligation on the Member States to determine the amounts of nitrogen that can be applied by farmers in a precise manner (see, to that effect Commission v Germany, C 543/16 … paragraphs 87, 88 and 92).'

28. Such 'precision' cannot be achieved if the focus is exclusively on the assessment of so-called protective measures.

29. Further, the assessment triggered by 'allowing' an amount different to 170 Kg N - whether there is prejudice to the achievement of the objectives specified in article 1 (namely (i) reducing water pollution caused or induced by nitrates from agricultural sources and (ii) preventing further such pollution) - must logically relate to the activities in question: to confine any assessment 'to the protective measures the plan positively includes and those alone' would not be consistent with the requirements of the Directives.

30. The AA screening assessment (Exhibits p.639) states (emphasis added) 'Just over half of Ireland's monitored surface water bodies have satisfactory water quality and agriculture is the most widespread and significant pressure impacting on the water environment. The EPA report that nearly half of all river sites and one quarter of all groundwater sites have elevated nitrate concentrations. Given the known and observed significant impact that the previous Nitrate Action Programmes have had on water quality and water dependent ecosystems, the fifth NAP is considered to have potential for significant direct, indirect or cumulative effects to European Sites.'

31. This statement is difficult to reconcile with the contention that only the protective measures the plan positively includes are to be assessed.

32. NIS 6.4 (Exhibits p.827) refers to 'the inputs potentially arising as a result of the NAP, namely elevated nitrogen concentrations within surface and groundwater and airborne deposition of ammonia.'

33. Dr McGoff, in her 2nd affidavit, quotes from the NIS for the draft RBMP in relation to 'Assessment of Effects and Requirement for Mitigation' in respect of the GAP Regulations and the forthcoming NAP, now impugned in these proceeding. The entire quote need not be repeated here but includes - 'The actions arising from the new NAP have potential for significant adverse effects on European Sites; particularly mindful of nutrient loss to water from agriculture is one of the most significant pressures on water quality in Ireland.'

34. Most of the CJEU case-law on the Nitrates Directive has involved enforcement action; however, Joined Cases C 105/09 and C 110/09 Terre Wallonne and Inter-Environnement Wallonie involved a preliminary reference, and thus present the more detailed interpretative analysis that tends to come with a reference.

35. The CJEU stated –

> 46 Thus, so far as the purpose of action programmes is concerned, it is apparent from Directive 91/676, in particular the 9th to 11th recitals in the preamble, Articles 1 and 3 to 5 and the annexes, that those programmes involve a global examination, at the level of vulnerable zones, of the environmental issues linked to nitrate pollution from agricultural sources, and that they put in place an organised system designed to provide a general level of protection against such pollution.
>
> 47 The specific nature of those programmes lies in the fact that they embody a comprehensive and coherent approach, providing practical and coordinated arrangements covering vulnerable zones and, where appropriate, the entire territory, for the reduction and prevention of pollution caused by nitrates from agricultural sources.'

36. So in Ireland's case what is (supposed to be) involved is a global examination, at the level of the whole of the national territory, of the environmental issues linked to nitrate pollution from agricultural sources.

37. To confine any assessment 'to the protective measures the plan positively includes and those alone' would not be consistent with the concept of a global examination, at the level of the whole of the national territory, of the environmental issues linked to nitrate pollution from agricultural sources.

38. Here the SEA Report at Page viii (Exhibits p.291) states - 'The draft NAP is a strategic national-level document which seeks to provide overall direction to policy and decision-makers involved in agriculture and river basin management in Ireland. It also seeks

to put in place a clear and sustainable policy framework that supports communities, the environment, the climate and the agri-food sector.'

39. This approach appears consistent with Terre Wallonne; but the limited assessments proposed by the State are inconsistent with such an approach.

40. In Terre Wallonne, the CJEU'S focus was on Article 3(2)(a) SEA Directive, including whether an NAP set the framework for development consent; accordingly, it did not find it necessary to address the 2nd question referred, concerning Article 3(2)(b) SEA Directive, and whether the requirement for SEA was triggered by the requirement for assessment under the Habitats Directive.

41. However, Adv-Gen Kokott did address this (making clear at §85 that she was doing so 'in the alternative'.)

42. At §88 she observed - 'Action programmes pursuant to Article 5 of the Nitrates Directive are neither directly connected with or necessary to the management of areas of conservation under the Habitats or Birds Directive. An environmental assessment is therefore required where an action programme is likely to have a significant effect on areas of conservation, either individually or in combination with other plans or projects.'

43. At §92 she observed - 'It is not evident from the Nitrates Directive, on the other hand, that an action programme pursuant to Article 5 necessarily influences the development consent of projects likely to have significant effects on areas of conservation. The compatibility of a project with an action programme does not provide any indication as to whether it is permissible if it has effects on an area of conservation. That is determined by the Habitats Directive.'

44. At §96 she observed - 'None the less, it is not impossible that action programmes will contribute to significant harm to areas of conservation.'

45. At §101 she concluded (emphasis added) - 'Should the Court adopt a position on the second question, its answer should therefore be that, under Article 3(2)(b) of the SEA Directive, an environmental assessment must be carried out for an action programme pursuant to Article 5 of the Nitrates Directive if it is likely to contribute to significant harm to areas of conservation on the basis of its own rules, because of the conservation objectives of the areas of conservation or under other provisions of domestic law.'

46. It is submitted that, if Adv-Gen Kokott's analysis is adopted, the key phrase for present purposes is 'on the basis of its own rules.' Here the NAP by its rules 'allows a different amount under point (b) of the second subparagraph,' for livestock manure applied to the land each year, ie 250 kg N per hectare rather than 170. An assessment confined to the so-called "protective measures" would fail to address the rules of the NAP liable to have significant effects on protected sites.

Habitats Directive

47. In terms of the Habitats Directive, the requirements of an AA are well known, eg Case C-127/02 Waddenzee §54 – 'Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field.' This requirement is expressly relied on by the CJEU in the context of a 'programmatic plan' in Joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation (aka the 'Dutch Nitrogen cases'), §95.

48. As identified at p.2, §1.2 of the NIS (exhibits, p523) 'The overall purpose of the AA process is to ensure that the NAP does not result in any adverse effects on the integrity of any European sites in view of its conservation objectives.' To exclude the agricultural activities is to breach the 'all aspects' requirement.

49. The Commission 2021 Guidance says 'The assessment must cover the impact of the entire plan or project in question, with all the activities it comprises, and during all phases (preparation, construction, operation and, where relevant, decommissioning or reconditioning). The assessment must identify and differentiate the various types of impact, including direct and indirect effects, temporary or permanent effects, short- and long-term effects and cumulative effects'.

50. In Joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation (aka the 'Dutch Nitrogen cases') the CJEU considered a 'programmatic plan' which enabled the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement.

51. The scheme is helpfully summarised by Adv-Gen Kokott at §3 – 'The specific point at issue is that nitrogen deposition by individual farms in the Netherlands is not assessed individually in certain protected sites, but is classified in a programmatic integrated plan, which defines the extent to which nitrogen deposition is permitted on the basis of an assessment of each individual protected site. It must be clarified not only whether such an

integrated plan is lawful, but also to what extent it is compatible with the protection of sites to take into account measures to reduce nitrogen deposition from other sources, measures to upgrade protected sites and future developments. It must also be examined how fertilising of agricultural land and grazing are to be classified in the system relating to the appropriate assessment of the implications for the site.' At §142 she identified – 'According to the request for a preliminary ruling, the assessment was based on the actual and expected extent and intensity of those activities and its outcome is that on average they would not cause an increase in nitrogen deposition.'

52. At §90 the CJEU explained – 'By the second question in Case C-294/17, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection.'

53. The CJEU addressed this question at §91-103 – including at §95 (as already noted) the 'all aspects' requirement.

54. It concluded at §104 – 'In the light of the foregoing, the answer to the second question in Case C 294/17 is that Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That is so, however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain.'

55. So in the context of a programmatic approach, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives must be identified in the light of the best scientific knowledge in the field.

56. Of note, the CJEU observed at §103 – 'In circumstances such as those at issue in the main proceedings, where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited.'

57. In this context, the following statements in the NIS are relevant -

58. Page 23 – Under the Heading '4.4 Conservation Status of EU Protected Habitats and Species' it is stated 'Many freshwater habitats are considered unfavourable due to nutrient loading within the catchment, however the Cycle 2 River Basin Management Plan [RBMP] (2018-2021) will aim to ensure improved targeting of mitigation measures (Note: the Cycle 3 RBMP is currently in preparation and will cover the period 2021-2027)'.

59. Page 24 - The NPWS National Biodiversity Action Plan 2017-2021 reports that 85% of Ireland's EU protected habitats are at unfavourable status, with 46% showing ongoing declines. Agricultural practices account for 70% of the negative impacts on habitats.

60. Page 45 (emphasis added) - On the basis of the above information, and on a precautionary basis, it is considered that no specific SAC or SPA in Ireland can be discounted in respect of the potential adverse effects arising via agricultural activity which would be associated with the measures set out in the NAP, or the inadequate enforcement of this Plan. However, certain SACs are known to be particularly sensitive to these potential adverse effects, already subject to deteriorating conditions associated with such effects and in unfavourable conservation condition. It is in this context that the assessment of the NAP measures on their implications for European sites is undertaken, as set out below.

61. Page 76 (emphasis added) - The 3rd National Biodiversity Action Plan 2017 – 2021, states that a 2013 assessment of the status of EU protected habitats and species in Ireland showed that 91% of the 58 habitats assessed have unfavourable conservation status (50% were 'Inadequate' and 41% were 'Bad'), while for species, 20% were assessed as being 'Inadequate' and 12% as 'Bad' including the water dependent SAC protected species – freshwater pearl mussel and sea lamprey. For Birds, the 2021 assessment of the status of 211 regularly occurring bird species placed 54 species on the Birds of Conservation concern in Ireland Red List, 79 on the Amber list and 78 on the Green list. It is noted however that the Regulations are solely concerned with the protection of water from agricultural pollution, and therefore the success of the Regulations can only be evaluated in the context of their ability to mitigate water specific impacts. In this regard, the River Basin Management Plan identifies agriculture as being a significant pressure in 729 (64%) of river and lake water

bodies that are At Risk of not meeting their environmental objectives. Regional Implementation Strategies are being developed, which will prioritise areas for action during the 3rd cycle of River Basin Management Planning and will include for investigative assessments to define local issues and inform mitigation measures. It is important to note that the determination of risk through the characterisation process included protected area requirements, and therefore the environmental supporting conditions for SAC and SPA were included in the assessment.

62. See also the discussion of the third and fourth questions in Case C-293/17 in the answer to 8(b) below.

WFD

63. In terms of the WFD, it must be recalled that measures required under the Nitrates Directive (such as the NAP) are one of the basic measures which must be included in the programme of measures under Article 11 WFD.

64. Further, in relation to diffuse sources of agricultural pollution in rural areas of the State, the NAP is the key mechanism provided in the Article 11 Programme of Measures in Ireland's RBMP for ensuring the attainment of the environmental objectives of the WFD. In that regard, the RBMP provides under 'Principal Action' that 'The new, strengthened Nitrates Action Programme (2018–2021) will be the key agricultural measure for preventing and reducing water pollution from nutrients (nitrogen and phosphorus) arising from agricultural sources.'

65. To assess WFD compliance with the environmental objectives in Article 4, without considering the underlying agricultural activities is logically inconsistent with the nature of the assessment required by the WFD.

SEA Directive

66. Regarding the SEA Directive – it will be recalled that under Article 5 an environmental report is to be prepared 'in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.'

67. It is hard to see how any of this can be achieved if the analysis is confined to the so-called protective measures but excludes the underlying agricultural activities. For example, Annex 1(f) refers to the likely significant effects on water - in the case of an NAP which establishes a derogation, how can the likely significant effects on water be identified, examined and assessed if the agricultural activities ensuing from the derogation are excluded?

General

68. The NAP inter alia regulates the conditions under which the cultivation of grassland for the sustenance of cattle for agricultural production is facilitated through the application of fertilisers on the surface of land or below its surface across the territory of Ireland, including in the vicinity of, and by way of hydrological connectivity to, Natura 2000 sites. It therefore determines the conditions under which farm-level projects for the grazing of cattle and the application of fertilisers on the surface of land or below its surface may be carried out. For the purposes of assessment, there is no valid distinction between the conditions and the activity.

69. To draw an analogy with planning permission – the competent authority could not say what has to be assessed is the difference between conditions and no conditions but the development itself is best ignored.

70. The NAP is not independent of the activities it regulates, and indeed in the context of the derogation, it 'allows'."

24. The State submitted:

"I. Summary

5. None of the cited provisions - Article 6(3) of Directive 92/43 ('the Habitats Directive'), Article 4(1) Directive 2000/60 ('the WFD'), or Article 3(1) of Directive 2001/42 ('the SEA Directive') - requires that an action programme under Article 5 of Directive 91/676 ('the Nitrates Directive') be assessed by reference to the effects on the environment of the Nitrate-emitting agricultural activities regulated by that action programme, either generally or by reference to whether the protective measures in the action programme are sufficiently rigorous to prevent such damage.

6. This does not mean that EU law does not require any assessment of whether an action programme is sufficiently rigorous to meet the objectives of Article 1(1) of the Nitrates Directive, or a programme of measures is sufficiently rigorous to meet the objectives of Article 4(1) of the WFD. There are ongoing positive obligations on Member States in that

respect, under Article 5 of the Nitrates Directive and Article 11 WFD. However, the Applicant has not challenged the State's compliance with either of those obligations.

7. Rather, the Applicant seeks – impermissibly - to read across the positive substantive obligations under Article 5 of the Nitrates Directive and Article 11 WFD, to the negative obligations under Article 6(3) of the Habitats Directive and Article 4(1) WFD and the procedural obligations under Article 3(1) of the SEA Directive. There is no basis in EU law for doing so.

II. Acte Clair

8. It is accepted that this issue is not acte clair.

III. Substantive response

Overview

9. In Question 8(a), the Court addresses the nature of the assessment obligation under each of the Directives, and draws a distinction between the following:

i. assessment of the adverse environmental effects of the positive measures put in place by the plan,

ii. assessment of the adverse environmental effects of the underlying activities causing the target environmental damage to be mitigated by the plan, and/or

iii. assessment of whether the protective measures in the plan are sufficiently rigorous to avoid the target environmental damage.

10. The Respondents agree that this is an essential conceptual distinction, both in determining these proceedings, and more generally when considering environmental assessment under EU law.

11. In that respect, EU law puts in place a comprehensive, and complex, framework of instruments aimed at environmental protection. It is often the case that more than one legal instrument will apply to a particular facet of environmental protection, or to a particular measure. The interaction between the obligations under those instruments can be complex, as can the application of the same obligation to different but related measures.

12. That does not mean, however, that the nature and subject of the assessment under each instrument can or should be conflated, as envisaged by the Applicant. On the contrary, to ensure that proper effect is given to EU environmental law, it is essential that there is conceptual clarity with respect to each applicable instrument, as to: (i) the nature of the obligation imposed on Member States by the instrument that gives rise to the assessment obligation, (ii) the subject of that obligation, and (iii) the nature of the assessment to be carried out.

13. These issues are inter-dependent and, in particular, the nature and subject of the obligation arising for Member States under a particular provision will typically determine the nature of the assessment required under that provision. In that respect, a distinction can be drawn between:

i. Positive obligations requiring Member States to adopt protective measures that must achieve a specific aim;

ii. Negative obligations requiring Member States to refuse to authorise measures that might cause specific environmental harm; and

iii. Procedural obligations requiring Member States to conduct assessments to inform a decision but that do not require any particular substantive outcome.

14. In that respect, a positive obligation to adopt protective measures to achieve a specific aim, such as the obligation under Article 5 of the Nitrates Directive or Article 11 of the WFD, will primarily require assessment of the positive environmental effects of the measures to be adopted, to determine whether they are sufficiently rigorous to achieve that aim. This will involve consideration of the negative environmental effects of the underlying activities causing the target environmental harm, albeit at a global as opposed to project level.

15. In contrast, a negative obligation to refuse to authorise any measure that will cause a specified harm, such as under Article 6(3) of the Habitats Directive, or the Weser obligation under Article 4(1) of the WFD, will require assessment of the adverse environmental effects of the measure, to determine whether the measure will cause the prohibited environmental damage. Such a negative obligation imposes no requirement to assess the positive environmental effects of the measure, to determine whether the measure is sufficiently rigorous to prevent project level activities from causing the target environmental harm, nor does it require Member States to refuse to authorise a measure should that be the case.

16. Finally, a procedural obligation such as arises under the SEA Directive may require assessment of the positive and negative environmental effects of the measures to be put in place by a plan. However, the purpose of such an obligation is to inform the decision-making process, not to achieve any particular outcome, and there is no requirement that such an

assessment determine whether a measure aimed at environmental protection is sufficiently rigorous to eliminate the target environmental harm, or require refusal of the measure if it is not.

17. It is clear, in that respect, that the purpose of environmental obligations under EU law, and it follows the nature of the assessment that arises under such obligations, can be markedly different depending on the obligation at issue. Thus when multiple obligations apply to a single measure, such as is the case with the NAP, it cannot be assumed – as the premise of the Applicant's argument assumes – that it is intended that the assessment under each of those obligations will consider the same matters. On the contrary, where multiple obligations apply to a single measure, those obligations are typically complementary, and avoid duplication of assessment.

18. This is evident having regard to the measures at issue here. Article 5 of the Nitrates Directive ensures that an action programme is sufficiently rigorous to achieve the aims of the Nitrates Directive, and Article 11 of the WFD ensures that the action programme together with the balance of the Programme of Measures is sufficiently rigorous to achieve the aims of the WFD. However, neither Directive addresses: (i) procedural requirements with respect to the consideration of environmental effects other than nitrates pollution prior to adopting the programme, or (ii) assessment as to whether the measures in the NAP might themselves cause environmental harm. Those assessments are the subject of other instruments, with Article 3(1) of the SEA Directive ensuring that the environmental effects of the proposed measures and reasonable alternatives are considered to inform the decision making process, and Article 6(3) of the Habitats Directive ensuring that none of those measures will cause an adverse effect on a protected site. In turn, neither the Habitats Directive nor the SEA Directive are concerned with ensuring that a Member State's obligations under the Nitrates Directive and the WFD are achieved. Rather, those measures serve a clear, and separate, purpose, and the assessment required by those measure is in turn distinct.

19. Clarity with respect to the nature of each obligation at issue is therefore essential to correctly identify the assessment that is required with respect to that obligation, and thus to responding to the Court's question. The Applicant's approach, of assuming without analysis that the positive obligations arising under Article 5 of the Nitrates Directive and Article 11 of the WFD are determinative of the nature of the assessment to be carried out to comply with Article 6(3) of the Habitats Directive, the Weser obligation under Article 4(1) of the WFD, and Article 3(1) of the SEA Directive, is in those circumstances unsupportable.

20. Finally, in addition to clarity as to the nature of the obligation, clarity with respect to the subject of the obligation at issue is essential in determining the nature of the assessment that is required. This may be of particular importance, for example, when considering the assessment of separate but related measures at different stages of the planning hierarchy.

21. The subject of the assessments here is the NAP, not the farm-level activities causing the target environmental harm. The Court has already held in An Taisce – The National Trust For Ireland v. The Minister for Housing, Local Government and Heritage & Ors (No. 1) [2024] IEHC 129 ('No. 1 Judgment') that (§88) 'by definition the AA relates to the NAP itself and not directly to the activities by farmers to which the NAP relates'. The Court further confirmed in the No. 1 Judgment that (§161) the NAP does not 'authorise' farm-level activities, and that '[a] more accurate term would be something in the ball-park of 'regulates' or 'mitigates'.

22. In light of those findings, the extent to which the assessment of the underlying agricultural activities might nevertheless be indirectly relevant to the assessments to be carried out under the relevant provisions is what requires to be determined in this module. The Applicant does not, however, engage in any substantive manner with this issue. Rather, it continues to proceed on the assumption that the subject of the assessment is the underlying agricultural activities, and/or that the NAP must be assessed on the basis that it authorises those agricultural activities, without engaging with the implications of the Court having found that this is not the case.

23. When seen in light of the foregoing, it is clear that the Applicant's submissions fail to establish that the obligations contended for arise under Article 6(3) of the Habitats Directive, Article 4(1) of the WFD, or Article 3(1) of the SEA Directive.

24. The Respondents' response to the Applicant's arguments with respect to each of those provisions, in light of the foregoing discussion, is detailed below. For ease of reference, the Respondents will follow the same headings as the Applicant.

Nitrates Directive

25. The State's compliance with the Nitrates Directive is not at issue in the proceedings. The Applicant nevertheless devotes 43 paragraphs of its submissions on Module III to

addressing the substantive requirements arising under the Nitrates Directive. The Respondents do not understand the Applicant to be seeking to introduce a claim for breach of the Nitrates Directive to the proceedings (and indeed it could not do so at this stage). Rather, the Applicant addresses this issue on the premise that the substantive obligations under the Nitrates Directive should inform the nature of the assessment under the Habitats Directive. A consideration of the nature and purpose of the obligations under the Nitrates Directive and the Habitats Directive makes clear that this argument is unsustainable.

26. The objective of the Nitrates Directive, as stated in Article 1 of that Directive, is reducing water pollution caused or induced by nitrates from agricultural sources and preventing further such pollution.

27. Article 5(1) of the Nitrates Directive requires Member States to establish an action programme for the purpose of realising the objectives of the Directive. Article 5(3) requires that action programme take into account available scientific and technical data, mainly with reference to respective nitrogen contributions originating from agriculture and other sources, and environmental conditions in the relevant regions of the Member States concerned. Article 5(4) provides that an action programme is required to consist of inter alia the mandatory measures in Annex III and the measures prescribed by Member States in their code of good agricultural practice, unless superseded by the Annex III measures.

28. Article 5(6) requires Member States to draw up appropriate monitoring programmes to monitor the effectiveness of their action programmes. Article 5(7) provides that an action programme must be reviewed and if necessary revised at least every four years.

29. The obligation to keep the action programme updated is not limited to the obligation under Article 5(7) to review the plan on a four-year cycle. Under Article 5(5), Member States are also required to take, in the framework of their action programmes, such additional measures or reinforced actions as they consider necessary if, at the outset or in the light of experience gained in implementing the action programmes, it becomes apparent that the measures specified in Article 5(4) will not be sufficient for achieving the objectives specified in Article 1. The CJEU has confirmed that the obligation under Article 5(5) is not limited to updating the action programme every four years in accordance with Article 5(7). Rather, those measures must be adopted as soon as the need for them is recognised. This is confirmed in Case C-197/18 Wasserleitungsverband Nördliches Burgenland and Others EU:C:2019:824, at §§54–56; 70–72.

30. The Applicant makes a number of assertions with respect to the implications of those obligations, as follows:

i. At §§18 and 19, the Applicant cites Case C-396/01 Commission v Ireland, which held that an action programme should be 'an organised and coherent system intended to meet a specific objective', and infers that this 'supports the idea that any assessment must take into account the agricultural activities, in order to constitute 'an organised and coherent system intended to meet a specific objective', ie the objectives specified in Article 1.'

ii. At §§23–25, the Applicant argues that the decision to grant a derogation and thereby 'allow' an increase to 250 kg N 'must therefore be assessed as part of the assessment of the NAP under the Directives cited in the question. That necessarily entails assessment of the underlying agricultural activities. To confine such an assessment to the protective measures would be contrary to the purposes of those Directives.'

iii. At §§26-28 the Applicant references Case C 237/12 Commission v. France and Case C 197/18 Wasserleitungsverband Nördliches Burgenland, which state that the provisions of the Nitrates Directive 'impose an obligation on the Member States to determine the amounts of nitrogen that can be applied by farmers in a precise manner'. The Applicant concludes that "[s]uch 'precision' cannot be achieved if the focus is exclusively on the assessment of so-called protective measures.'

iv. At §29, the Applicant again states that the derogation 'allows' an increase to 250 kg N, and that the assessment triggered in that respect, as to "whether there is prejudice to the achievement of the objectives specified in article 1 … must logically relate to the activities in question: to confine any assessment 'to the protective measures the plan positively includes and those alone" would not be consistent with the requirements of the Directives.'

v. At §§34-37 the Applicant cites Joined Cases C 105/09 and C 110/09 Terre Wallonne and Inter-Environnement Wallonie ('Terre Wallone'), which states that the 9th to 11th recitals and Articles 1 and 3 to 5 of the Nitrates Directive require 'a global examination, at the level of vulnerable zones, of the environmental issues linked to nitrate pollution from agricultural sources' and concludes that to 'confine any

assessment 'to the protective measures the plan positively includes and those alone' would not be consistent with the concept of a global examination';

31. In each case, the Applicant commences with a principle derived from the Nitrates Directive, or judicial commentary on the positive substantive obligations arising under the Nitrates Directive, and draws a conclusion with respect to 'the Directives' or 'any assessment'. From that, the Applicant appears to infer that all such assessments of the NAP, under any EU environmental law instrument, such be directed at ensuring that the action programme meets the objectives set out in Article 1(1) of the Nitrates Directive.

32. Insofar as those conclusions are intended to relate to Member States' obligations under the Nitrates Directive alone, the Respondents take no issue with them. For the avoidance of doubt, the State does not suggest that consideration of the environmental effects of nitrate-producing agricultural activities, and/or of whether an action programme is sufficiently rigorous to meet the objective set out in Article 1(1) of the Nitrates Directive, is not required for the purposes of the State's compliance with its obligations under Article 5(1) of the Nitrates Directive when adopting an action programme. However, those obligations do not arise for consideration here, where there is no challenge to the State's compliance with its substantive obligations under the Nitrates Directive.

33. However, insofar as those conclusions are intended to apply to the nature of the assessment required for the purposes of the negative obligations under Article 6(3) of the Habitats Directive and Article 4(1) of the WFD, or the procedural obligations under Article 3(1) of the SEA Directive, the Applicant's argument is misconceived. As considered above, the obligations under those provisions are of an entirely different nature, and serve a distinct purpose. There is no basis to superimpose the positive substantive obligations under Article 5 onto the distinct obligations arising under those provisions, and the Applicant identifies no authority, or rationale, for proceeding on that basis. Nor has the Applicant identified any rationale for the contention that the same assessment, as to whether the NAP is sufficiently rigorous to meet the objectives of the Nitrates Directive, which was carried out by the State under Article 5 of the Nitrates Directive, and by the Commission in the context of the derogation decision, should be repeated on no less than three occasions. This is not consistent with the general approach of EU environmental law of avoiding duplication of assessment.

34. In that respect, the authorities relied on by the Applicant, other than Terre Wallone, address the Nitrates Directive only. The only authority cited by the Applicant that engages with the relevant issue – the interaction between the Nitrates Directive, the NAP and the Habitats Directive – is the Opinion of Advocate General Kokott in Terre Wallone, and that is not supportive of the Applicant's position.

35. Rather, in considering whether an action programme under the Nitrates Directive required appropriate assessment and thus fell under Article 3(2)(b) of the SEA Directive so as to require SEA, Advocate General Kokott drew a clear distinction between the action programme adopted under the Nitrates Directive, and the authorisation of activities regulated by the action programme. She recognised that an action programme does not authorise such activities, nor does it determine the compatibility of such activities with the Habitats Directive. She notes in that respect, that (§92): 'the compatibility of a project with an action programme does not provide any indication as to whether it is permissible if it has effects on an area of conservation. This is determined by the Habitats Directive.'

36. Advocate General Kokott continued to recognise that there are circumstances where an action programme could cause damage to a protected site, and she identifies three examples of when that might occur: (i) where an action programme includes measures additional to those required by the Nitrates Directive, that do have the effect of influencing or determining development consent, (ii) where conservation objectives expressly reference the action programme as setting appropriate standards for the purposes of the Habitats Directive, or (iii) where domestic provisions characterise the action programme as determining whether a measure is compatible with the Habitats Directive.

37. In other words, Advocate General Kokott concluded that where domestic law gives the action programme a status beyond its function as an action programme, so that it authorises activities or is determinative with respect to the authorisation of activities, it may cause harm to protected sites. However, it is clear that she otherwise viewed action programmes as protective measures that would not cause such harm, and that she did not consider that the environmental effect of activities regulated by the action programme required assessment for the purposes of an AA of an action programme, save in the foregoing circumstances.

38. None of those circumstances arise here. There is no provision in domestic law, that provides that compliance with the action programme is determinative of compliance with the

obligations under the Habitats Regulations, or disapplies the Habitats Regulations where a measure complies with the action programme.

39. The Applicant's interpretation of that dicta at §46 of its Submissions on Module III, as meaning that where the action programme contains a derogation, the underlying agricultural activities require assessment, is therefore not supported by the passage quoted, when read in the context of the opinion as a whole.

40. In the circumstances, the Applicant's reliance on the substantive obligations arising under the Nitrates Directive, to argue that the relevant provisions require assessment of whether the NAP is sufficiently rigorous to achieve the aims of the Nitrates Directive, should be rejected.

Habitats Directive

41. As detailed above, the nature of the required assessment must be determined in accordance with the obligation at issue.

42. Article 6(3) of the Habitats Directive introduces a negative obligation only, to refuse authorisation for measures that might cause an adverse effect on the integrity of a protected site.

43. Positive obligations do arise under Article 6(1), which requires conservation measures to be put in place, and Article 6(2), which requires Member States to take appropriate steps to avoid deterioration in protected sites. However, those positive obligations do not arise under Article 6(3). In any event, they are not ad idem the positive obligations that arise under the Nitrates Directive, and which the Applicant seeks to read across to Article 6(3) of the Habitats Directive.

44. In that respect, the CJEU in the Dutch Nitrates case expressly drew a distinction between the obligations under Article 6(2) and Article 6(3) of the Habitats Directive, confirming that it is not intended that positive obligations would arise under the latter provision:

> '87. As a preliminary point, it should be recalled that, while Article 6(2) and Article 6(3) are designed to ensure the same level of protection (judgment of 12 April 2018, People Over Wind and Sweetman, C-323/17, EU:C:2018:244, paragraph 24 and the case-law cited), the subject matter of those two provisions is different, in that the first is intended to introduce preventive measures whereas the second establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (judgment of 17 April 2018, Commission v Poland (Białowieża Forest), C-441/17, EU:C:2018:255, paragraph 108 and the case-law cited)'

45. Having regard to the nature of the obligation under Article 6(3), there is no basis to conclude that an AA of the NAP should include an assessment of whether the measures in the NAP are sufficiently rigorous to meet the obligations under Article 1(1) of the Nitrates Directive, for all of the reasons already set out above.

46. A number of further observations arise in that respect, having regard to the submissions made by the Applicant specific to the Nitrates Directive, at §§47-62 of its Submissions on Module III.

47. First, the Applicant relies on dicta from Case C-127/02 Waddenzee, to the effect that the assessment under Article 6(3) must include 'all the aspects' of the plan or programme under assessment, and notes that this dicta is expressly relied on by the CJEU with respect to its consideration of a 'programmatic plan' in the Dutch Nitrates case.

48. Relatedly, at §49 the Applicant cites Commission Guidance to the effect that' '[t]he assessment must cover the impact of the entire plan or project in question, with all the activities it comprises'.

49. However, a requirement that an AA consider 'all the aspects' of a plan or programme cannot require an AA to consider matters that do not form part of that plan or programme. The same applies to the Commission Guidance cited at §49. The NAP does not authorise agricultural activities, and therefore those agricultural activities are not 'an aspect' of the NAP.

50. Second, the Applicant continues at §56 to note that the CJEU in the Dutch Nitrates case observed, at §103:

> 'In circumstances such as those at issue in the main proceedings, where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited.'

51. At paragraph 52-61, the Applicant references aspects of the NIS intended, it appears, to establish that there is a risk to protected sites from nitrates pollution, and thus that the possibility of authorising activities which may affect those sites is 'necessarily limited', in line with the dicta in the Dutch Nitrates case.
52. However, again, the NAP does not authorise agricultural activities, so this has no relevance to the AA of the NAP.
53. More generally, in the context of the Dutch Nitrates case, the Applicant appears to infer that, because the CJEU held that nitrates-producing agricultural activities could be authorised by a programmatic measure, it follows that the NAP is a programmatic measure authorising agricultural activities, comparable to the programmatic measure at issue in the Dutch Nitrates case, and thus the obligations identified in that case apply to the AA of the NAP.
54. That is not correct.
55. It is instructive, in that respect, to consider how the preliminary reference in the Dutch Nitrates case arose. That case did not involve a challenge to the AA of an action programme adopted under Article 5 of the Nitrates Directive; an action programme was not involved in that case. Rather, that case involved a challenge to six authorisations with respect to specific agricultural activities. Those authorisations were challenged based, inter alia, on an argument that the programmatic consenting measure under which the authorisations were granted ('the PAS') did not properly transpose Article 6 of the Habitats Directive.
56. Importantly, therefore, the dicta of the CJEU in the Dutch Nitrates Case relates to the AA of individual projects, not to the AA of an action programme and/or any other measure regulating, as opposed to authorising, agricultural activity. The CJEU confirmed, in that respect, that the matter at issue in that preliminary reference was 'the authorisation issued to the farms' (§88). That authorisation issued under a programme expressly aimed at authorising nitrogen-producing agricultural activities.
57. The Applicant's attempt to directly apply that judgment of the CJEU to the assessment of the NAP must therefore be rejected.
58. Third, the Applicant has, in the circumstances, identified no authority supportive of the proposition it relies on, namely that Article 6(3) of the Habitats Directive requires that the AA of a protective measure assess the environmental harm caused by the activities it regulates, to determine whether the protective measure is sufficiently rigorous to prevent those activities causing harm to a protected site.
59. The Applicant did previously rely on the Opinion of Advocate General Kokott in Case C 434/22 AS 'Latvijas valsts meži', when making this argument. Where that Opinion is not referenced in the Applicant's Submissions on Module III it is unclear if the Applicant continues to rely on it. Irrespective, it does not support the case the Applicant seeks to make.
60. With respect to Case C 434/22 AS 'Latvijas valsts meži', in its original submissions the Applicant argues:

> 'Calling something 'protective' does not offer a way around the requirements of the Habitats Directive - see Adv-Gen Kokott's opinion in Case C 434/22 AS 'Latvijas valsts meži' in the context of tree-felling in an SAC with a view to the 'protection' of forest habitats in order to maintain/create infrastructure installations in accordance with the legal requirements relating to forest fire protection.'

61. However, the Opinion relied on is entirely consistent with the Respondents' position. The Advocate General concludes that the felling of trees for the purposes of fire prevention, despite being a measure aimed at environmental protection through fire prevention, required assessment under the Habitats Directive. However, the assessment envisaged was not an assessment of whether the planned felling of trees was sufficient to achieve the environmental aim of fire prevention, or whether more could or should have been done to achieve that aim. Rather, the assessment envisaged was whether the measure at issue, the felling of trees and reduction in the frequency of fires, might itself cause environmental harm, for example by damaging a habitat.
62. That Advocate General's Opinion therefore does not support the Applicant's position. On the contrary, it is consistent with the Respondents' position, and with the approach taken to the AA of the NAP.
63. Finally, throughout its submissions on Module III, the Applicant relies on a characterisation of the derogation decision as being a measure causing harm to protected sites rather than a protective measure, to justify the proposition that the AA of the NAP must ensure that the NAP is sufficiently rigorous, in light of the derogation, to achieve the aims of Article 5(1) of the Nitrates Directive, and/or to ensure that no agricultural activity that avails

of the derogation will cause harm to any protected site. This attempt to distinguish the measures in the NAP included on foot of the derogation decision, from the balance of the measures in the NAP, should be rejected.

64. It is notable, in that respect, that the Applicant characterises the decision to apply for the derogation, or the Commission's decision to grant the derogation, as being the measure that requires assessment. The logic appears to be that by reason of that decision, the regulation of the underlying agricultural activities is less strict than if that decision had not been taken, and the decision to seek or grant the derogation is therefore not protective, but potentially caused harm that must be assessed under the Nitrates Directive.

65. However, the measure that requires to be assessed under Article 6(3) is not the decision to apply for a derogation, but rather the measure included in the NAP on foot of the derogation, which is a limit prohibiting nitrogen concentrations in excess of 250 kg N/ha (if an application for a derogation is made and granted) and a limit of 170 N kg in all other cases.

66. Again, a limitation on nitrogen concentrations cannot cause damage to a protected site by reason of nitrogen pollution; it is the underlying agricultural activity that risks causing that damage. This remains the case irrespective of whether the limit is 170 kg N/ha or 250 kg N/ha. The correct analysis of the obligation arising under the Habitats Directive with respect to the NAP does not alter by reason of the upper limitation in nitrates concentration being increased.

67. The other basis on which the Applicant appears to contend that the decision to adopt the derogation alters the nature of the assessment under Article 6(3) is an inference that if that were not the case, there would be no assessment of whether the derogation will prejudice the objectives of the Nitrates Directive (§29 of the Applicant's Submissions on Module III).

68. Insofar as the Applicant seeks to make that case, it should be rejected. The relevant analysis was necessarily carried out, having regard to Article 5 of the Nitrates Directive, by the State in determining that a derogation should be sought, and the Commission in granting that derogation. As noted by the Court in the Judgment in Module I:

> '189. The really critical point is that while superficially the nitrates directive gives the impression that it is up to the member state to decide on acceptable concentration levels, art. 5(2) and (3) of Regulation 182/2011 make it clear that the Commission is the decision-maker, basing itself primarily on expert advice.'

69. The Commission therefore carried out the assessment that the Applicant contends is necessary, and should be carried out under Article 6(3) of the Habitats Directive, and concluded that the Derogation is 'justified on the basis of objective criteria', 'will not prejudice the objectives set out in [the Nitrates Directive]' and 'is coherent with the legally binding targets of the WFD'.

70. Thus, even if the logic of the Applicant's position – that a gap in a relevant environmental assessment could alter the assessment obligations arising under a Directive – were correct, which it is not, no such gap arises here.

71. In all of the circumstances, the Applicant's claim with respect to the application of Article 6(3) of the Habitats Directive, should be rejected.

Article 4(1) WFD

72. The Respondents understand that this question is to be addressed on the assumption that an obligation to assess the NAP does arise under Article 4(1) of the WFD (which is not accepted by the Respondents). The balance of this response proceeds on that basis.

73. The Respondents' position is that even if that obligation did arise, it would require no more than an assessment of whether the positive measures put in place by the NAP might cause a deterioration in a water body. It would not require assessment of the underlying agricultural activities, and the authorisation of the NAP would not be contingent on it being established that the measures under the NAP are sufficient to prevent any future deterioration in any water body. The Applicant's position to the contrary is misconceived in the context of the WFD, as it is misconceived in the context of the Habitats Directive, for the following reasons.

74. First, that argument by the Applicant is premised on the application of the assessment obligation recognised by the CJEU in Case C-461/13 Weser ('Weser'), where the CJEU held:

> 'Article 4(1)(a)(i) to (iii) of Directive 2000/60 must be interpreted as meaning that the Member States are required - unless a derogation is granted - to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good

surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.'

75. Assuming (contrary to the Respondents' position) that this obligation arises at all with respect to the NAP, it is a negative obligation, similar to that arising under Article 6(3) of the Habitats Directive, to refuse authorisation where a project may cause a deterioration in the status of a body of surface water or jeopardise the attainment of inter alia good water status. All of the arguments set out above, as to why the Applicant's positive obligations under Article 5 of the Nitrates Directive cannot be read across as applying also to assessment under Article 6(3) of the Habitats Directive, apply here also.

76. Second, this argument must be rejected where it assumes that the NAP is required to prevent any deterioration to any water body. This is incorrect. While the NAP has a significant role in contributing to the objectives of the WFD, it does not have the sole responsibility for delivering these objectives. Rather, the achievement of good ecological status under the WFD is complex, involving a range of environmental pressures, impacts and management responses from the multiple sectors involved. The NAP is only one part of one of the 12 basic measures required to be included in the programme of measures under the WFD. The WFD therefore does not require that the NAP alone will deliver the objectives of Article 4(1).

77. Third, and as a result, this is an impossible standard, that could never be met. The proposition that the WFD would prevent a Member State from adopting a protective measure required to be adopted by the same Directive, solely on the basis that it cannot be established with certainty that it alone will prevent any deterioration of water quality, when the WFD itself does not require that NAP to reach that standard, is plainly unsupportable. Again, the Applicant's contention here would result in a lowering of the standard of environmental protection, as opposed to enhancing it.

78. Finally, the Applicant's alternative argument, that this assessment should be conducted cumulatively with other binding measures, must also be rejected, where it is irreconcilable with the framework established by the WFD. This is addressed in more detail in response to Question 37.

SEA DIRECTIVE

79. The purpose of the assessment of the environmental effects of plans or programmes under the SEA Directive is to provide environmental information to inform the plan making process at its early stages, and to consider reasonable alternatives to the proposed plan. No substantive obligation, either positive or negative, arises.

80. It is accepted that some high-level consideration of the environmental impact of underlying agricultural activities may arise in this context, in particular in the context of the assessment of reasonable alternatives, and indeed the SEA of the NAP carried out did consider this issue at a high-level.

81. However, the obligation as contended for by the Applicant, that absent an assessment demonstrating that the plan is sufficiently robust to achieve the objectives of the Nitrates Directive, the SEA will be invalid, is, nevertheless, unsupported. An assessment of that nature is not required to achieve the purposes of the SEA Directive, and could not be reconciled with the nature of the SEA Directive in providing for procedural obligations only.

Conclusion

82. In the circumstances, the answer to Question 8(a) must be no. The Applicant's argument is premised on an impermissible reading across of obligations from the Nitrates Directive to the measures at issue, and an assumption that the subject of the assessment is the underlying agricultural activities, and/or that the NAP authorises those activities. This is evident throughout the Applicant's submissions, and is confirmed in its conclusion on this issue, where it states that the NAP:

> '… determines the conditions under which farm-level projects for the grazing of cattle and the application of fertilisers on the surface of land or below its surface may be carried out. For the purposes of assessment, there is no valid distinction between the conditions and the activity.
>
> To draw an analogy with planning permission – the competent authority could not say what has to be assessed is the difference between conditions and no conditions but the development itself is best ignored.'

83. Assessing the NAP based on the positive measures that will be imposed by that programme, rather than the underlying agricultural activities, is not in any way comparable to a competent authority assessing only the conditions to be attached to a development, when granting development consent, and not the development itself. In that example, the proposed development, rather than the measure regulating the conditions, is the subject of the assessment by the competent authority. Here, the subject of the assessment is the

NAP. The analogy does not follow, and demonstrates the misconception that underlies the Applicant's case."

25. The ICMSA submitted:

"9. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §5 to §83 of the State's submissions.

10. In addition, ICMSA would merely note, and echo, the concern which the State expresses at §77 regarding 'an impossible standard that could never be met'. Much case law inclines against impossible, or impracticable, standards. For example:-

- Hardiman J. stated in Maguire v Ardagh [2002] 1 IR 385 (p.669: 'I do not find appealing a line of argument which sets up a distinction between a universally accepted state of fact in real life and a quite contrary state of law'.
- In An Taisce v An Bord Pleanála [2022] IESC 8, dismissing an appeal by An Taisce from a judgment of Humphreys J. in a case concerning a cheese factory in Kilkenny, Hogan J. stated (§103):

> 'Such an open-ended interpretation of these words leads, however, to conclusions which are not practicable or feasible. In the present case, for instance, it is simply not possible to audit or assess the 4,500 Glanbia farms – which, it may be useful to remind ourselves, are all independently owned and operated …'"

26. My decision is as follows. It is accepted by the opposing parties that this is not *acte clair*. In such circumstances a reference at some stage in the proceedings is all but inevitable so it is very much in the interests of the most expeditious determination of the point that is practicable for such a reference to occur at first instance, and I would propose to proceed in that way. The other criteria for a reference are also satisfied.

27. I should note here that there will be some re-wording of the questions generally for the purposes of the formal order and judgment for reference. In particular it is appropriate to make express reference to the overarching principles of Article 3(3) TEU and/or Article 11 and/or 191(2) TFEU and/or Article 37 of the Charter of Fundamental Rights.

Issue 8(b) – second question – scope of assessment in the absence of farm-level AA

28. Issue 8(b) is:

"(b) If the answer to the foregoing question in general is No, do the provisions referred to have that effect where provisions in the domestic law of the member state concerned for assessment of individual derogations granted consequent on a national action plan under directive 91/676 are not operated in practice in that context so that there is in practice no assessment carried out under directive 92/43 of individual derogations granted consequent on the plan in terms of the effect on European sites of Nitrate-emitting agricultural activities which will be carried out on foot of such derogations?"

29. The applicant submitted:

"Concise summary

Yes. The key issue in the question is the non-application in practice of the law. Where an AA is performed of an NAP which establishes a derogation from the 170 kg N limit, but the Habitats Directive is not in fact applied to individual derogation applications, it is imperative that the AA of the NAP consider the underlying Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan, rather than merely the protective measures the plan positively.

Acte Clair

The Applicant's position is supported by case-law of the CJEU but the Applicant does not go so far as to say it is Acte Clair, in the sense of precluding a reference.

Detailed answer

71. In its judgment on Module II, this Court observed:

> 91. It is of note that the AA process in the WFD context includes the statement that 'It will therefore be vital that any derogations which emerge from the NAP will be subject to AA; which should include a robust assessment of in-combination adverse effects': Natura Impact Statement of draft River Basin Management Plan 2022-2027, p. 45. Not just reasonable or even desirable – 'vital'. Even if time passes, as the ICMSA points out, or if hypothetically some contrary view is articulated by the executive or another expert later in the process or in some other process, there's your scientific doubt right there.
>
> 92. The failure to dispel such doubt by not having in practice a process of derogation-specific AA doesn't mean that the NAP should have assessed every farm impacting on a European site individually. But it does mean that any shortcoming in plan-level AA, if there is any such shortcoming, could be more significant due to the lack of a farm-level safety net.

> 93. Lest anybody misunderstand, that doesn't mean that the AA of the NAP was actually defective. The applicant will have to prove the assumption of the discussion, which will be an agenda item for Module III.

72. The assumption in question was that the effects of the underlying agricultural activities should be considered.

73. In Joined Cases C 105/09 and C 110/09 Terre Wallonne and Inter-Environnement Wallonie the CJEU stated –

> 46 Thus, so far as the purpose of action programmes is concerned, it is apparent from Directive 91/676, in particular the 9th to 11th recitals in the preamble, Articles 1 and 3 to 5 and the annexes, that those programmes involve a global examination, at the level of vulnerable zones, of the environmental issues linked to nitrate pollution from agricultural sources, and that they put in place an organised system designed to provide a general level of protection against such pollution.
>
> 47 The specific nature of those programmes lies in the fact that they embody a comprehensive and coherent approach, providing practical and coordinated arrangements covering vulnerable zones and, where appropriate, the entire territory, for the reduction and prevention of pollution caused by nitrates from agricultural sources.'

74. The applicant submits that the assessment of the agricultural activities in the course of the NAP, which per Terre Wallonne above is supposed to be 'a global examination, at the level of the whole of the national territory, of the environmental issues linked to nitrate pollution from agricultural sources', is the only way to address the absence of a farm-level assessment.

75. The approach of the CJEU to waivers or exemptions from the provisions of the Habitats Directive is instructive in this regard.

76. In Joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation (aka the 'Dutch Nitrogen cases') the CJEU considered a 'programmatic plan' which enabled the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement.

77. The issue is helpfully summarised by Adv-Gen Kokott at §3 – 'The specific point at issue is that nitrogen deposition by individual farms in the Netherlands is not assessed individually in certain protected sites, but is classified in a programmatic integrated plan, which defines the extent to which nitrogen deposition is permitted on the basis of an assessment of each individual protected site. It must be clarified not only whether such an integrated plan is lawful, but also to what extent it is compatible with the protection of sites to take into account measures to reduce nitrogen deposition from other sources, measures to upgrade protected sites and future developments. It must also be examined how fertilising of agricultural land and grazing are to be classified in the system relating to the appropriate assessment of the implications for the site.' At §142 she identified – 'According to the request for a preliminary ruling, the assessment was based on the actual and expected extent and intensity of those activities and its outcome is that on average they would not cause an increase in nitrogen deposition.'

78. At §90 the CJEU explained – 'By the third and fourth questions in Case C-293/17, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows a certain category of projects, in the present case the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement and, accordingly, to an individualised appropriate assessment of its implications for the sites concerned, since that legislation is itself based on an 'appropriate assessment' within the meaning of that provision.'

79. The CJEU concluded §120 – 'Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation, such as that at issue in the main proceedings, which allows a certain category of projects, in the present case the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement and, accordingly, to an individualised appropriate assessment of its implications for the sites concerned, unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites, which it is for the referring court to ascertain'.

80. Such certainty cannot logically be ascertained without assessing the agricultural activities as opposed to the protective measures.

81. The CJEU also addressed whether it was sufficient that, as Adv-Gen Kokott put it at §3 that 'on average an increase in nitrogen deposition can be ruled out.' The CJEU identified 119 ' An average value is not, in principle, capable of ensuring that there are no significant effects on any single protected site as a result of fertilising or grazing, as such effects seem to depend, inter alia, on the extent and, as the case may be, the intensiveness of those activities, the proximity which may exist between the place in which those activities are carried out and the protected site concerned, and specific conditions, for example owing to the interaction of other sources of nitrogen, potentially characterising that site.'

82. See also the discussion of the second question in Case C-294/17 in the answer to 8(a) above. As noted there, the CJEU observed at §103 – 'In circumstances such as those at issue in the main proceedings, where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited.'

83. In this context, the quotes from the NIS at Page 23, Page 24, Page 45, Page 76 (set out on the answer to 8(a) are relevant.

84. Miron and Cashman, 'European Union case law on the Birds and Habitats Directives' (2024) at p.81 observe 'general waivers are likely to contravene Article 6(3)' and in this regard refer to a number of cases where waivers contravened Article 6(3) - Case C 98/03 Commission v Germany; Case C 241/08 Commission v France; Case C 538/09 Commission v Belgium; Case C 661/20 Commission v Slovak Republic.

85. Returning to the analysis of Adv-Gen Kokott in Cases C 105/09 and C 110/09 Terre Wallonne and Inter-Environnement Wallonie, she observed

> 92 It is not evident from the Nitrates Directive, on the other hand, that an action programme pursuant to Article 5 necessarily influences the development consent of projects likely to have significant effects on areas of conservation. The compatibility of a project with an action programme does not provide any indication as to whether it is permissible if it has effects on an area of conservation. That is determined by the Habitats Directive.
>
> 93. Nor does the Habitats Directive indicate that action programmes are important for the development consent of projects relating to areas of conservation. The second sentence of Article 6(3) and Article 6(4) instead contain autonomous criteria for the development consent of plans and programmes, which are not directly connected with the objectives of action programmes.

86. However, where an AA is performed of an NAP which establishes a derogation from the 170 kg N limit, but the Habitats Directive is not in fact applied to individual derogation applications, it is logically imperative that the AA of the NAP consider the underlying Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan, rather than merely the protective measures the plan positively. That is the only way the requisite certainty can be achieved where farm-level derogation assessments are dispensed with."

30. The State submitted:

"I. Summary

84. The provisions referred to do not have that effect, even where in practice there is no assessment carried out of individual derogation decisions under the Habitats Directive.

85. An alleged failure to comply with obligations under the Habitats Directive with respect to a downstream measure will, if established, result in consequences for that downstream measure. However, there is no basis to contend that an upstream measure would be invalidated in those circumstances, or that the obligations arising under the Habitats Directive with respect to an upstream measure would alter on that basis.

86. There is no textual support for that position in the Habitats Directive, and a purposive approach would not support that claim. The purpose of Article 6(3) is to prevent the implementation of measures that will have adverse effects on the integrity of a site. Refusing to authorise the NAP under Article 6(3) would only prevent the authorisation of the NAP. It would have no effect on the underlying agricultural activities and, in particular, would not prevent those activities from continuing. It would serve only to remove the regulation of those activities that currently are in place under the NAP.

II. Acte Clair

87. It is not contended that this is acte clair.

III. Substantive response

88. The logic of the Applicant's case is that if it is established that downstream measures are not in practice subjected to assessment for the purposes of the Habitats Directive when they should be, an upstream measure that regulates that downstream measure will be

invalidated, and/or the assessment requirements under Article 6(3) of the Habitats Directive for that upstream measure will alter.

89. There is no basis for that contention. It is comparable to arguing that if it were determined that a planning authority was not conducting AA screening or AA on a particular category of development that should have been subject to such assessment, it would serve to invalidate upstream programmatic measures regulating that category of development, and/or fundamentally alter the requirements of conducting an AA of those measures.

90. That consequence clearly would not follow. A failure to carry out AA with respect to a project, or category of projects, that requires AA will have implications at project level. However, there is no basis to contend that it could alter the assessment obligations that arise with respect to an upstream plan, still less invalidate that plan.

91. There is no textual basis for that contention in the Habitats Directive, and a purposive approach would not support that claim. The purpose of Article 6(3) is to prevent the implementation of measures that will have adverse effects on the integrity of a site. Refusing to authorise the NAP under Article 6(3), and/or quashing the NAP, on the basis that in practice there is no farm level assessment of agricultural activities in Ireland, would only prevent the authorisation of the NAP. It would have no effect on the relevant agricultural activities, and in particular it would not invalidate those activities or prevent them from continuing. It would serve only to remove the regulation of those activities that is currently in place under the NAP, and thus reduce rather than enhance environmental protection.

92. Thus the fact that appropriate assessment is not in practice being carried out with respect to derogation decisions cannot of itself invalidate the NAP, or alter the requirements for the AA of the NAP."

31. The ICMSA submitted:

"11. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §84 to §92."

32. My decision is as follows. Again the logic of the acceptance by all parties that the point is not *acte clair* is that a reference is potentially appropriate. As with the other questions, I think that the other criteria area also satisfied.

Issue 37(a)(i) – third question – interaction between assessments

33. Issue 37(a)(i) is:

"37. (a) (i)
Do
(I) art. 6(3) of directive 92/43 and/or
(II) art. 3(1) and/or 5(1) and/or 11(2) of directive 2001/42
have the effect that
assessment of a plan or programme that is subject to those articles and that is capable of having environmental effects on a water body must include assessment by reference to art. 4 of directive 2000/60 either alone or together with other binding measures adopted by the member state are sufficiently rigorous to ensure that the plan or programme will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by directive 2000/60,
and if so,
do those provisions or either of them require such an assessment to state in express and/or clearly ascertainable terms whether the relevant environmental objectives of directive 2000/60 will be met following adoption of the plan or programme;
either generally or in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of directive 2000/60 and in particular a nitrates action programme under art. 5 of directive 91/676 (as referred to in Annex VI part A para (ix) of directive 2000/60 as referenced in art. 11(3)(a) of that directive)?"

34. The applicant submitted:

"Applicant's Summary Answer
There is an obligation to conduct the assessment identified in the Court's question and to refuse a proposed development unless the assessment is conducted and the requisite degree of certainty (no change in status and no deterioration) is substantiated. That conclusion must be expressly stated.
Acte clair
The general principles in Bund Naturschutz have been consistently re-iterated but the Applicant does not go so far as to say it is Acte Clair, in the sense of precluding a reference.
Detailed answer
As identified in the first part of the Court's first question there is already such an obligation pursuant to Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik

Deutschland (C-461/13)(§51) 'Article 4(1)(a)(i) to (iii) of Directive 2000/60 must be interpreted as meaning that the Member States are required—unless a derogation is granted—to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.' That necessarily means that Member States must also refuse to adopt a plan if the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are insufficient to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status.

87. Although the Applicant accepts that the Court of Justice has given judgement on this issues comparatively rarely it has consistently reiterated this obligation. In IL v Land Nord-Rhein Westfallen Case 535/18 the Court of Justice held (§§74-76):

> 'Article 4 of Directive 2000/60 not only contains more long-term planning requirements provided for by management plans and programmes of measures, but also concerns specific projects to which the prohibition of deterioration of the status of bodies of water also applies. A Member State is consequently required to refuse authorisation for a project where it is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of 'good status' for bodies of surface water or groundwater, subject to the derogations also provided for in Article 4 (see, to that effect, judgment of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland, C 461/13, EU:C:2015:433, paragraphs 47, 48 and 50).
>
> More specifically, as the Court has held, when a project is liable to have adverse effects on water, consent may be given to it only if the conditions set out in Article 4(7)(a) to (d) of that directive are satisfied. Without prejudice to the possibility of judicial review, the national authorities which are competent to authorise a project are required to review whether those conditions are satisfied before the grant of such an authorisation (see, to that effect, judgment of 1 June 2017, Folk, C 529/15, EU:C:2017:419, paragraphs 36 and 39).
>
> It follows from the foregoing that, during the procedure for approval of a project, and therefore before the decision is taken, the competent authorities are required, under Article 4 of Directive 2000/60, to check whether that project may have adverse effects on water which would be contrary to the requirements to prevent deterioration and to improve the status of bodies of surface water and groundwater. That provision therefore precludes such a check from taking place only after that time.'

88. The Applicant emphasises both the requirements to prevent deterioration and the necessity that the required level of certainty be established prior to the grant of the development consent. The Court continued (§§80-82):

> 'The information that the developer must, in any event, provide to the decision-making authority includes, in accordance with Article 5(3)(b) and (c) of Directive 2011/92, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects and the data required to identify and assess the main effects which the project is likely to have on the environment.
>
> Therefore, in the light of Article 3(b) of Directive 2011/92 and in view of the mandatory nature of the check to be carried out pursuant to Directive 2000/60, recalled in paragraphs 74 to 76 of the present judgment, and in view of the importance which that directive attaches to the protection of waters, it must be held that the information referred to in Article 5(3)(b) and (c) of Directive 2011/92 must contain the data that are necessary in order to assess the effects of a project on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, inter alia, Article 4(1) of Directive 2000/60.

89. Finally, in relation to the second part of the Court's question the Court noted (§86) the necessity to have full information in relation to potential impacts available for the purposes of public participation:

> 'Therefore, the documents in the file that are made available to the relevant public must make it possible for that public to obtain an accurate impression of the impact that the project at issue will have on the status of the bodies of water concerned in order for it to be able to verify compliance with the obligations arising from, inter alia, Article 4 of Directive 2000/60. In particular, the data provided must be such as to show whether, having regard to the criteria established by that directive, the project at issue is liable to result in a deterioration of a body of water.'

90. That is, it is respectfully submitted, an answer to the final part of the Court's question – it must be possible to understand from the data provided that the relevant environmental objectives in the WFD will be met.

91. All of this, it is respectfully submitted makes very clear the necessity to refuse permission for any project in respect of which there is any uncertainty in respect of the possibility that a proposed plan or programme may cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive for the purposes of part (ii) of the Court's question. The necessity to adopt a precautionary approach was reiterated in Sweetman v An Bord Pleanala Case 301/22 where the Court repeated Bund Naturschutz and held that even if a water body potentially affected by a grant of development consent was not a water body within the ambit of Article 4 if it was hydrologically linked to another water body that did fall within the ambit of the Directive then the same principle applied (§59):

> 'In that context, it should be recalled in particular that, in accordance with Article 4(8) of Directive 2000/60 as regards the application of, inter alia, Article 4(7) thereof, a Member State is to ensure that the application does not permanently exclude or compromise the achievement of the objectives of that directive in other bodies of water within the same river basin district and is consistent with the implementation of other EU environmental legislation.'

92. The Court's conclusion is contained at §69:

> 'In the light of all of the foregoing, the answer to the third question is that Article 4(1)(a) and Article 11 of Directive 2000/60 must be interpreted as requiring a competent authority – when it decides on an application for development consent for a project which potentially affects a lake in respect of which, because its surface area is below 0.5 km², neither its type-specific reference conditions, nor a programme for the monitoring of water status has been established pursuant to the first indent of Article 5(1) and Article 8 of Directive 2000/60, read in conjunction with Annexes II and V to that directive respectively – to satisfy itself, first, that the achievement of such a project is not liable to cause, on account of its effects on such a lake, a deterioration of the status of another surface water body which has been or ought to have been identified by that Member State as constituting a surface water body 'type', nor is it liable to compromise the attainment of good surface water status or of good ecological potential and good chemical status of such other surface water body and, second, that the achievement of that project is compatible with the measures implemented pursuant to the programme established, in accordance with Article 11 of that directive, for the river basin district concerned.'

93. In other words the obligation on the consent authority is to ensure that development consent is refused if the proposed development 'is liable to compromise the attainment of good water status, or of good ecological potential' and that the project is 'compatible with the measures implement pursuant to the programme of measures'.

94. All of this is in turn consistent with the precautionary approach adopted by Hyland J. in Sweetman v An Bord Pleanala 2021 IEHC 16. Although the principle at issue – whether non-classification of water bodies precluded an assessment for the purposes of the WFD - in that case is not directly engaged by the Court's question, the approach is the same. A Member State is required to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status. That conclusion must be expressly stated, to establish (a) that the assessment has been done and (b) to enable the public (and if necessary the courts) to understand the reasons for the conclusion and assess their adequacy."

35. The State submitted:

"I. Summary

93. Neither Article 6(3) of the Habitats Directive, nor Articles 3(1) and/or 5(1) and/or 11(2) of the SEA Directive require that, as part of the assessment of a Plan for the purposes of those provisions, there is an additional assessment under Article 4(1) of the WFD. The Applicant has identified no authority for that proposition.

94. Moreover, there is no obligation to assess the NAP under Article 4(1) of the WFD, separate to the assessment of the Programme of Measures under Article 11 of the WFD, under the principle established in Weser. The CJEU has never held that the Weser obligation applies to plans or programmes. Even if it did, it could never apply to the assessment of one part of the programme of measures adopted under Article 11.

95. Even if those provisions did require an assessment under Article 4(1), that assessment would be limited to whether the positive measures to be implemented under the NAP caused a deterioration in a body of water. There could be no requirement for an assessment as to whether the NAP is sufficiently rigorous, either alone or together with other binding measures, to ensure that there would be no deterioration of any water body in the State.

96. Strictly without prejudice to the foregoing, if any such obligation arose, a measure could not be invalidated by reason of a failure to state in express and/or clearly ascertainable terms whether the objectives of the WFD will be met, once the necessary assessment was completed in substance.

II. Acte Clair

97. It is not contended that this is acte clair.

III. Substantive response

No obligation under Article 6(3) of the Habitats Directive and/or Article 3(1) of the SEA Directive

98. There is no basis for the contention that either Article 6(3) of the Habitats Directive or Article 3(1) of the SEA Directive require, in addition to an assessment satisfying the obligations arising under those sections, an assessment as to whether a plan is sufficiently rigorous to achieve the aims of the WFD, under Article 4(1) of the WFD.

99. Article 6(3) of the Habitats Directive relates to adverse effects on protected sites. It is not concerned with achieving the aims of the WFD, and it does not require Member States to put in place protective measures sufficient to achieve that aim.

100. The SEA Directive introduces procedural obligations only. There is no basis to suggest that it imposes an obligation to assess whether a plan is sufficiently ambitious to meet the objectives of the WFD, or that authorisation for a plan must be refused where it does not carry out that assessment. Such an obligation would be entirely contrary to the procedural nature of the obligations arising under the SEA Directive.

101. The Applicant has identified no basis on which such an obligation, which is stated nowhere in the Directives, could be implied. Moreover, the Applicant does not assert, in its submission responding to this question, that such an obligation in fact arises under either Article 6(3) of the Habitats Directive or Article 3(1) of the SEA Directive. Rather, the Applicant relies in response to this question wholly on the Weser obligation, and does not address the first part of the question at all.

102. The contention that Article 6(3) of the Habitats Directive or Article 3(1) of the SEA Directive require an assessment as to whether a plan is sufficiently rigorous to achieve the aims of the WFD under Article 4(1) of the WFD should be rejected.

The Weser obligation does not apply to the NAP

103. The Applicant now appears to rely, when contending that such an assessment was required, solely on the obligation under Article 4(1) of the WFD with respect to individual projects, recognised by the CJEU in Weser.

104. There is no dispute with respect to the existence of that obligation in the context of individual projects. What requires to be determined is whether that obligation extends: (i) to plans and programmes, and (ii) if so, to measures that are part of the programme of measures adopted under Article 11 of the WFD, and in particular the NAP.

105. The Applicant does not address those questions in its submissions on this issue. Instead, the Applicant proceeds to apply the Weser obligation as if the NAP were a project. The Applicant concludes its submissions by stating that a consenting authority must 'ensure that development consent is refused if the proposed development 'is liable to compromise the attainment of good water status, or of good ecological potential'' and that a Member State 'is required to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water…'

106. This does not answer the issues raised in the Court's question. The Respondents' position on those issues is set out below.

107. With respect to the application of the Weser obligation to plans and programmes, the Respondents note that when formulating, and re-stating, the Weser obligation, the CJEU has consistently referred expressly to that obligation arising for an 'individual project', often in juxtaposition to the programmatic measures to be adopted under Article 11. The CJEU has never applied that principle to a plan, although it is accepted that the issue has not arisen directly for determination.

108. It is respectfully submitted, however, that the Court need not decide that broader issue now, where irrespective of how that issue is resolved with respect to plans generally, it is clear that the Weser obligation could never apply to a measure that forms part of the Programme of Measures, and thus to the NAP, for the following reasons.

109. First, the Applicant's argument assumes that Article 4(1) WFD requires an assessment of the sufficiency of individual protective measures adopted as part of the programme of measures to meet the objectives of Article 4(1), on the adoption of those individual measures, in addition to the global assessment of the sufficiency of those measures to meet those objectives that is required under Article 11 WFD.

110. This is entirely contrary to the framework established by the WFD, and has no textual support in the Directive. This is the case irrespective of whether the obligation is to establish that the individual measure itself meets the objectives of Article 4(1), or to establish that it does so together with other binding measures adopted by the Member State.

111. In that respect, Article 4(1) WFD and Article 11 WFD have clear and distinct functions under the WFD.

112. Article 4(1) WFD sets out the objectives of the WFD that must be met by Member States. It is entitled 'Environmental objectives', and it provides: 'In making operational the programmes of measures specified in the river basin management plans' Member States 'shall … implement the necessary measures to prevent deterioration of the status of' water bodies.

113. However, while Article 4 WFD sets out the objectives to be achieved by the programme of measures, and requires that Member State ensure that those objectives are achieved, it does not determine the protective measures that Member States are required to put in place, or address how the sufficiency of those measures to meet the objectives of Article 4 WFD is to be assessed, or how the programme of measures should be monitored, and supplemented where necessary, to ensure those objectives are achieved.

114. Rather, those matters are addressed under Article 11 WFD, and are based on a global assessment of the sufficiency of the programme of measures, rather than an individual assessment of each measure that form part of that programme on its adoption.

115. In that respect, Article 11(1) requires Member States to put in place a programme of measures, in order to achieve the objectives of the WFD established in Article 4:

> '1. Each Member State shall ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4. …'

116. Article 11(2) provides that Member States are required to include specified 'basic' measures in the programme of measures, and may also be required to include 'supplementary' measures, if those supplementary measures are necessary to achieve the objectives of the WFD established in Article 4.

117. Article 11(3) sets out the eleven basic measures that Member States are in all cases required to include in the programme of measures. The first of those basic measures is: 'those measures required to implement Community legislation for the protection of water, including measures required under the legislation specified in Article 10 and in part A of Annex VI'.

118. The Nitrates Directive is referenced in both Article 10 WFD and part A of Annex VI WFD. The State is therefore required by Article 11(2) and 11(3) WFD to include the NAP, being the 'measure required' under the Nitrates Directive, in the programme of measures. However, the NAP is only one part of the eleven basic measures, required to be put in place to meet the Article 4(1) objectives.

119. Article 11(4) provides for supplementary measures, that may be required to meet the objectives of Article 4(1), in addition to the basic measures. Part B of Annex VI sets out a broad range of supplementary measures that Member States may choose to adopt as part of the programme of measures required under Article 11(4). Where supplementary measures are required to meet the objectives of Article 4(1), Member States must include them in the programme of measures.

120. Article 11(5) then addresses the obligations on Member States where it appears that the objectives of Article 4 will not be met with respect to any body of water:

> '5. Where monitoring or other data indicate that the objectives set under Article 4 for the body of water are unlikely to be achieved, the Member State shall ensure that:
> - the causes of the possible failure are investigated,
> - relevant permits and authorisations are examined and reviewed as appropriate,
> - the monitoring programmes are reviewed and adjusted as appropriate, and
> - additional measures as may be necessary in order to achieve those objectives are established, including, as appropriate, the establishment of stricter environmental quality standards following the procedures laid down in Annex V.

> Where those causes are the result of circumstances of natural cause or force majeure which are exceptional and could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, the Member State may determine that additional measures are not practicable, subject to Article 4(6)'.

121. It is clear that this procedure under Article 11(5) is intended to include a global assessment, of all causes of the possible failure, with a reassessment and review of: (i) any relevant permits and authorisations, (ii) the monitoring programme, and (iii) all relevant aspects of the programme of measures in place. If supplemental measures, over and above the measures already in place, are required, they must be implemented.

122. Thus Article 4 and Article 11 when read together make clear that the WFD does not require any separate assessment process to determine whether each individual protective measure is sufficient to meet the Article 4(1) objectives, either alone or in combination with other binding measures adopted; that assessment is carried out under Article 11 at a programmatic level, having regard to the suite of measures globally.

123. There is therefore no basis for an assumption that two obligations arise under the WFD with respect to the assessment of the sufficiency of protective measures – one in Article 11 and one in Article 4.

124. Moreover, the proposed second obligation would not be reconcilable with the Scheme established by the WFD.

125. Insofar as concerns the obligation initially proposed by the Applicant, whereby the NAP could not be adopted unless it were established with scientific certainty, following a separate assessment under Article 4(1), that it alone would prevent the deterioration of the status of any water body in Ireland, that contention is entirely incoherent with the framework established by the WFD, and significantly exceeds any obligation on the State under the WFD.

126. The Applicant has sought to develop its argument to avoid that difficulty, by arguing that the State could have regard to other measures when carrying out the assessment of the NAP under Article 4(1), and carry out a cumulative assessment, on the adoption of the NAP, to determine if the Programme of Measures cumulatively will satisfy the objectives of Article 4(1).

127. However, this is again misconceived, and ignores that the relevant obligation to ensure the global sufficiency of measures to meet the objectives of the WFD is already expressly addressed, in Article 11 of the WFD. The Applicant in effect argues that an assessment under Article 11 of the sufficiency of the measures in place must take place every time any individual basic measure is adopted as part of the programme of measures.

128. The consequence of the Applicant's argument would be that the Programme of Measures would undergo multiple assessments, on every occasion a measure is adopted. If it emerged that the Programme of Measures was no longer sufficient, the proposed measure could not be adopted. It bears emphasising that refusing to adopt the measure at issue might be entirely unnecessary, and inappropriate, should the basis on which the Programme of Measures was no longer sufficient relate to a matter covered by a different measure. This would result in a lowering of environmental protection.

129. In contrast, the system that is in place under Article 11 allows for ongoing monitoring of the adequacy of the Programme of Measures, and the remedying of any inadequacy identified, without requiring protective measures required as part of the programme of measures to be refused, and without prejudicing environmental protection.

130. Thus, not only would the introduction of the obligation contended for by the Applicant result in a duplication of assessment, but the additional assessment contended for would be less beneficial environmentally, and would in fact interfere with the system established by the WFD.

131. It is notable, in that respect, that the CJEU in Sweetman, at §§52-53, placed significant emphasis on the fact that the Directive establishes 'a complex process involving a number of extensively regulated stages, for the purpose of enabling the Member States to implement the necessary measures…' and made clear that the Directive should not be interpreted in a manner incompatible with that Scheme.

132. Moreover, the test that the CJEU held must be applied in Sweetman is worth noting:

> '61 It will be for the referring court to ascertain whether those other lakes or, as the case may be, a stretch of coastal water have been or ought to have been identified by Ireland as constituting surface water body 'types' and, if so, whether the achievement of the project at issue in the main proceedings may affect the status of those surface water bodies or, as the case may be, of another surface water body which has been or ought to have been identified as being a surface water body 'type'.

> 62 Furthermore, it will be for the referring court to ascertain whether the achievement of the project at issue in the main proceedings is compatible with the measures implemented pursuant to the programme established, in accordance with Article 11 of Directive 2000/60, for the river basin district concerned.

133. It is illogical to contend that a measure adopted under the Programme of Measures requires to be assessed to determine if it is 'compatible with the measures implemented pursuant to the programme established in accordance with Article 11 of Directive 2000/60.'

134. In the circumstances, the Applicant has therefore identified no dicta in Weser or any other case that would justify implying – from the obligation to assess the potential harmful effects of individual projects with respect to which the WFD is silent – an obligation of assessment of the sufficiency of individual protective measures adopted as part of the programme of measures, with respect to which the WFD sets out a clear and detailed framework. On the contrary, such an obligation would be irreconcilable with the scheme in fact put in place.

135. It is clear, having regard to the foregoing, that the purported obligation under Article 4(1) of the WFD relied on by the Applicant does not arise. The claim pleaded by the Applicant in that respect should be rejected.

No obligation to assess whether NAP is sufficiently rigorous

136. Moreover, for the reasons set out in response to Question 8, even if any obligation did arise to assess the NAP under Article 4(1) by reason of the Weser obligation, all that would be required would be an assessment of whether the positive measures put in place by the NAP might cause a deterioration in the status of a water body.

No requirement for express statement

137. Finally, in relation to the last part of the Court's question, the Applicant cites the following dicta in C-535/18 Land Nordrhein-Westfalen EU:C:2020:391, §86:

> 'Therefore, the documents in the file that are made available to the relevant public must make it possible for that public to obtain an accurate impression of the impact that the project at issue will have on the status of the bodies of water concerned in order for it to be able to verify compliance with the obligations arising from, inter alia, Article 4 of Directive 2000/60. In particular, the data provided must be such as to show whether, having regard to the criteria established by that directive, the project at issue is liable to result in a deterioration of a body of water.'

138. The Applicant then concludes that this is 'an answer to the final part of the Court's question – it must be possible to understand from the data provided that the relevant environmental objectives in the WFD will be met'.

139. However, that does not address the Court's question, as to whether Article 6(3) of the Habitats Directive or Article 3(1) of the SEA Directive 'require such an assessment to state in express and/or clearly ascertainable terms whether the relevant environmental objectives of directive 2000/60 will be met following adoption of the plan or programme'.

140. The dicta relied on in IL does not address whether an express statement in that respect is required. Rather, it refers only to what the data provided must show.

141. It is well established that the requirements of the Habitats Directive and the SEA Directive should not be applied with undue formalism. The relevant principles in that respect were recently restated by the Court of Appeal in Friends of the Irish Environment v Government of Ireland [2021] IECA 317, as follows:

> '114. Excessive formalism in the context of the Habitats Directive is inconsistent with the spirit and purpose of EU environmental law. In the context of the EIA Directive, in Case C-128/09 Boxus v. Région wallonne, Advocate General Sharpston stated that:-
>
> '… [t]he EIA Directive is not about formalism. It is concerned with providing effective EIAs for all major projects; and, in its amended form, with ensuring adequate public participation in the decision-making process.'
>
> 115. In Cases C-43/18 CFE SA v. Région de Bruxelles-Capitale and C-321/18 Terre wallone ASBL v. Région wallonne, Advocate General Kokott was of the view that designation of European sites ought to have been the subject of an Environmental Assessment under the SEA Directive but nonetheless held, at para. 104 that:-
>
> '…it will have to be examined in any case whether or not the requirements of the SEA Directive were nevertheless complied with…'.
>
> 116. She had regard to the purpose of the SEA Directive and emphasised that what was important was examining the substance of what was done, rather than quashing decisions on the basis of formulistic non-compliance with any EU environmental assessment requirement.

117. The rejection of formulism has been followed in the High Court. In Ó'Gríanna v. An Bord Pleanála (No. 2) [2017] IEHC 7, McGovern J. stated:-
'I entirely agree with the opinion of Advocate General Sharpston in Antoine Boxus and Ors. v. Région wallonne where she stated that the E.I.A. Directive is not about formalism but is concerned with providing effective E.I.A.s for all major projects and with ensuring adequate public participation in the decision making process. 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.'
118. In Kelly v. An Bord Pleanála [2019] IEHC 84, Barniville J. agreed with the dicta of McGovern J. rejecting 'an excessive degree of formalism' in favour of looking at the substance of an AA Screening Report and the details of the Inspector's Report. I accept that the approach of the High Court to the EIA Directive and the Habitats Directive was correct and I adopt it here."

142. It is respectfully submitted that this principle applies here. Once the substance of the obligation (if any such obligation arose, which is denied) was complied with, the lack of a statement in express and/or clearly ascertainable terms to that effect should not invalidate the NAP."

36. The ICMSA submitted:
"12. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §93 to §142."

37. My decision is that the previous points apply. The parties agree this is not *acte clair*, and the other criteria for a reference as also satisfied.

Issue 37(a)(ii) – fourth question – requirements of water framework directive in the context of adoption of a plan

38. Issue 37(a)(ii) is:
"(ii) If:
(A) the answer to issue [37](a)(i) is such that that assessment of a plan or programme that is subject to art. 6(3) of directive 92/43 and/or art. 3(1) of directive 2001/42 and that is capable of having environmental effects on a water body must include assessment by reference to art. 4 of directive 2000/60 and
(B) the answer to issue 8 is such that assessment for the purposes of directive 2001/42 in terms of compliance with directive 2000/60 is required to include an assessment of the effects on the environment of the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan and/or in particular the omission of more rigorous provisions in a plan,
does art. 4(1) of directive 2000/60
(and specifically the principle that Member States are required, unless a derogation is granted, to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive – as laid down in the judgment of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland, C-461/13, ECLI:EU:C:2015:433)
have the effect that
(I) member states must also refuse to adopt a plan if the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by directive 2000/60,
(II) either generally or in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of directive 2000/60 and in particular a nitrates action programme under art. 5 of directive 91/676 (as referred to in Annex VI part A para (ix) of directive 2000/60 as referenced in art. 11(3)(a) of that directive)?"

39. The applicant submitted:
"(I)
Applicant's Summary Answer
There is an obligation to refuse to adopt a plan if the particular protective measures are not sufficiently robust.
Acte clair
This is not acte clair.

Detailed answer

95. There is no basis in Article 4 or 11 to bifurcate a plan that results in nitrates emitting activities and the protective measures designed to ameliorate the environmental effects of those activities. Unless the particular protections are sufficiently rigorous to ensure that the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan will not cause a deterioration of the status of a body of surface water then permission for that plan must be refused. The obligation on Member States in Article 4(1)(a)(i) is a mandatory one ('shall') to implement the necessary measures to prevent deterioration of all bodies of surface water and there is no basis to read the WFD as permitting a position where because the nitrates emitting activities and the protective measures have been administratively sub-divided that the test to be applied in relation to the latter is any less rigorous than that identified in Bund Naturschutz and or that the underlying activities can be permitted in the absence of protective measures that discharge the Article 4 obligation.

(II)

Applicant's Summary Answer:

There is an obligation to refuse to adopt a plan if the particular protective measures are not sufficiently robust.

Acte clair

This is not acte clair.

Detailed answer

96. The Applicant repeats the answer above. It is important to re-emphasis the functional inter-relationship between the derogation and the Nitrates Action Programme. The latter exists in order to justify the former. As is made express in the Commission decision granting the derogation, it is the NAP that justifies the exceptional grant of the derogation, which permits derogation farms to stock to 250 kilograms of organic manure per hectare whereas the default rule is 170 kilograms. Ireland is now the only Member State with a Derogation as Denmark, like Ireland, has failed to reduce the discharge of nutrients into water bodies and has correctly not sought to extend its Derogation past its expiry in July 2024. Unless the NAP, as a basic measure as defined by art. 11(3) of directive 2000/60 and in particular a nitrates action programme under art. 5 of directive 91/676 (as referred to in Annex VI part A para (ix) of directive 2000/60 as referenced in art. 11(3)(a) of that directive), can discharge the Article 4 obligation then the Member State must also refuse to adopt the underlying plan."

40. The State submitted:

"I. Summary

143. There is no such obligation, for all of the reasons already set out in response to Question 8 and Question 37.

II. Acte Clair

144. The Respondents do not assert that this is acte clair.

III. Substantive response

145. This question has already been answered in the context of Question 8 and Question 37(i). The Respondents rely on the responses to those questions with respect to Question 37(ii) also."

41. The ICMSA submitted:

"13. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §143 to §145."

42. My decision is as follows. The previous points apply here. It is agreed by the parties that this is not *acte clair*. As with other questions, in a case such as this, a reference is therefore inevitable at some stage so it is quicker all round if it takes place at first instance. The other criteria are satisfied.

Issue 37(a)(iii) – fifth question – requirements of water framework in context of plan adoption in the absence of farm-level AA

43. Issue 37(a)(iii) is:

"(iii) If the answer to question (i) and/or (ii) in general is No, do the provisions referred to have the effect referred to where provisions in the domestic law of the member state concerned for assessment of individual derogations granted consequent on a national action plan under directive 91/676 are not operated in practice in that context so that there is in practice no assessment carried out under directive 92/43 (whether by reference to art. 4 of directive 2000/60 or otherwise) of individual derogations granted consequent on the plan in terms of the effect on water bodies in the member state of Nitrate-emitting agricultural activities which will be carried out on foot of such derogations?"

44. The applicant submitted:

"Applicant's Summary Answer
Yes.
Acte clair
This is not acte clair
Detailed answer
97. If farm level permitting or assessments are not undertaken in order to assess at farm level the potential impacts of the nitrates emitting activities that will result as a consequence of individual derogations, the certainty required for the purposes of Article 4 WFD must be found in the assessments of the NAP itself. that is the only way in which the requirements of Article 4 WFD can be achieved if the effects of individual derogations are not assessed at farm level. The Applicant relies on the case-law identified in the answer to question 8(b)."

45. The State submitted:
"I. Summary
146. No, for the same reasons as detailed in response to Question 8(b).
II. Acte Clair
147. It is accepted that this is not acte clair.
III. Substantive response
148. The Respondents' position is that the answer to this question must be no, for the same reasons that the answer to Question 8(b) is no."

46. The ICMSA submitted:
"14. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §146 to §148."

47. My decision is that the same situation applies as with the previous question.

Issue 46(a) – sixth question – requirement to assign reference conditions to water bodies (to be re-worded)

48. Issue 46(a) is:
"46. (a) Does art. 4 of directive 2000/60 have the effect that a plan or programme (in particular an NAP) with the potential to affect the status of any relevant water body cannot be adopted by the competent authority of a Member State unless:
(i) all water bodies potentially affected with a surface area of 0.5 km^2 or more have been assigned type-specific reference conditions or by the obligation to establish programmes for the monitoring of water status, because in the absence of that it cannot be ascertained as to whether a deterioration in such status would be caused by the activities the subject of provisions contained in the plan; and/or
(ii) the competent authority is required to satisfy itself,
(I) first, that the adoption of the plan or programme is not liable to cause a deterioration of the status of any surface water body which has been or ought to have been identified by that Member State as constituting a surface water body 'type', nor is it liable to compromise the attainment of good surface water status or of good ecological potential and good chemical status of such a surface water body and,
(II) second, that the adoption of the plan or programme is compatible with the measures implemented pursuant to the programme under directive 2000/60 established, in accordance with Article 11 of that directive, for the river basin district concerned?"

49. The applicant submitted:
"(i)
Applicant's Summary Answer
For the reasons identified by Hyland J. in Sweetman. outside of the de minimis exclusions, there is such an obligation to assess the potential impacts on all water bodies; however, based on the decision of the Court of Justice in Sweetman the answer to this question is unclear. In the Weser case the Advocate General observed §53 'In the present case, it is clear from the documents in the main proceedings that a management plan covering a programme of measures was adopted for the Weser river basin district. Consequently, the Court is not called upon to determine the effects of Article 4(1) of the WFD with regard to a body of water in respect of which the assessment and planning measures required by Article 4 of the WFD have not been adopted.'
Acte clair
This is not acte clair.
Detailed answer
98. The Court of Justice in Sweetman v An Bord Pleanala considered two questions which were included in the judgement in the following terms (§20):

> 'Are Member States required to characterise and subsequently classify all water bodies, irrespective of size, and in particular is there a requirement to characterise and classify all lakes with a topological surface area below 0.5 km2?
> To what extent is the position different with respect to water bodies in a protected area, if at all?
> If the answer to question 1(a) is yes, can a competent authority for the purposes of development consent grant development consent for a project that may affect the water body prior to it being categorised and classified?
> If the answer to question 1(a) is no, what are the obligations on a competent authority when deciding upon an application for development consent that potentially affects a water body not characterised and/or classified?'

99. The CJEU, looking at in particular Annex II and the travaux prepartoire, concluded that there was no obligation on Member States to assess lakes of less than 0.5 sq. km (§33) in order to accord them a status or to establish programme for the monitoring of water status (§41).

100. The obligation to classify does not extend to water bodies that fall outside Article 4 for the reasons identified by the Court of Justice – i.e. that the water body fails to satisfy the minimum catchment length of overall size prescribed in Annex II to the Directive (extracted at §10 of the Court's judgement). However, in respect of water bodies that do satisfy the minimum criteria in Annex II but are not characterised and/or classified, the Court of Justice did not need to answer that question. In the Weser case the Advocate General observed at §53 'In the present case, it is clear from the documents in the main proceedings that a management plan covering a programme of measures was adopted for the Weser river basin district. Consequently, the Court is not called upon to determine the effects of Article 4(1) of the WFD with regard to a body of water in respect of which the assessment and planning measures required by Article 4 of the WFD have not been adopted.'

101. The Applicant therefore respectfully suggests that this is a matter which the Court should refer to the Court of Justice, on Worldport principles in circumstances where this question was deemed to be necessary by Hyland J. and which was not answered by the Court of Justice.

102. In the alternative in the Applicant's respectful submission, outside of the de minimis exclusions in Annex II the Court can conclude that there is such an obligation to assess the potential impacts on all water bodies for the reasons identified by Hyland J. in Sweetman. In that case the Court assessed Weser in detail (§91 onwards). The Court in that case noted that the Inspector had conducted a form of proxy analysis on a waterbody, the status of which was not characterised (§119). She held that this analysis was futile, in the absence of such characterisation (§121), and could not be relied upon in place of the detailed analysis required by the EPA (§127) before concluding:

> '[128] Further, to say that no evidence of deterioration was presented is to misunderstand the scheme of the WFD. The Board, as an emanation of the State, has an obligation under EU law to refuse permission if either a deterioration in status or a jeopardization of the attainment of good water status will occur as required by Article 4(1). Where the status has not been determined, a red light ought to have gone off for the Board, and it ought to have realised that it could not evaluate compliance with the requirements of Article 4 (1) until the EPA assigned the water body a status.
> [129] Moreover, both the Board and the notice party confined their argument to lack of deterioration. But neither addressed the impossibility of the Board confirming that the proposed development would not jeopardise the attainment of good water status, good ecological potential and good surface water chemical status in circumstances where the status of Loch an Mhuilinn had not been evaluated.'

103. The Applicant respectfully agrees with this conclusion and suggests that it applies to these proceedings on the basis of well-known Worldport principles. It is self-evidently impossible to conduct an assessment of the potential impact of the NAP on water bodies which are required to be classified for the purposes of Article 4 but have not been so classified.

104. It is respectfully submitted that nothing in the judgement of the Court of Justice disturbs the approach adopted by Hyland J. If anything the Court's approach bears this out as it clarifies that even when assessing a proposed development which may affect a water body that does not fall within the purview of Article 4(1) there remains an obligation to assess whether that grant of permission is consistent with the programme of measures or will impact a water body which has been classified, or should have been classified. There is nothing in the judgement of the Court of Justice to suggest that Hyland J. was incorrect. On

the contrary, the precautionary approach of the Court of Justice is entirely consistent with the approach adopted by ... Hyland J.

(ii)

Applicant's Summary Answer

For the reasons identified by Hyland J. in Sweetman outside of the de minimis exclusions, there is such an obligation to assess the potential impacts on all water bodies; however, based on the decision of the Court of Justice in Sweetman the answer to this question is unclear.

Acte clair

This is not acte clair.

Detailed answer

105. In the Applicant's respectful submission, outside of the de minimis exclusions in Annex II the Court can conclude that there is such an obligation to assess the potential impacts on all water bodies for the reasons identified by Hyland J. in Sweetman. In that case the Court assessed Weser in detail (§91 onwards). The Court in that case noted that the Inspector had conducted a form of proxy analysis on a waterbody, the status of which was not characterised (§119). She held that this analysis was futile, in the absence of such characterisation (§121), and could not be relied upon in place of the detailed analysis required by the EPA (§127) before concluding:

> '[128] Further, to say that no evidence of deterioration was presented is to misunderstand the scheme of the WFD. The Board, as an emanation of the State, has an obligation under EU law to refuse permission if either a deterioration in status or a jeopardization of the attainment of good water status will occur as required by Article 4(1). Where the status has not been determined, a red light ought to have gone off for the Board, and it ought to have realised that it could not evaluate compliance with the requirements of Article 4 (1) until the EPA assigned the water body a status.
>
> [129] Moreover, both the Board and the notice party confined their argument to lack of deterioration. But neither addressed the impossibility of the Board confirming that the proposed development would not jeopardise the attainment of good water status, good ecological potential and good surface water chemical status in circumstances where the status of Loch an Mhuilinn had not been evaluated.'

106. The Applicant respectfully agrees with this conclusion and suggests that it applies to these proceedings on the basis of well-known Worldport principles. It is self-evidently impossible to conduct an assessment of the potential impact of the NAP on water bodies which are required to be classified for the purposes of Article 4 but have not been so classified.

107. It is respectfully submitted that nothing in the judgement of the Court of Justice disturbs the approach adopted by Hyland J. If anything the Court's approach bears this out as it clarifies that even when assessing a proposed development which may affect a water body that does not fall within the purview of Article 4(1) there remains an obligation to assess whether that grant of permission is consistent with the programme of measures or will impact a water body which has been classified, or should have been classified. There is nothing in the judgement of the Court of Justice to suggest that Hyland J. was incorrect. On the contrary, the precautionary approach of the Court of Justice is entirely consistent with the approach adopted by the Hyland J. and it is respectfully submitted that it is profoundly illogical to require an assessment of not directly affected but hydrologically linked water bodies which do meet the classification threshold for the purposes of WFD but not to require an assessment of the receiving water body itself, irrespective of whether it meets the minimum criteria in Annex II."

50. The State submitted:

"I. Summary

149. The Respondents in respect of Issue 46(a) maintain their position that there is no obligation to assess the compliance of the NAP with Article 4(1) of the WFD, and the contention that the assessment obligation established in Weser and developed in Sweetman applies to the adoption of an action programme under Article 5(1) of the Nitrates Directive is misconceived.

II. Acte Clair

150. The Respondents accept that Issue 46(a) is not acte clair.

III. Substantive submissions

151. The Respondents' position is that Article 4 of the WFD does not have the effect that the NAP cannot be adopted by the Respondents unless Issue 46(a)(i) is complied with and/or the requirements in Issue 46(a)(ii) are satisfied.

152. In the Advocate General's Opinion, in Case C-301/22 Sweetman EU:C:2023:697, Advocate General Rantos stated that the questions referred to the CJEU by the High Court 'follow[s] on from the judgment' in Weser.

153. Accordingly, the Respondents, in respect of Issue 46(a), maintain their position that there is no obligation to assess the compliance of the NAP with Article 4(1) of the WFD and the contention that the assessment obligation established in Weser applies to the adoption of an action programme under Article 5(1) of the Nitrates Directive, which is one of the suite of measures required by the WFD, and the objective of which is to contribute to achieving the obligations under Article 4(1) of the WFD, is misconceived.

154. The Applicant's submission in respect of Issue 46(a) fails to recognise that the NAP requires assessment not as a project, but as a strategic national plan.

155. For the same reason, the Respondents disagree with the Applicant's submission at §102 of its Module III submissions that the Court can conclude that there is an obligation to assess the potential impacts on all water bodies for the reasons identified by Hyland J in Peter Sweetman v an Bord Pleanála, Ireland and The Attorney General [2021] IEHC 16.

156. In the High Court in Sweetman, Hyland J was considering the decision of An Bord Pleanála granting permission to the proposed development on the basis of its failure to comply with the requirements of the WFD."

51. The ICMSA submitted:

"15. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §149 to §156."

52. My decision is that the previous points generally apply here as well, notably the agreement of all parties that this is not *acte clair*.

53. However it has now been established that the relevant water bodies had in fact been assigned a status prior to the adoption of the NAP. The first part of the issue (para. (i)) therefore does not arise and thus a re-worded question for the CJEU omitting that part is appropriate.

54. The applicant's response dated 16th July 2024 to the information that a status had already been assigned pre-NAP included the following:

4. The Applicant does not think that the legal point has been altered by the State's Affidavit, but if necessary to do so, or as required by the Court or the parties, the Applicant will seek to amend its Statement of Grounds to reflect the information now adduced by the State and to alter §43 of the SOG to reflect the fact that the waterbodies were classified when the NAP was adopted but that the State was unaware of it.

55. The applicant also complained about the assignment of status based on modelling, and about the lack of information on monitoring.

56. But particularly when we move beyond the kind of preliminary organising and formatting discussions that can arise at leave stage, and into the zone of hotly contested *inter partes* trench warfare, it's not up to the court to encourage parties to amend their pleadings – they need to make that decision themselves. And they need to do so with particular urgency where the case has already been heard and judgment reserved subject to some modest clarifications. However all is not lost for the applicant because its submissions of 16th July 2024 identify the essential issue as follows:

"3. The crux of the issue is whether the State could have been satisfied that the project would jeopardise the attainment of good status of the water bodies."

57. That issue remains as part of the question despite the inevitable dropping of the first paragraph ((a)(i)) which is premised on the erroneous understanding that the water bodies had not been assigned a status at the material time.

Issue 46(b) – impact of *Sweetman* issue on the facts

58. Issue 46(b) is:

"(b) If the answer to either or both limbs of the foregoing is Yes, does this affect the NAP on the facts here?"

59. The applicant submitted:

"Applicant's Summary Answer

Yes

Acte clair

N/A

Detailed answer

108. There has been no assessment of the water bodies potentially affected by the NAP. The State is precluded from adopting the NAP because it has the potential to affect all, or at the very least a significant number of, waterbodies in the jurisdiction, including all the unclassified water bodies at the time of the adoption or approval of the decision, in the absence of the relevant assessment and indeed where such an assessment was not possible in the absence of classification/characterisation. In the absence of those water bodies being classified prior to the mass designation of unclassified water bodies by the EPA on 22nd April

2022, the State could not have been satisfied that the project will not jeopardise the attainment of good status of these water bodies or cause a deterioration of status of these water bodies. In this regard the Applicant relies on the finding of fact that the NAP has the potential to potentially affect all Natura 2000 sites, which are protected under Article 4(1)(c) of the WFD. The Applicant does not understand that the State is making the argument that the NAP will not impact water bodies that were required to be classified and were not, in fact, so classified at the time of the adoption of the NAP."

60. The State submitted:

"I. Summary

157. The Respondents accept that if the answer to either or both limbs in Issue 46(a) is yes, this would affect the NAP on the facts.

II. Acte Clair

158. The Respondents accept that Issue 46(b) is not acte clair.

III. Substantive submissions

159. The Respondents accept that if the answer to either or both limbs in Issue 46(a) is yes, this would affect the NAP on the facts.

160. However, the Respondents submit that in such a circumstance, the Court would be entitled to decline to grant relief at all or alternatively to decline to make any order that affects the validity of the NAP, in the exercise of the Court's discretion. The Respondents rely on their response to Issue 69 in this regard.

161. Moreover, the Respondents note that in Case C-301/22 Sweetman EU:C:2024:347, Hyland J referred the following to the CJEU (§20(2)):

'If the answer to question 1(a) is yes, can a competent authority for the purposes of development consent grant development consent for a project that may affect the water body prior to it being categorised and classified?'

162. However, the CJEU considered that (§42) there was no need to answer the second question referred, in light of the CJEU's answer to the first question.

163. If this Honourable Court considers it necessary to refer a question to the CJEU concerning Issue 46(a), the Respondents submit that a, suitably modified, similar question to the second question referred by Hyland J in Sweetman would also be appropriate to refer to the CJEU."

61. The ICMSA submitted:

"16. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §157 to §163."

62. My decision is as follows. In its own terms, as a matter of fact, the question doesn't give rise to a controversy between the parties given the State's response since I can find as a fact (in the light of that response) that if the answer to either or both limbs of question 46(a) is Yes, this does affect the NAP on the facts here.

63. Insofar as the State want a further question referred here, I don't see that as adding anything to what was issue 46(a)(i).

64. Re-wording the State's proposed question in terms of plans rather than projects, it would read something like:

"If the answer to either or both limbs of question 46(a) is Yes, can a member state adopt a plan or programme that may affect a water body prior to such water body being categorised and classified for the purposes of directive 2000/60?"

65. But that replicates the previous question:

"(a) Does art. 4 of directive 2000/60 have the effect that a plan or programme (in particular an NAP) with the potential to affect the status of any relevant water body cannot be adopted by the competent authority of a Member State unless:

(i) all water bodies potentially affected with a surface area of 0.5 km2 or more have been assigned type-specific reference conditions ..."

66. In such circumstances I don't think an additional question would have been necessary. But all of that has been superseded anyway by the new information that the relevant water bodies had already been classified. So sub-paragraph (a)(i) falls away in any event and no reference of this specific question arises on any view.

Issue 57 – seventh question – requirement to set out details of monitoring

67. Issue 57 is:

"57. Do art. 5(1) of and Annex I para. (i) to directive 2001/42 have the effect that the environmental report itself must include a description of the measures envisaged concerning monitoring in accordance with art. 10 in sufficient detail to demonstrate that art. 10 will be complied with, including details of:

(i) how this monitoring will occur;

(ii) when it will be done; and/or

(iii) how the monitoring will be used and how any identified unforeseen adverse environmental effects will be addressed?"

68. The applicant submitted:

"Concise Summary

Article 5(1) and Annex 1 paragraph (i) to Directive 2001/42 requires that the environmental report must include a description of the measures envisaged for monitoring under Article 10 in sufficient detail to demonstrate how Article 10 will be complies with. This clear from the wording of the directive, the context and the purpose of SEA. The public is entitled to comment on envisaged monitoring measures and therefore ought to be given sufficient information to verify that they are consistent with Article 10. Furthermore clarity in monitoring serves other purposes such as avoidance of duplication by facilitating reuse of monitoring in other plans or programmes or coordinating SEA monitoring activities into a larger suite of environmental surveillance.

Acte Clair

As far as the Applicant can ascertain, the Court of Justice has not ruled on the interpretation of Article 5(1) and Annex 1 paragraph (i), therefore the issue does not appear to be acte clair. Nonetheless, a similar issue was pleaded before the Supreme Court in Friends of the Irish Environment v Government of Ireland (Supreme Court No 1/2022). The Supreme Court summarised the issue as 'The appellant's argument concerns the absence of detail as to how monitoring will occur, who will do it, when it will be done, and how any identified or unforeseen adverse environmental effects will be addressed.' It held that the issue was one of application of the provisions of the Directive and no interpretative difficulty requires further clarification from the CJEU . The Supreme Court deferred further consideration of the issue until after the Court of Justice gave its decision on other questions referred for a preliminary ruling.

Detailed answer

109. The Commission Guidelines define monitoring as follows:

The Directive does not define the meaning of 'monitor'. Monitoring can, however, be generally described as an activity of following the development of the parameters of concern in magnitude, time and space. In the context of Article 10 and its references to unforeseen adverse effects and remedial action, monitoring may also be a means of verifying the information in the environmental report. Article 10 does not contain any technical requirements about the methods to be used for monitoring. The methods chosen should be those which are available and best fitted in each case to seeing whether the assumptions made in the environmental assessment correspond with the environmental effects which occur when the plan or programme is implemented, and to identifying at an early stage unforeseen adverse effects resulting from the implementation of the plan or programme. It is clear that monitoring is embedded in the context of the environmental assessment and does not require scientific research activities. Also the character (e.g. quantitative or qualitative) and detail of the environmental information necessary for monitoring depend on the character and detail of the plan or programme and its predicted environmental effects

110. There does not appear to be any Irish or Court of Justice case law on Article 10 of the SEA Directive, although the issue of the level of detail is currently pending before the Supreme Court in Friends of the Irish Environment v Government of Ireland .

111. Article 5(1) and Annex I to the SEA Directive sets out the information to be contained in the environmental report (as defined in Article 1). Paragraph (i) lists "a description of the measures envisaged concerning monitoring in accordance with Article 10" as one of the categories of information to be contained in the environmental report.

112. Article 5(2) requires that the environmental report shall include information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan and programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

113. Article 6 requires that the draft plan or programme and the environmental report must be made available to the public and that they be given an early and effective opportunity to comment on the draft plan or programme and the environmental report before its adoption.

114. Clearly the public is entitled to comment on the monitoring envisaged monitoring measures and to offer views on their compatibility with Article 10.

115. Article 9(1) of the SEA Directive specifies the information on the decision which must be made available to the public when a plan or programme is adopted. These are:

a. The plan or programme as adopted

b. a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and

c. the measures decided concerning monitoring in accordance with Article 10

116. Article 9(2) leaves it to the Member States to provide for the detailed arrangements concerning this information.

117. Article 10(1) of the SEA Directive requires that Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action. Article 10(2) gives Member States discretion to use existing monitoring arrangements if appropriate with a view to avoiding duplication.

118. Thus it is clear that the measures envisaged for monitoring in compliance with Article 10 must be set out in the environmental report during the preparation of the plan and programme and the measures decided when a plan or programme is adopted. In the former case the public is entitled to an effective opportunity to comment on the proposed monitoring measures. To be given an effective opportunity to comment, the public must be given sufficient information to verify whether the monitoring measures envisaged are fit for purpose having regard to the requirements of Article 10. It is submitted that this is clear from the wording of the SEA Directive and the fact that envisaged monitoring measures are part of the public consultation process.

119. In the case of the decision, the SEA Directive does not require that the monitoring measures be included in the SEA Statement although this is equally not precluded. It does however require that the public is informed of the monitoring measures at the same time as the adopted plan or programme and SEA Statement are published.

120. It is clear from the language of paragraph (i) that the environmental report must contain a description of the measures envisaged for monitoring in accordance with Article 10. Therefore such a description must be sufficient to demonstrate to the public how the competent authority intends to satisfy the monitoring obligation under Article 10.

121. Article 10 requires that the monitoring of the significant environmental effects of the implementation of the plan in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

122. The purpose of monitoring under Article 10 is more than simply data gathering and comprises a number of elements.

123. First monitoring must be of the significant environmental effects of the implementation of a plan or programme. Therefore as a matter of logic the description of the monitoring must identify what significant environmental effects are likely such that they should be monitored. This would include positive, adverse, foreseen and unforeseen effects

124. Second the purpose of the monitoring must be defined. The SEA Directive requires as a minimum that the monitoring must identify at an early-stage unforeseen adverse effects. The Commission Guidance describes unforeseen adverse effects as "better interpreted as referring to shortcomings of the prognostic statements in the environmental report (e.g. regarding the predicted intensity of an environmental effect) or unforeseen effects resulting from changes of circumstances, which have led to certain assumptions in the environmental assessment being partly or wholly invalidated."

125. However, the scope of Article 10 is not confined to unforeseen adverse effects. The competent authority must therefore also document the specific objectives of the monitoring programme decided upon adoption of the plan or programme. For example, it is conceivable that there may be monitoring of positive effects on the environment, for example in terms of water quality, strictly protected species or European Sites. It may be conceivable that the monitoring of individual plans and programmes forms part of a larger suite of environmental surveillance activities.

126. Third, there is a temporal aspect, at least for the mandatory objective. The monitoring programme must identify unforeseen adverse effects on the environment at an early stage and be able to undertake appropriate remedial action. Therefore the monitoring measures must set out when the monitoring will take place and how it is capable of fulfilling this requirement.

127. In the absence of this level of description neither the competent authority nor the public will know whether the monitoring complies with both the letter and spirit of Article 10. In particular, the fact that details of envisaged monitoring is required to be made

available to the public in the environmental report indicates that the public has a part to play in ensuring that the envisaged monitoring measures are effective.

128. The purpose of making available details of the decided monitoring also serves this purpose and also the purpose of avoiding duplication of monitoring. Therefore, the information to made available under Article 9(1)(c) must be such that another competent authority can confidently rely on the monitoring of a plan or programme for the purposes of using it under Article 10(2) in another plan or programme.

129. For all of the reasons set out above the answer to this question is yes."

69. The State submitted:

"I. Summary

164. The Respondents' position is that Article 5(1) of the SEA Directive does not contain a bright line rule as to the level of detail that is required to be included in an environmental report, which is to be determined on an individual basis, in light of the Respondents' discretion pursuant to Article 5(2) of the SEA Directive to include the information in the environmental report that may reasonably be required.

165. Accordingly, the Respondents disagree with the proposition that Article 5(1) of the SEA Directive requires an environmental report to include a description of the measures envisaged concerning monitoring in accordance with Article 10 of the SEA Directive in sufficient detail to demonstrate that Article 10 of the SEA Directive will be complied with.

II. Acte Clair

166. The Respondents submit that Issue 57 is acte clair.

III. Substantive response

167. The Respondents' position is that Article 5(1) of the SEA Directive does not contain a bright line rule as to the level of detail that is required to be included in an environmental report, which is to be determined on an individual basis.

168. Accordingly, the Respondents disagree with the proposition that Article 5(1) requires an environmental report to include a description of the measures envisaged concerning monitoring in accordance with Article 10 in sufficient detail to demonstrate that Article 10 will be complied with.

169. Article 5(1) of the SEA Directive provides that:

'Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.'

170. Paragraph (i) of Annex I provides that:

'The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

…

a description of the measures envisaged concerning monitoring in accordance with Article 10;' (Emphasis added).

171. The obligation to provide the information in paragraph (i) of Annex I for the purposes of Article 5(1) is expressly 'subject to Article 5(2) and (3)', which qualify the general obligation in Article 5(1) of the SEA Directive.

172. In particular, Article 5(2) of the SEA Directive provides that:

> 'The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.' (Emphasis added).

173. Accordingly, the information to be provided in an environmental report for the purposes of Article 5(1) is not static and is modulated depending on the particular environmental report in question, having regard to what may reasonably be required.

174. The UK Supreme Court in R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52 considered the information which is required to be included in an environmental report pursuant to Article 5(1) and stated that (§59):

> 'an 'environmental report', whether by article 5(1) itself or by that provision in conjunction with Annex I, is qualified by article 5(2) and (3) in a number of respects. First, the obligation is only to include information that 'may reasonably be required', which connotes the making of a judgment by the plan-making authority. Second, that judgment may have regard to a number of matters, including current knowledge and assessment methods. In addition, the contents and level of detail in a plan such

as the ANPS, the stage it has reached in the decision-making process and the ability to draw upon sources of information used in other decision-making, may affect the nature and extent of the information required to be provided in the environmental report for the strategic environmental assessment.' (Emphasis added).

175. The Court continued to state that (§142):

'It is common ground that the effect of article 5(2) and (3) is to confer on the Secretary of State a discretion regarding the information to include in an environmental report.'

176. The Respondents submit that:

(1) the measures envisaged for the monitoring of the NAP that are outlined in Chapter 9 of the SEA Environmental Report and Chapter 6 of the SEA Statement comply fully with the requirements of Article 5(1) of the SEA Directive; and

(2) the Respondents were fully entitled to have regard to the detailed and prescriptive monitoring, as required by the Nitrates Directive and implemented by inter alia Articles 27, 29 and 30 of the GAP Regulations when exercising their discretion regarding the information to include in the SEA Environmental Report.

177. Moreover, the Commission Guidance relied on by the Applicant at §109 of their Module III submissions states that, with respect to Article 5(2)–(3), that (§5.16):

'The reference to 'contents and level of detail in the plan or programme' is a recognition that, in the environmental report for a broad-brush plan or programme, very detailed information and analysis may not be necessary, (for example, a plan or programme at the top of a hierarchy which descends from the general to the particular); whereas much more detail would be expected for a plan or programme that itself contained a higher level of detail. So the environmental report for a national plan might not need to assess the effects of the plan on, say, every river in the country; but the environmental report underpinning a town plan would certainly be expected to address its implications for rivers or other waterbodies in or near the town.'

178. With respect to paragraph (i) of Annex I, the Commission Guidance states that (§5.29):

'According to Article 10 the significant environmental effects of the implementation of the plan or programme shall be monitored and, since these effects are specified in paragraph (f), the report should contain a description of how that monitoring is to be undertaken. The description should refer to existing monitoring arrangements if these are to be used. There is some overlap between paragraph (i) and the requirement in Article 9(1)(c) to make available at the time of adoption information on the 'measures decided concerning monitoring'. It is obvious that no definitive statement about the final monitoring measures can be made when the environmental report is still being prepared, since the content of the plan or programme is not decided, and in any event the content of the environmental report is subject to the criteria laid down in Article 5(2). Likewise, in some circumstances the monitoring arrangements may need to be adapted as implementation of the plan or programme proceeds. There appears to be nothing in the Directive to preclude this in appropriate cases.' (Emphasis added).

179. Accordingly, the Respondents submit that the Commission Guidance relied on by the Applicant, in fact, supports the Respondents' proposed answer to Issue 57."

70. The ICMSA submitted:

"17. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §164 to §179."

71. My decision is as follows. By contrast with other questions, the State contends that this issue is *acte clair*. Unfortunately I don't agree given the absence of material that suggests an unambiguous answer to this particular point. A contestable interpretation of Commission guidance doesn't render the point *acte clair*. A reference appears appropriate here also.

Issue 63(a) – eighth question – scope of SEA assessment

72. Issue 63(a) is:

"63. (a) If the term 'material assets' in para. (f) of annex I of directive 2001/42 excludes the value of such assets and/or in particular in the case of an action plan under directive 91/676 excludes the broad societal impacts of agricultural activities, the impact of the plan or project on the agricultural industry, and on the output and income of farmers, the sustainability of the agricultural industry in the member state concerned, the food supply chain and the employment of a significant portion of the population, does directive 2001/42 have the effect that consideration of such matters is unlawful in assessing the effects of the plan?

[This raises the issue of whether Leth has the effect of precluding the consideration of matters that fall outside the definition of material assets, assuming that applies to SEA]"

73. The applicant submitted:

"Concise Summary

By analogy with the judgment in Case C-420/11, Leth the term 'material assets' in paragraph (f) of Annex I to the SEA Directive excludes the value of material assets and in the case of an action plan under Directive 91/676 excludes other economic or social impacts on the agriculture sector and farmers except in so far as these factor have an impact on the environment. Such an interpretation is not supported by the wording of the Directive and is not consistent with the objective of the Directive.

Acte Clair

To the best of the Applicant's knowledge the Court of Justice has not ruled on the [interpretation] of the term 'material assets' in the SEA Directive but it has ruled in Leth on the same term which is in the EIA Directive.

Detailed answer

130. Paragraph (f) of Annex 1 sets out a non-exhaustive list of the likely significant effects on the environment which must be provided in the environmental report under Article 5. This list includes 'material assets'.

131. The concept 'material assets' is one which makes no express reference to the law of the Member States and is therefore it must be given a uniform and independent interpretation throughout the European Union.

132. There is no specific guidance or case law on the definition of 'material assets' on the SEA Directive. However it is submitted that a uniform definition of 'material assets' between the SEA and EIA Directives should be adopted, in particular that such directives serve complementary and overlapping purposes to ensure a high degree of environmental protection in the EU , and that the SEA and EIA Directives are integrated insofar as plans and programmes which set the framework for future development consent under the EIA Directive must be subject to SEA.

133. In Case C-420/11, Leth the Court of Justice interpreted the concept of 'material assets' under the EIA Directive. It held that under the EIA Directive 'it is necessary to examine, in particular, the effects of a project on the use of material assets by human beings' and in that particular case the impacts on the use of buildings from projects liable to result in increased aircraft noise.

134. The Court ruled that it could not be inferred from the wording of Article 3 of the EIA Directive that the environmental assessment included an assessment of impact of the project on the pecuniary value of material assets. The Court also held that it would not be in accordance with the objectives of that directive.

135. The Court explained, having regard to the purposes of the EIA Directive, it is necessary to take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment and therefore the assessment under the EIA Directive does not include the assessment of the effects which the project under examination has on the value of material assets.

136. It is submitted that by analogy the same definition of material assets must be adopted under the SEA Directive. The purpose of the SEA Directive is also to integrate environmental protection requirements into decision-making. It does this by setting out measures of a procedural nature i.e. provision of information to the public, the carrying out of consultations, taking into account the environmental report and the results of the consultations in decision-making and the provision of information on the decision. The SEA procedure does not dictate the ultimate decision and it is up to the competent authority to weigh up all factors, environmental, economic and social in adopting a plan or programme.

137. Thus the SEA Directive provides an input into the decision-making process and in particular EU law does not envisage it as a procedure which is intended to capture the entire scope of relevant matters to be taken into account, but rather is confined to information on the likely significant effects on the environment. In light of this objective it is important that the SEA procedure is confined to environmental effects only and that the lines are not blurred with further stages of the decision making process where non-environmental considerations are brought to bear.

138. An important aspect of the SEA procedure is the consideration of reasonable alternatives and it is a requirement under Article 5(1) that the environmental report shall include the identification, description and evaluation of the likely significant effects on the environment of implementing the plan or programme and reasonable alternatives. Thus it is critical that only environmental effects are included in the SEA procedure as otherwise economic or social factors could skew the analysis of reasonable alternatives.

139. In addition if economic or social benefits were to be considered under material assets then it would also require the examination of adverse economic and social impacts within the SEA, which is not consistent with what was intended by the Directive which is confined to an examination and assessment of environmental factors only.
140. That is not to say that other factors such as economic factors are not relevant to the decision-making, but rather the SEA procedure is limited to environmental effects. There is no provision in the SEA Directive to take into account non-environmental effects, for example when weighing up reasonable alternatives.
141. Therefore EU law (as interpreted in Leth) does preclude a consideration of impacts on the value of material assets in the SEA procedure as well as specifically a consideration of the broad economic and social impacts of agriculture activities, the impact on the agriculture industry, and on the output and income of famers, the sustainability of the agriculture industry, the food supply chain and the employment of a significant portion of the population insofar as those effects do not have an impact on the environment.
142. The Applicant stresses that such non-environmental matters are not necessarily irrelevant to the decision on the action plan under Directive 91/676 but rather they are irrelevant to the assessment under the SEA Directive.
143. The concept of sustainable development aims to meet the needs of the present without compromising the ability of future to meet their own needs by finding a balance between the environment, the economy and society. The SEA Directive provides procedural rights to integrate environmental considerations into decision-making which necessarily involves three competing considerations. Therefore it would be contrary to the SEA Directive to in effect take economic and social considerations into account other than insofar as these [sic]."

74. The State submitted:

"I. Summary
180. Even if 'material assets' excludes a consideration of 'critical infrastructure essential for the functioning of society' (which is not accepted), the Respondents submit that the taking into account of 'critical infrastructure essential for the functioning of society' is still permissible in an environmental report prepared pursuant to Article 5(1) of the SEA Directive for the following reasons given that Article 5(2) provides that the environmental report prepared pursuant to Article 5(1) shall include the information 'that may reasonably be required…' and that paragraph f of Annex I of the SEA Directive, which refers to 'material assets' is non-exhaustive.
181. The interpretation of 'material assets' in Leth is specific to the EIA Directive and not capable of automatic transposition to an SEA Directive context in light of the fact that environmental assessment at a strategic level is a fundamentally different process from that at a project level.
182. However, in the context of the EIA Directive, the Applicant misapplies Leth by conflating value diminution and economic interests in an attempt to import its interpretation of Leth into the present proceedings by analogy.
183. Even if Leth is applicable in the context of the SEA Directive (which the Respondents maintain that it is not), it would be supportive of the Respondents' case in any event.
II. Acte Clair
184. The Respondents accept that this is not acte clair.
III. Substantive submissions
185. Even if 'material assets' excludes a consideration of 'critical infrastructure essential for the functioning of society' (which is not accepted), the Respondents submit that the taking into account of 'critical infrastructure essential for the functioning of society' is still permissible in an environmental report prepared pursuant to Article 5(1) of the SEA Directive for the following reasons:
(1) Article 5(2) provides that the environmental report prepared pursuant to Article 5(1) shall include the information 'that may reasonably be required…'; and
(2) Paragraph f of Annex I is non-exhaustive and states that:
'Information referred to in Article 5(1)
The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:
…
'the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;'

186. In responding to the Applicant's submissions, the Respondents make the following points.
187. First, the Applicant's position is that 'material assets' must have a uniform interpretation across all EU laws, which is not correct.
188. By virtue of this assertion, the Applicant seeks to import its interpretation of Case C-420/11 Jutta Leth v Republik Österreich, Land Niederösterreich EU:C:2013:166 ('Leth') into the present proceedings by analogy.
189. In this regard, Counsel for the Applicant on Day 2 of the hearing stated that (p. 22): 'So, 24, material assets has a uniform application in European law.
Then the example they give is aircraft noise, you assess the effects of the latter on the use of buildings by human beings, but you don't take into account the effect on the pecuniary value of the material assets. So, the implication seems to be you would assess the impacts of aircraft noise on the people in the building, but you wouldn't say it was a rented accommodation; you wouldn't say we can't do that, because that is going to diminish the value of the landlord's asset.' (Emphasis added).
190. Similarly, the Applicant's submission in respect of Module II state that (§§131–132): "The concept 'material assets' is one which makes no express reference to the law of the Member States and is therefore it must be given a uniform and independent interpretation throughout the European Union.
There is no specific guidance or case law on the definition of 'material assets' on the SEA Directive. However it is submitted that a uniform definition of 'material assets' between the SEA and EIA Directives should be adopted…'.
191. However, what §24 of Leth provides is that:

> 'As regards the term 'material assets' within the meaning of Article 3 of Directive 85/337, it must be recalled that, according to settled case-law, it follows from the need for a uniform application of European Union law that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an Independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see Case C-287/98 Linster [2000] ECR I-6917, paragraph 43, and Case C-497/10 PPU Mercredi [2010] ECR I-14309, paragraph 45).'

192. Accordingly, to ensure a uniform application of EU law, the independent and uniform interpretation of 'material assets' in Leth is specific to 'material assets' in the EIA Directive itself.
193. Second, however, this is not to say that jurisprudence in respect of a particular EU law may not have applicability by analogy in respect of the correct interpretation of a provision in a different EU law. What the CJEU provides for is a qualitative examination to be applied to guide this assessment.
194. Nonetheless even if the Court agrees with the Applicant's interpretation of Leth for the purposes of the EIA Directive, this interpretation is not capable of direct transposition to the circumstances of the SEA Directive for the following reasons:

> (1) Article 3(c) of the EIA Directive and Article 5(1) of the SEA Directive are not equivalent provisions; and
> (2) While the rationale and clearly-defined subject matters of the EIA Directive and the SEA Directive are complementary, they do not converge.

195. An interpretation of 'material assets' for the purposes of Article 5(1) of the SEA that would preclude a consideration of critical infrastructure essential for the functioning of society is incorrect as a matter of EU law.
196. Moreover, it would also be inconsistent with the deference provided in Article 5(2) of the SEA Directive to determine what reasonably may be required.
197. Third, Leth arose in a different context to that of the present case.
198. The decision of the CJEU in Leth concerned an applicant seeking compensation for the diminution in value to a private property as a result of aircraft noise.
199. Accordingly, the referring court asked the CJEU to consider whether (§17):

> '… the duty of the competent authorities of the Member State concerned to carry out an environmental impact assessment, laid down in both European Union law and national law, is liable to protect the individuals concerned against purely pecuniary damage caused by a project in respect of which such an assessment has not been carried out." (Emphasis added).
> 200. However, the present proceedings are not concerned with "purely pecuniary damage'.

201. They concern the interpretation in the NAP of 'material assets', in line with EPA guidance, to cover agricultural assets as critical infrastructure essential for the functioning of society. In this regard, the Respondents reiterate that the agri-food sector is Ireland's largest indigenous exporting sector and in 2020, the sector accounted for over 6% of GNI, 9% of exports and employed 163,600 people.

202. Fourth, relatedly, the Applicant's submissions conflate value diminution and economic interests in an attempt to rely on Leth.

203. The Applicant's submission in respect of Module III argues (§141):

> 'Therefore EU law (as interpreted in Leth) does preclude a consideration of impacts on the value of material assets in the SEA procedure as well as specifically a consideration of the broad economic and social impacts of agriculture activities, the impact on the agriculture industry, and on the output and income of famers, the sustainability of the agriculture industry, the food supply chain and the employment of a significant portion of the population insofar as those effects do not have an impact on the environment.'

204. The Applicant has interpreted Leth too narrowly in any event as the CJEU held that pecuniary damage, in so far as it is the direct economic consequence of the effects on the environment of a public or private project, is covered by the objective of protection pursued by the EIA Directive.

205. The Court in Leth stated that (§29):

> '… it is necessary to take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment.'

206. To this end, the CJEU continued to state that (§§35–36):

> 'In circumstances where exposure to noise resulting from a project covered by Article 4 of Directive 85/337 has significant effects on individuals, in the sense that a home affected by that noise is rendered less capable of fulfilling its function and the individuals' environment, quality of life and, potentially, health are affected, a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment, this being a matter which must be examined on a case-by-case basis.
>
> It must therefore be concluded that the prevention of [pecuniary] damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337. As such economic damage is a direct consequence of such effects, it must be distinguished from economic damage which does not have its direct source in the environmental effects and which, therefore, is not covered by the objective of protection pursued by that directive, such as, inter alia, certain competitive disadvantages.'

207. The Applicant's position in these present proceedings appears to be inconsistent with its prior position in R. (on the application of An Taisce (National Trust For Ireland)) v Secretary of State for Energy and Climate Change [2013] EWHC 4161 (Admin), where the Applicant argued, for the purposes of the assessment pursuant to Article 7 of the EIA Directive of whether Hinkley Point C was likely to have significant effects on the environment in Ireland, that (§157): '… impact includes effects on socio-economic conditions resulting from alterations to environmental factors' and the Applicant relied on §36 of Leth to this effect.

208. Even if Leth is applicable in the context of the SEA Directive (which the Respondents maintain that it is not), it would be supportive of the Respondents' case in any event.

209. In line with the Respondents' interpretation of 'material assets', Advocate General Kokott in Leth stated that (§§19-20):

> 'The Commission is also correct in its view that, under Article 3 of the EIA Directive, the effects of aircraft noise on the human utilisation of buildings have to be examined, as such utilisation constitutes an interaction between the factors 'human' and 'assets', of which account has to be taken in the application of that provision.
>
> However, as various parties rightly argue, an extension of the assessment to the value of material assets is neither consistent with the purpose of the EIA Directive nor set out in the wording thereof.' (Emphasis added).

210. Moreover, this aspect of Advocate General Kokott's Opinion was followed by the CJEU, where the Court stated that (§26):

> 'It follows that, in the assessment of projects such as those at issue in the main proceedings, which are liable to result in increased aircraft noise, it is necessary to assess the effects of the latter on the use of buildings by human beings.' (Emphasis added).

211. It is the utilisation of material assets that is central to this case—not the pecuniary value of material assets.
212. The interpretation of 'material assets' as critical infrastructure essential for the functioning of society necessarily involves an assessment of the utilisation of material assets.
213. In this regard, the Affidavit of Thomas O'Dwyer sworn on 6 April 2023 for and on behalf of ICMSA states that (§7):

> 'If my farm was not in receipt of a derogation, the number of cows I would be able to milk would be 47, a raw reduction in cow numbers of 32 from my herd's present size, or a reduction of over 40%.' (Emphasis added).

214. Similarly, the Affidavit of Pat McCormack sworn on 6 April 2023 for and on behalf of ICMSA states (§50) that without a derogation, a farmer with a stocking rate above 170kgs of N per hectare will have the following options (§50):
(1) Reduce livestock numbers;
(2) Export slurry; and
(3) Buy or lease additional land."

75. The ICMSA submitted:
"Summary of ICMSA's position on Issue 63(a)
18. Issue 63(a) comprises two sub-questions within a question – essentially :
(i) does the term 'material assets' exclude impacts on agricultural activities, the agricultural industry and farmers, and,
(ii) if so, does Directive 2001/42 'have the effect that consideration of such matters is unlawful…?'.
19. As an initial matter, it should be noted that An Taisce's submissions are relatively light on the second sub-question within Issue 63(a) posed, which is at the core of the Issue – namely whether, if the postulate in the first sub-question is satisfied, the effect is that 'consideration of such matters is unlawful in assessing the effects of the plan.'
20. ICMSA adopts the State's submissions on Issue 63(a), which are set out between §180 and §214 of those submissions. Without prejudice to that, there are further reasons still why An Taisce's submission under this Issue does not withstand scrutiny. ICMSA will focus on these, which, in summary are:-
o C-420/11, Leth merely concerns what is required to be included in an EIA. It says nothing about what must not be included in such an assessment, much less one for SEA purposes. An Taisce adduces no case law on this in the SEA context, EIA context or any context.
o An Taisce's arguments seem predicated on an assumption that readers of the report are, in effect, so easily confused that they could not process or understand the report if it contained anything other than environmental matters. There is no warrant for this assumption, nor does An Taisce provide any.
o Even assuming arguendo that something had been included which ought not to have been, An Taisce has not demonstrated that any 'consideration' which follows is 'unlawful' as a result.
Acte clair
21. In common with the State, ICMSA does not assert that this point is acte clair.
22. However, for the avoidance of doubt, that certainly does not mean that a preliminary reference on this, or any other issue, is 'necessary' for Article 267 TFEU purpose.
23. An Taisce itself has noted (§132, Module III submissions) that: 'There is no specific guidance or case law on the definition of 'material assets' on the SEA Directive.'
24. That seems to be the basis on which it invites regard to the EIA Directive and to Leth.
25. To be clear, a lack of any case law by way of support for a particular proposition (not least an extremely ambitious one, such as An Taisce's here) does not mean that a reference should ensue, such that that reference could hypothetically produce the case law which An Taisce's argument lacks.
26. If anything, and as will be submitted, the Leth case, upon which An Taisce heavily, indeed exclusively, relies under Issue 63(a), undermines An Taisce's arguments.
ICMSA'S SUBSTANTIVE RESPONSE ON ISSUE 63(a)
Relevant legal provisions
27. 'Material assets' comes from para. 1(f) in Annex I to the SEA Directive. It may assist to quote the relevant provisions.
28. Annex I states:
'Information referred to in Article 5(1)
The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

…
(f) the likely significant effects(1) on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors; …'

29. Subparagraph (f) contains a Footnote (1) which reads as follows: 'These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.'

30. It will be recalled that 'material assets' are not defined in the SEA Directive nor its implementing Regulations but that the EPA's 'SEA Pack' defines 'material assets' as 'critical infrastructure essential for the functioning of society'.

31. It is also helpful to recall aspects of this Court's Module II Judgment.

32. Regarding Issue 61(b), the Court held at §148:

> '148. My decision is that no deficiency has been established as postulated. Assuming for the sake of argument that, as proposed by the applicant, perhaps implausibly, material assets are confined to critical infrastructure, the food supply chain and the farming sector overall constitute such critical infrastructure. Therefore even on the hypothesised restrictive interpretation of 'material assets', which for transparency I very much doubt but of course I could be wrong, the State hasn't gone outside that for SEA purposes.'

33. The Court returned to this in its Summary at §192(vi) stating:

> 'if the applicant is correct that material assets are confined to material infrastructure (which is a contestable proposition), the material assets considered by the State in SEA constitute such infrastructure so no issue arises in that respect;'

34. Article 5 of the SEA Directive reads:

> '1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.
>
> 2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.
>
> 3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I.
>
> 4. The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report.'

35. Article 5, including Article 5(1), is merely concerned with the 'Environmental Report'. As considered below, nothing in the Article, nor in case law, requires non-environmental matters to be excluded from the Report, much less prescribes that illegality will ensue were that to occur.

What Leth holds and does not hold

36. An Taisce seeks to derive from Leth a proposition which Leth does not hold. The CJEU stated at §29 that '…It is necessary to take into account only those effects upon material assets which, by their very nature, are also likely to have an impact on the environment.'

37. An Taisce seeks to transform that into a proposition that matters which are not necessary to take into account must not be taken into account.

38. Leth nowhere so holds. Indeed, that is unsurprising when one considers that this was not one of the Questions the subject of a preliminary reference in that case. Those are listed at §18 of the Leth judgment as follows:

'Is Article 3 of Directive 85/337 …, as amended by Directive 97/11 … and by Directive 2003/35 …, to be interpreted as meaning that:

1.) the term 'material assets' covers only their substance or also their value;

2.) the environmental impact assessment serves also to protect an individual against pecuniary damage as a result of a decrease in the value of his property?'

39. When considering Issue 63(b), this Court's Module II Judgment started with what was decided in Leth (see Humphreys J. at §154-§156). The Court then correctly continued at §157:

> 'But Leth is about the minimum as to what needs to be assessed, not the maximum, in the sense that the EIA, AA and SEA directives don't on their own terms preclude a State from assessing other matters (such as the effect of a plan on the economy). We can consider whether there is an implicit preclusion in due course. But in fairness to the applicant and sticking to the question here, assuming for the sake of argument that there is such a preclusion, the applicant has done enough to show that the State did consider such broader economic factors in the SEA process. Whether that has any legal implications can be considered in Module III.'

40. Kingston, Heyvaert and Cavoski, European Environmental Law (Cambridge, 2017), citing to Leth, comment at p.388:

> 'The assessment under Article 3 of the directive need not include an assessment of the effects of the project on the financial value of assets. Nevertheless, the CJEU has recognised that a decrease in the financial value of an asset (in that case, a decrease in the value of a house from noise pollution) is covered by the objective of the Directive in cases where it is a direct economic consequence of the environmental effects identified in the assessment'.

41. Browne, Simons on Planning Law (3rd ed., 2021) notes at §14-18:

> 'The EIA Directive is not prescriptive in relation to the manner in which an EIA is to be conducted but merely requires that certain matters are assessed in an appropriate manner, in light of each individual case. As the Advocate General noted in Leth, the EIA Directive does not preclude the implementation of a project even in the case where the EIA establishes that there are significant negative effects on the environment. In Balz v An Bord Pleanala [2018] IEHC 309 Haughton J. stated that the reference to 'in an appropriate manner' in article 3 means that the assessment required will vary and will depend on the subject matter and level of direct or indirect effect.'

Non-sequiturs in An Taisce's submission, and the submission's incorrect assumption and troubling consequences

42. An Taisce's submissions here are replete with non-sequiturs. Consider the first sentence of §137, which is as follows:-

> 'Thus the SEA Directive provides an input into the decision-making process and in particular EU law does not envisage it as a procedure which is intended to capture the entire scope of relevant matters to be taken into account, but rather is confined to information on the likely significant effects on the environment.'

43. The underlined words simply do not follow from the earlier part of the sentence.

44. Even the first part of the sentence is not a fully correct characterisation of Leth - and a better and more exact description might be that EU law 'does not envisage [the SEA assessment] as a process which is required to capture the entire scope of relevant matters'.

45. The second sentence of §137 proceeds from this to a further non-sequitur – asserting that it is 'important' that "the lines are not blurred with further stages of the decision making process'. However, An Taisce makes no effort to explain how or why this would necessarily be so.

46. No authority cited for this concept of 'blurred lines'. Even worse, it seems to proceed on the basis of an assumption that those conducting an analysis or reading the environmental report would be easily confused if further matters were included in the report. Is An Taisce's contention that if other matters were referred to the relevant persons might not notice, read or appreciate what was said about environmental effects? Patently, there would be no merit to any such contention.

47. §138 notes the importance of consideration of reasonably alternatives, but then leaps from that to assert: 'Thus it is critical that only environmental effects are included …'. That is another non-sequitur. The point is made that reference to economic or social matters could 'skew the analysis' but, again, that is merely asserted. It also seems, again, to proceed on a presumption of a low level of ability or discernment on the part of those conducting an analysis or of readers. Again, that cannot be presumed.

48. It is accepted that Article 5(1) would not be complied with if 'the likely significant effects on the environment' were excluded from, or not dealt with, in the report.

49. However, it is a leap from that to assert that that Article 5(1) requires only 'the likely significant effects on the environment' – and nothing else at all – to be dealt with in the environmental report.

50. Article 5(1) does not so state. Moreover, such an proposition could have troubling consequences. It could lead to a clash with legal certainty – being a general principle of EU law. For example, any report in any field, including an environmental report here, must inevitably 'set the scene' to some extent and may have to deal with various contextual and other matters. The exclusionary legal proposition which An Taisce invites this Court to innovate is liable to cast a shadow of uncertainty over all such matters. The drafters of such reports would be operating under the Sword of Damocles, and (on An Taisce's case) possible illegality, if they strayed too far from what An Taisce asserts to be the only permissible content.

Second part of Issue 63(a): An Taisce has not established that consideration would be 'unlawful' even if the report had been over-inclusive

51. Turning to the second part of Issue 63(a), nothing in Article 5(1) purports to require economic or social effects to be excluded from 'consideration' of the relevant matters. That is so regardless of whether Issue 63(a)'s reference to 'consideration' refers to consideration within the report itself, or subsequent substantive consideration.

52. Three points may be made under this sub-heading.

53. First, turning to consideration within the report, Leth stated at §25 regarding an EIA that:

> 'Pursuant to Article 3 of Directive 85/337, it is necessary to examine the direct and indirect effects of a project on, inter alia, human beings and material assets and, in accordance with the fourth indent of that article, it is also necessary to examine such effects on the interaction between those two factors. Therefore, it is necessary to examine, in particular, the effects of a project on the use of material assets by human beings.'

54. While recognising that Leth was a case under the EIA Directive, and without prejudice to what flows from that (including that An Taisce has pointed to no relevant case law at all), it is submitted that there is no evident reason why 'direct and indirect effects … on … human beings and material assets' could not extend to effects upon farmers, including (if necessary) incomes of farming families.

55. Second, turning to subsequent substantive consideration, a different article of the SEA Directive – Article 8 – is entitled 'Decision making'. Article 8 reads:

> 'The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any trans-boundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.'

56. Case law clearly holds that there is not a requirement to select the most environmentally friendly option. This is apparent from Leth where the CJEU stated at §46:

> 'To that end, the nature of the rule breached must be taken into account. In the present case, that rule prescribes an assessment of the environmental impact of a public or private project, but does not lay down the substantive rules in relation to the balancing of the environmental effects with other factors or prohibit the completion of projects which are liable to have negative effects on the environment. Those characteristics suggest that the breach of Article 3 of Directive 85/337, that is to say, in the present case, the failure to carry out the assessment prescribed by that article, does not, in principle, by itself constitute the reason for the decrease in the value of a property.'

57. In a similar vein, Kingston, Heyvaert and Cavoski state at p.388 regarding the EIA Directive and Leth:

> 'Crucially however Article 3 does not lay down substantive rules on the balancing of the environmental effects of a project with other factors, or prohibit the competition of projects which are liable to have negative effects on the environment.'

58. Indeed, An Taisce does not seem to dispute any of that. Thus, An Taisce's submission states:-

- 'The SEA procedure does not dictate the ultimate decision and it is up to the competent authority to weigh up all factors, environmental, economic and social in adopting a plan or programme' (§136);
- 'That is not to say that other factors such as economic factors are not relevant to the decision-making …' (§140);
- 'The Applicant stresses that such non-environmental factors are not necessarily irrelevant to the decision on the action plan under Directive 91/676 …' (§142).

59. Third, An Taisce does assert that EU law 'precludes' a consideration of the matters referred to (e.g. §141 of its submissions). However, An Taisce does not set out, at least under its submissions here, how that would invalidate the SEA assessment undertaken.

60. Nor should it be assumed that follows. After all, taking An Taisce's submission under Issue 63(a) at its height, all that would have happened is that reference would have been made to matters which should not have been referred to. Even under 'regular' administrative law, it would not necessarily follow that a decision or assessment would be invalid as a result. One would have to go further and to demonstrate, for example, that the matters in question were actually material, or that their inclusion was such as to vitiate the decision/assessment.

61. For example, the Court of Appeal has repeatedly underscored the requirement that an error be 'material' if it is to warrant setting decisions of the Information Commissioner aside (Grange v Information Commissioner [2022] IECA 153 at §52 and §97). Similarly, with respect to the Financial Services and Pensions Ombudsman, the Court of Appeal requires that an appellant show that

'taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors.'

(See, in that regard, Ulster Bank v Financial Services Ombudsman [2006] IEHC 323, approved in Millar v Financial Services Ombudsman [2015] IECA 127, per Kelly at e.g. §33 of his judgment).

Conclusion regarding Issue 63

62. In conclusion under Issue 63(a), on the one hand An Taisce asserts that 'non-environmental' considerations must (seemingly) not even be mentioned in an SEA environmental report. That is supported by no authority, and indeed by nothing other than an unwarranted assumption that unspecified persons would be so lacking in discernment that they might become confused were such matters to be referenced.

63. However, on the other hand, An Taisce correctly accepts, on multiple occasions (e.g. §136, §140 and §142 quoted above), that in decision-making there is no obligation to choose the most environmentally friendly outcome and economic and social considerations can be taken into account. An Taisce's (correct) position on this second matter, sits uneasily with the position it posits on the first point.

64. Moreover, even if An Taisce were correct, and that certain content was included which ought not to have been, An Taisce has not established that any unlawfulness results such as might vitiate the report, much less the subsequent decisions.

65. For all, or any, of the above reasons, it is submitted that Issue 63(a) should be answered 'No', and that no requirement for a reference on the point arises or has been demonstrated."

76. My decision is as follows. There is much to be said for the ICMSA view that the applicants are contending for what is in effect an "exclusionary rule" and are offering a troubling non-sequitur to the effect that only strictly environmental considerations could be raised in SEA. Such a stance, it was submitted, was liable to the riposte: "what should they know of England who only England know?" (Rudyard Kipling, "The English Flag", *St. James's Gazette* and *National Observer*, April 4th, 1891). If this were the only question, I would be more tempted to follow the ICMSA suggestion to decide the point myself. But given that a reference is happening anyway, my fear is that to do as proposed would cause procedural confusion and delay ultimately. That is because, given the concession that the point is not *acte clair,* not deciding it would set the stage for yet a further reference in the context of any hypothetical appeal. In such a context, it might be implausible for the opposing parties to effect a *volte face* on the status of the point as not being *acte clair*, so if there was still a live issue at that stage, a further reference could be seen as mandatory. Simplicity of procedure suggests a reference on this point also.

Issue 69(a) – discretion of the court

77. Issue 69(a) is:

"69. (a) Does art. 4(3) TEU have the effect that a domestic court does not enjoy a general discretion, in the event of a breach of EU law by or on behalf of a member state being established in relation to the making of a national action plan under Annex III to directive 91/676, to decline to grant relief at all or alternatively to decline to make any order that affects the validity of the plan or implementing regulations, in the exercise of the Court's discretion on judicial review, taking into account the general principle (as a matter of EU law) of proportionality, and prejudice to third parties including by reference to any applicable rights and interests of others, including under the Charter of Fundamental Rights, in particular the right to work under art. 15, to conduct a business under art. 16, and to property under art. 17, as well as Union policies generally including the CAP under art. 39

TFEU and Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, and/or by reference to domestic law considerations?"

78. The applicant submitted:

"Applicant's Summary Answer

The Court can in principle maintain the impugned measure for a limited period of time, but only under strictly defined circumstances, and cannot refuse relief or an order affecting the validity of the NAP permanently. Third parties may have a remedy against the State in respect of their interests.

Acte clair

No, in the sense that only the Court of Justice may, in exceptional cases, for overriding considerations of legal certainty, allow temporary suspension of the ousting effect of a rule of EU law with respect to national law that is contrary thereto. If national courts had the power to give provisions of national law primacy in relation to EU law contravened by those provisions, even temporarily, the uniform application of EU law would be undermined - Case C 411/17 Inter-Environnement Wallonnie ASBL and Bond Beter Leefmilieu Vlaanderen

Detailed answer

144. As per the Transcript, Day 2, p39 '…the aim for An Taisce in the proceedings is the correct interpretation and implementation of the law. We accept, in principle, that if certiorari is found to be the appropriate remedy, that there can be a stay on the grounds of environmental prejudice or environmental protection on matters such as animal welfare - because I totally appreciate that if animals are in calf then one can't immediately take away the surroundings which were envisaged for them. And we would also accept that the interests of the individual farmers are something that can be taken into account in the context of a stay.' The 'stay' referred to there is a stay on any order of certiorari.

145. The Applicant understands the Court's current question to go beyond the question of a stay on any order of certiorari, and instead to address refusal of relief altogether (on the assumption that the case for relief has otherwise been made out).

146. In Berkeley v Secretary of State [2003] 3 All ER 897 Lord Hoffman stated at p.907: 'Although s. 288(5)(b), in providing that the court 'may' quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether....the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the directive. To do so would seem to conflict with the duty of the court under article 5 of the EC Treaty (now article 10 EC) to ensure fulfilment of the United Kingdom's obligations under the Treaty.'

147. Art 10 EC is now Art. 4(3) TEU.

148. Case C-41/11 Inter-Environnement Wallonie is the principle authority here, and expressly concerned breach of the SEA Directive in respect of a Nitrates Action Programme

149. It was a follow-up to Joined Cases C 105/09 and C 110/09 Terre Wallonne and Inter-Environnement Wallonie - which were themselves a follow-up to Case C 221/03 Commission v Belgium, where the CJEU had found Belgium to be in breach of obligations under the Nitrates Directive. The NAP challenged in Terre Wallonne was apparently an attempt to comply with the judgment in those enforcement proceedings.

150. The Belgian Court in C-41/11 asked §29 whether it could 'defer in time the effects of the judicial annulment for a short period necessary for the redrafting of the annulled measure in order to maintain in European Union environmental law a degree of specific implementation without any break in continuity?'

151. The CJEU reformulated the question §39 – 'By its question, and in view of the developments in the main proceedings, the referring court asks in essence whether, in circumstances such as those at issue in the main proceedings, where it has before it an action for annulment of a national measure constituting a 'plan' or 'programme' within the meaning of Directive 2001/42 and it finds that the plan or programme was adopted in breach of the obligation laid down by that directive to carry out a prior environmental assessment, but finds that the contested measure implements Directive 91/676 appropriately, it may make use of a provision of its national law which would allow it to maintain some of the past effects of the measure until the date on which measures designed to remedy the irregularity which has been established entered into force.'

152. The Court referred §43 to the principle of cooperation in good faith laid down in Article 4(3) TEU, and the obligation to nullify the unlawful consequences of a breach of European Union law, owed, within the sphere of its competence, by every organ of the Member State concerned.

153. It explained at §46 – 'Consequently, courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the

'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment …'.

154. However, it identified at §49 (emphasis added) – 'According to the referring court, maintaining the effects of the contested order, adopted in breach of the requirements set out in Directive 2001/42, may be justified since annulling that order with retroactive effect would deprive the Belgian legal order of any measure designed to transpose Directive 91/676 in the Region of Wallonia. Moreover, those effects would be maintained for a relatively short time since this would cover only the period up to the date on which the new order entered into force.'

155. The Court observed §55 – '…there is a risk that, in remedying the irregularity under Directive 2001/42 affecting the procedure by which the contested order was adopted by annulling that order, the referring court would create a legal vacuum incompatible with the obligation on the Member State concerned to adopt measures to transpose Directive 91/676 as well as the measures required of it in order to comply with the judgment in Commission v Belgium.' So there was a clash of European obligations – the obligation to nullify the unlawful consequences of a breach of European Union law on the one hand, and on the other the duty adopt measures to transpose the Nitrates Directive (and indeed comply with the original enforcement judgment).

156. The Court expressly noted §57 – 'that the referring court does not rely on economic grounds in order to be authorised to maintain the effects of the contested order, but refers only to the objective of protecting the environment, which constitutes one of the essential objectives of the European Union and is both fundamental and cross-cutting in nature (see, to that effect, Case C 176/03 Commission v Council … paragraphs 41 and 42).

157. The Court then explained at §58 'In view of that objective, the referring court can, given the existence of an overriding consideration relating to the protection of the environment, exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of an annulled national measure, in so far as the following conditions are met.'

158. Thus it appears that it was only reliance on the objective of protecting the environment that justified the exceptional approach.

159. The conditions were set out at 59-62 and identified in the curial part as follows:

- that national measure is a measure which correctly transposes Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources;
- the adoption and entry into force of the new national measure containing the action programme within the meaning of Article 5 of that directive do not enable the adverse effects on the environment resulting from the annulment of the contested measure to be avoided;
- annulment of the contested measure would result in a legal vacuum in relation to the transposition of Directive 91/676 which would be more harmful to the environment, in the sense that the annulment would result in a lower level of protection of waters against pollution caused by nitrates from agricultural sources and would thereby run specifically counter to the fundamental objective of that directive; and
- the effects of such a measure are exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied.

160. That appears to envisage that the question is one of maintaining the effects of the national measure only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied; it is not a question of declining to grant relief at all.

161. Case C 41/11 was considered in yet another Inter-Environnement Wallonnie case - Case C 411/17 Inter-Environnement Wallonnie ASBL and Bond Beter Leefmilieu Vlaanderen, which addressed whether the adoption of a law extending the period of industrial production of electricity by nuclear power stations required various types of environmental assessment, under the EIA Directive and the Habitats Directive, the Espoo and Aarhus Conventions.

162. One of the questions referred at §58(9) was ' If, on the basis of the answers to the preceding questions, the national court should conclude that the Law [of 28 June 2015] fails to fulfil one of the obligations arising under the abovementioned Conventions or directives, and the security of the country's electricity supply cannot constitute an imperative reason of overriding public interest permitting a derogation from those obligations, might the national court maintain the effects of the Law of 28 June 2015 in order to avoid legal uncertainty and

to allow the environmental impact assessment and public participation obligations arising under those Conventions or directives to be fulfilled?'

163. The CJEU reformulated the question at §167– By Question 9, the referring court asks, in essence, whether EU law allows a national court to maintain the effects of measures such as those at issue in the main proceedings for the time necessary to remedy any infringement of the EIA Directive and the Habitats Directive.

164. It addressed the question as follows:

> '177 It must be added that only the Court of Justice may, in exceptional cases, for overriding considerations of legal certainty, allow temporary suspension of the ousting effect of a rule of EU law with respect to national law that is contrary thereto. If national courts had the power to give provisions of national law primacy in relation to EU law contravened by those provisions, even temporarily, the uniform application of EU law would be undermined (see, to that effect, judgments of 8 September 2010, Winner Wetten, C 409/06, EU:C:2010:503, paragraphs 66 and 67, and of 28 July 2016, Association France Nature Environnement, C 379/15, EU:C:2016:603, paragraph 33).
>
> 178 However, the Court has also held, in paragraph 58 of its judgment of 28 February 2012, Inter-Environnement Wallonie and Terre wallonne (C 41/11, EU:C:2012:103), that a national court may, given the existence of an overriding consideration relating to the protection of the environment, as applied in the case giving rise to that judgment, and provided that the conditions specified in that judgment are met, exceptionally be authorised to make use of a provision of its national law empowering it to maintain certain effects of an annulled national measure. It is thus apparent from that judgment that the Court intended to afford, on a case by case basis and by way of exception, a national court the power to adjust the effects of annulment of a national provision held to be incompatible with EU law, with due regard to the conditions laid down by the Court's case-law (see, to that effect Association France Nature Environnement, C 379/15 …paragraph 34).
>
> 179 In this instance, in accordance with the case-law cited in paragraph 177 of the present judgment, it is for the Court of Justice alone to determine the circumstances in which it may be justifiable, by way of exception, to maintain the effects of measures such as those at issue in the main proceedings on account of overriding considerations relating to the security of the electricity supply of the Member State concerned. In that regard, such considerations could justify maintaining the effects of national measures adopted in breach of the obligations under the EIA Directive and the Habitats Directive only if, in the event that the effects of those measure were annulled or suspended, there was a genuine and serious threat of disruption to the electricity supply of the Member State concerned, which could not be remedied by any other means or alternatives, particularly in the context of the internal market.
>
> 180 It is for the referring court to assess whether, given the other means and alternatives available to the Member State concerned for the purpose of ensuring electricity supply within its territory, the need to respond to such a threat justifies maintaining, exceptionally, the effects of the measures contested before that court.
>
> 181 In any event, the effects may only be maintained for as long as is strictly necessary to remedy the breach.

165. In Case C-24/19 A and Others (Wind turbines at Aalter and Nevele) the CJEU concluded 'Where it appears that an environmental assessment within the meaning of Directive 2001/42 should have been carried out prior to the adoption of the order and circular on the basis of which a consent, which is contested before a national court, was granted for the installation and operation of wind turbines with the result that those instruments and that consent do not comply with EU law, that court may maintain the effects of those instruments and that consent only if the national law permits it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the electricity supply of the whole of the Member State concerned, and only for the period of time strictly necessary to remedy that illegality. It is for the referring court, if necessary, to carry out that assessment in the case in the main proceedings.'

166. The Applicant is not aware of any case where the right to work under art. 15, to conduct a business under art. 16, and to property under art. 17, made any difference to the approach above, and it is hard to reconcile same with the approach of the CJEU.

167. In terms of the impact on third parties, the approach of the CJEU appears to envisage compensation. In Case C 278/21 AquaPri, which concerned a breach of Article 6(3) Habitats Directive. the CJEU identified - '…it is important to clarify that, whatever measure is used

to erase the unlawful consequences of a breach of an assessment obligation such as that provided for in the first sentence of Article 6(3) of Directive 92/43, the Member State responsible for that breach may be held liable, if such a measure results in the revocation or amendment of the authorisation granted as a result of that breach, to make good any damage which its conduct may have caused to the economic operator who benefited from that authorisation, which is maintained in this case by AquaPri and which it is for the competent national court to verify.'

168. So it would appear that protection of economic interests may be achieved by the Member State responsible for the relevant breach being held liable to make good any damage which its conduct may have caused.

169. The existence of the Common Agricultural Policy, or the treaty provisions in respect of same, do not support or justify the refusal of relief. By Article 11 TFEU (emphasis added) – 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.' The CAP cannot be operated in a manner inconsistent with environmental protection requirements, and does not justify a breach of them.

170. If the Applicant is understanding the last part of the question correctly, domestic law considerations do not appear to have any relevance beyond what was considered in Case C 411/17 Inter-Environnement Wallonnie ASBL and Bond Beter Leefmilieu Vlaanderen – ie they cannot oust European Law.

171. Finally, the Court may wish to consider whether the need (if established in accordance with the case-law above or by reference to the CJEU) to temporarily maintain certain aspects of the NAP requires it to maintain all aspects."

79. The State submitted:

"I. Summary

215. Article 4(3) TEU may have the effect that a domestic court does not enjoy a general discretion in the event of a finding of a breach of EU law to decline to grant relief at all but, alternatively, does not have the effect that a domestic court does not enjoy a general discretion to decline to make any order that affects the validity of the plan or implementing regulations.

216. The Applicant errs by conflating the requirement, pursuant to Article 4(3) TEU, to nullify the unlawful consequences of a breach of EU environmental law with the specific remedy of certiorari.

217. If the unlawful consequences of an infringement of EU law may be nullified without the quashing of a national action plan, the Court retains a discretion to order this course of action. In deciding whether to exercise its discretion, it is submitted that the Court may take into account a range of factors in deciding which remedy is appropriate, including proportionality, prejudice to third parties, Union policies generally and domestic law considerations.

218. Where a national court decides to remedy a breach of EU law by annulling a national measure, the national court retains an exceptional jurisdiction to maintain certain effects of an annulled measure having regard to an overriding consideration relating to the protection of the environment.

II. Acte Clair

219. The Respondents accept that this is not acte clair.

III. Substantive submissions

220. Article 4(3) TEU may have the effect that a domestic court does not enjoy a general discretion in the event of a finding of a breach of EU law to decline to grant relief at all but, alternatively, does not have the effect that a domestic court does not enjoy a general discretion to decline to make any order that affects the validity of the plan or implementing regulations.

221. Moreover, the Respondents respectfully submit that the Applicant has erred in its submissions by conflating the requirement, pursuant to Article 4(3) TEU, to nullify the unlawful consequences of a breach of EU environmental law with the specific remedy of certiorari.

222. Pursuant to the principle of sincere cooperation pursuant to Article 4(3) TEU, Member States are required to nullify the unlawful consequences of an infringement of EU environmental law.

223. Significantly, EU law is not prescriptive as to how this nullification of the unlawful consequences of an infringement of EU environmental law is to occur.

224. In C-411/17 Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen EU:C:2019:622, the Court stated that (§§169–170):

'However, neither the EIA Directive nor the Habitats Directive specify what action should be taken in the event of infringement of the obligations laid down by those directives.

Nonetheless, under the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of that infringement of EU law. The competent national authorities are therefore under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted in order to carry out such an assessment (see, to that effect, judgment of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35 and the case-law cited).'

225. The Court continued to hold that (§§173–§177):

'It is true that the Court has also held that EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law (judgment of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, paragraph 37 and the case-law cited).

However, such a possible regularisation would have to be subject to the condition that it does not offer the parties concerned the opportunity to circumvent the rules of EU law or to refrain from applying them, and should remain the exception (judgment of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, paragraph 38 and the case-law cited).

Consequently, in the event of failure to carry out an assessment of the environmental impact of a project required under the EIA Directive, although Member States are required to nullify the unlawful consequences of that failure, EU law does not preclude regularisation through the conducting of such an assessment while the project is under way or even after it has been completed, on the twofold condition, first, that national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to refrain from applying them, and second, that an assessment carried out for regularisation purposes is not conducted solely in respect of the project's future environmental impact, but must also take into account its environmental impact since the time of completion of that project (see, to that effect, judgments of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, paragraph 43, and of 28 February 2018, Comune di Castelbellino, C-117/17, EU:C:2018:129, paragraph 30).

By analogy, it must be held that EU law does not preclude such regularisation, subject to the same conditions, in the event of failure to conduct a prior impact assessment of the effects of the project concerned on a protected site, as required by Article 6(3) of the Habitats Directive.

It must be added that only the Court of Justice may, in exceptional cases, for overriding considerations of legal certainty, allow temporary suspension of the ousting effect of a rule of EU law with respect to national law that is contrary thereto. If national courts had the power to give provisions of national law primacy in relation to EU law contravened by those provisions, even temporarily, the uniform application of EU law would be undermined (see, to that effect, judgments of 8 September 2010, Winner Wetten, C-409/06, EU:C:2010:503, paragraphs 66 and 67, and of 28 July 2016, Association France Nature Environnement, C-379/15, EU:C:2016:603, paragraph 33).'

226. In Case C-261/18 Commission v. Ireland EU:C:2019:955, the CJEU referred to revocation or suspension as an 'example', not a requirement (§75):

'Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are nevertheless required to eliminate the unlawful consequences of that breach of EU law. That obligation applies to every organ of the Member State concerned and, in particular, to the national authorities which have the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, Wells, C-201/02, EU:C:2004:12, paragraph 64, and of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35).' (Emphasis added).

227. The Respondents submit that if the unlawful consequences of an infringement of EU law may be nullified without the quashing of a national action plan, the Court retains a discretion to order this course of action. In deciding whether to exercise its discretion, it is submitted that the Court may take into account a range of factors in deciding which remedy is appropriate. These range of factors may include:

(1) proportionality as a matter of EU law;

(2) prejudice to third parties, including by reference to any applicable rights, interests and freedoms of others, including those in inter alia the Charter of Fundamental Rights and Freedom of the European Union; and

(3) European Union policies generally, including the CAP under Article 39 TFEU and Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021; and

(4) domestic law considerations.

228. Moreover, even where a national court decides to remedy a breach of EU law by annulling a national measure, the national court retains an exceptional jurisdiction to maintain certain effects of an annulled measure having regard to an overriding consideration relating to the protection of the environment.

229. Quashing the NAP and/or the GAP Regulations would result in a legal vacuum that is incompatible with Ireland's obligations to adopt measures to transpose the Nitrates Directive.

230. This would lead to a lower level of protection of water against pollution caused by nitrates from agricultural sources, which would run specifically counter to the fundamental objective of the Nitrates Directive.

231. The environmental damage caused by quashing the NAP and the GAP Regulations would therefore be more harmful to the environment than maintaining their effects pending any remedial measures coming into effect.

232. In those circumstances, were the Court to consider that the NAP is invalid (which is denied), the Court would be permitted to, and the Respondents plead that it should, exercise its discretion to maintain exceptionally the effects of the NAP and/or the GAP Regulations, pending the implementation of remedial measures.

233. In this regard, in Case C-41/11 Inter-Environnement Wallonie ASBL and Terre wallonne ASBL v Région wallonne EU:C:2012:103, the CJEU stated that (§§58–62) in view of the objective of protecting the environment:

'… the referring court can, given the existence of an overriding consideration relating to the protection of the environment, exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of an annulled national measure, in so far as the following conditions are met.

First, the contested order must be a measure which correctly transposes Directive 91/676.

Secondly, the referring court must determine whether the adoption and entry into force of the new order providing, in particular in Article 8, for certain acts adopted on the basis of the contested order to be maintained do not enable the adverse effects on the environment resulting from the annulment of the contested order to be avoided.

Thirdly, annulment of the contested order must result in a legal vacuum in relation to the transposition of Directive 91/676 which would be more harmful to the environment, a matter which is for the referring court to determine. That would be the case if annulling the order resulted in a lower level of protection of waters against pollution caused by nitrates from agricultural sources, given that this would run specifically counter to the fundamental objective of that directive, which is to prevent such pollution.

Fourthly and finally, the effects of such a national measure can be exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied.'

234. Finally, with respect to overriding considerations not related to the protection of the environment, the Respondents submit that the CJEU may recognise such overriding considerations. See: C-411/17 Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen EU:C:2019:622, §§177–180."

80. The ICMSA submitted:

"Summary of ICMSA's position

66. For convenience, the treatment of Issue 69 may be subdivided into two parts:-

o The first part of the Issue, concerns the Court's jurisdiction regarding relief the Court. ICMSA submits that the Court has a wide jurisdiction and discretion in

this regard, and that both EU law and national law point in a similar direction in this respect. An Taisce's response focuses on CJEU case law on maintaining the effects of measures found to be unlawful.

- The second part of the Issue concerns fundamental rights, other EU policies and other matters. Essentially, An Taisce merely makes a very brief reference at §166 and, even then, only to fundamental rights. It also refers at §169 to the Common Agricultural Policy, but in a manner which actually doesn't address the relevant point at all, because An Taisce proceeds to refer only to environmental protection).

67. On one view, it might be thought that there is little enough between the parties in this regard. An Taisce expressly accepts as follows (§144, submissions, quoting its prior oral submissions):-

> 'And we would also accept that the interests of individual farmers are something that can be taken into account in the context of a stay.'

68. ICMSA submits that this is too limited – this is not a 'can', but a 'must'. ICMSA makes the same observation regarding §277 of the State's submissions, as has already been noted in the Introduction above.

69. Other than that very minor point, ICMSA adopts the points in the State's submissions and makes the following further submissions which are set out below.

70. For the avoidance of doubt, all submissions which follow are premised upon some illegality actually having been established by An Taisce, and are strictly without prejudice to ICMSA's overall position that that is not the case.

Acte Clair

71. Like the State, ICMSA does not assert that this precise issue is acte clair – although, as set out below, ICMSA contends that it is very clear that account must be taken of matters such as effects on fundamental rights.

ICMSA'S SUBSTANTIVE RESPONSE ON ISSUE 69

An Taisce's submissions regarding maintaining measures in force

72. An Taisce quotes extensively from Case C-41/11 Inter-Environnement Wallonie. At §156, An Taisce quotes §57, where the CJEU noted '... the referring court does not rely on economic grounds in order to be authorised to maintain the effects of the contested order, but refers only to the objective of protecting the environment …'.

73. Of course, this means precisely what it says, and only what it says – namely that in that case, non-environmental concerns were not put before the CJEU. That does not mean that it would be somehow be impermissible for non-environmental concerns to form a basis for maintaining the effects of a measure.

74. To be fair, An Taisce does not suggest otherwise – indeed it expressly accepts (§144) that farmers' interests can be taken into account in this respect. Moreover, at §164 of its submissions An Taisce quotes from §179 of the CJEU's judgment in the later case of Case C-411/17 Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen which held that a '… genuine and serious threat of disruption to the electricity supply …' could justify maintaining the effects of unlawful national measures. That is clearly not an environmental consideration.

75. The then President of the ICMSA, Mr. McCormack, averred in his Affidavit (§59):

'All of this is to say that the NAP is but one aspect of a delicate balance which the State has attempted to strike between multiple, complex competing economic, environmental, and social interests. That balance will not, of course, be perfect. At the very least, however, the reliefs sought by the Applicant, if granted, risk upsetting that balance as it currently stands.'

76. This, and other such averments, have not been controverted. It is submitted that the undoubted undermining of the balance which would ensue were the NAP to be struck down is directly analogous to the concerns regarding ensuring the absence of 'legal vacuum' which have been influential in the CJEU case law An Taisce has referred to.

This Court's wide discretionary jurisdiction on judicial review

77. ICMSA does not assert that EU obligations could be in any way ignored, whether as part of the Court's discretion on judicial review or otherwise.

78. However, the undoubted jurisdiction as a matter of EU law regarding maintaining in effect measures which might be unlawful, harmonises with this Court's wide discretion on judicial review.

79. In De Roiste v Minister for Defence [2001] 2 ILRM 241 Denham J. stated (p.260):

> 'The general rule is that an order of certiorari is a discretionary remedy. The circumstances of each case have to be considered. The general course is to grant certiorari if, for example, a criminal conviction has been ordered in excess of jurisdiction. However, the circumstances of the case are considered by the court in

> exercising its discretion and the court has a discretion to refuse the relief if, for example, the conduct of the applicant disentitles him or her to that relief. The facts and circumstances of each case have to be considered. Whereas the applicant is in a stronger position if he has been particularly aggrieved, the court retains its discretion in all applications.'

80. In R v Lincolnshire CC and Wealden DC ex p. Atkinson, Wales and Stratford (1996) 8 Admin L.R. 529 Sedley J. stated (p.55):

'To refuse relief where an error of law by a public authority has been demonstrated is an unusual and strong thing; but there is no doubt that it can be done.'

81. Hare, Donnelly and Bell eds, De Smith's Judicial Review (9th ed, 2023) state (§18-057):

> 'In some cases the court has withheld a remedy from a claimant on the basis that he has been caused no harm (the term 'prejudice' is often used) by the unlawful act of the public authority. Under this head a minor technical breach of a statutory requirement may be too insignificant to justify relief. The court has also taken into account the fact that the public authority would invariably have made the same decision even if the legal flaw had not occurred.'

82. On the latter point, it is submitted that it would be entirely appropriate for this Court to consider whether any relief which it might be minded to grant could occasion more 'harm' than good.

83. In that regard, An Taisce's purpose in bringing the proceedings is relevant. §10 of Ms. Goff of An Taisce's First Affidavit averred:

> 'The Applicant is taking these proceedings primarily to attempt to protect our streams, rivers, lakes, estuaries and coastal waters from the severe environmental harm caused by excess nitrate pollution'.

84. Bearing in mind An Taisce's starting point as so described by Ms. Goff, ICMSA submits that any quashing of the NAP (if that is seriously being sought or pursued), would not advance, and may even undermine, the stated purpose of the proceedings. Accordingly, and even allowing for the status of An Taisce as an environmental advocacy association, there would be no 'prejudice' to it, or to its objectives, if the quashing of the NAP and GAP were refused.

85. De Smith also states (§18-055):

> 'The court may exercise discretion not to provide a remedy if to make an order would serve no useful purpose.'

86. ICMSA submits that that is indeed the position here, at least insofar as any quashing of purely protective measures such as the NAP and GAP are concerned.

87. In Habte v Minister for Justice [2020] IECA 22 Murray J. stated at §123 of his judgment:

> 'And if all of this is wrong, I would refuse relief on this ground for the simple reason that I do not believe it would serve any useful purpose. If the Minister decides in the light of the decision of the Court that he does enjoy a power to cancel the certificate and to simultaneously issue a new certificate that he does not want to pursue revocation under section 19, he is free to determine that process. If he wishes to press ahead with the procedure under section 19, on the basis of the other conclusions I have reached here he is free to recommence it even if the present process were arrested. I do not believe that it can be said that had the Minister understood the correct legal position he would have reached any different decision (see Smith v. Minister for Justice [2013] IESC 4)…'

88. In Prendergast v Higher Education Authority [2010] 1 IR 490 Charleton J. stated (§§66-67):

> 'Were I to strike down the existing Fottrell scheme as an unconstitutional inequality, I must consider the effect that it would have. I am not entitled to act in an unthinking way. Furthermore, I am only entitled to act within the limit of my authority, which is to correct legal wrongs and not to set government policy. ...
>
> Is the court, on that basis, to strike down a carefully thought through government policy based merely on looking at one side of the situation? To do so would be to replace one alleged inequality with a different but very real and unjust inequality.'

89. Accordingly, it is submitted that Irish and EU law regarding remedies point in a broadly similar direction. While any breach of EU law (were it to be established) certainly cannot be ignored, regard must be had to the nature of the breach, and to the effects which the grant of relief might have. The Court has a level of discretion regarding the formulation of relief, and in particular can grant a stay which might maintain in effect for a time measures that were otherwise contrary to aspects of EU environmental law.

90. It is also submitted that regard must be had to aspects of EU law beyond environmental law alone. The remainder of these Submissions will consider that matter.

Plurality of EU values and objectives

91. Issue 69, and An Taisce's position thereunder, flows from Article 4(3) TEU which provides as follows:-

> 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

92. It is submitted that the words underlined above, clearly refer, and must logically refer, to EU law as a whole. Accordingly, in this case, the relevant matters cannot properly be atomised to obligations under EU environmental law alone.

93. Article 3(3) TEU provides inter alia:

> 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
>
> …
>
> It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.'

94. Given how essential the agricultural sector is to Ireland's community life and cultural heritage, as ICMSA has previously submitted and averred without contradiction, the latter underlined words are clearly relevant.

95. For example, Mr McCormack of the ICMSA avers (§57):

> 'Social and community impacts may also arise if the viability of family farms is imperilled, or even cast into doubt. For example, dairy co-operatives have invested heavily in rural areas which, generally, are lacking in other forms of investment. Should the viability of these co-operatives be threatened, it is unlikely that the areas in which they currently operate would benefit from other forms of replacement investment.'

96. EU law and policy are not, and are not permitted to be, myopic. Article 7 TFEU provides:

> 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account...'

97. Thus, the diversity of cultures (Article 167(4) TFEU), ensuring cohesion among regions (Article 175 TFEU), promoting a high level of employment (Art. 9 TFEU and Art. 147(2) TFEU), shall be 'taken into account' in the definition and implementation of all Union policies and activities.

98. Another of the tasks and activities of the EU is the Common Agricultural Policy. Accordingly, it is submitted that this, and any effects on same, must also be relevant for Article 4(3) TEU purposes. Article 39 TFEU provides:

> '1. The objectives of the common agricultural policy shall be:
>
> (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
>
> (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
>
> (c) to stabilise markets;
>
> (d) to assure the availability of supplies;
>
> (e) to ensure that supplies reach consumers at reasonable prices.
>
> 2. In working out the common agricultural policy and the special methods for its application, account shall be taken of:
>
> (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;
>
> (b) the need to effect the appropriate adjustments by degrees;

(c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.'

99. In Case 230-78 SpA Eridiana EU:C:1979:216 the then ECJ, in the context of the authorities' powers to alter quotas, stated that Article 39 of the then Treaty concerning the CAP expressed the desire (§31):

'not only to ensure a fair standard of living for the agricultural community but also to increase agricultural productivity, stabilize markets, assure the availability of supplies and ensure that supplies reach consumers at reasonable prices.'

100. In the most recent iteration of the CAP – i.e. Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 - Recital 24 states:

'The Union needs to foster a modern, competitive, resilient and diversified agricultural sector which reaps the benefits of high-quality production and resource-efficiency and which ensures long-term food security as part of a competitive and productive agri-food sector while safeguarding the family farm model.'

101. Moreover, environmental protection and economic activity are incommensurable values. The choice of by how much one might be limited to advance the other cannot be assessed by reference to legal standards. Accordingly, it is an inherently political question, and it is not accepted that that issue is a justiciable one.

102. For example, Advocate General Bot in Case C-283/11 Sky Osterreich EU:C:2013:28 (§49):

'the Community legislature must be allowed a broad discretion in an area such as that involved in this case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.'

103. It is submitted that this, of itself, further inclines in favour of maintaining the effects of the NAP here, even if any lack of lawfulness (which is denied) were established.

The general importance of fundamental rights as a matter of EU law

104. At §166 of its Module III submissions, An Taisce says that it is 'not aware' of any case where rights under Articles 15, 16 or 17 of the Charter 'made any difference' to maintaining the effects of unlawful measures, and asserts that this would be 'hard to reconcile with the approach of the CJEU.'

105. However, ICMSA submits that any proposition that such Charter rights would or could be ignored is what is 'hard to reconcile' with EU law.

106. It is clear from the Treaties themselves that fundamental rights – such as those under Articles 15, 16 and 17 of the Charter – cannot be disregarded when considering Art. 4(3) TEU (which has been quoted above) and therefore whether Art. 4(3) TEU requires that measures be maintained, or not maintained, in effect.

107. Article 2 TEU provides:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

108. Considering fundamental rights, Lenaerts and van Nuffel, EU Constitutional Law (Oxford, 2022), state at §25.002:

'Moreover, all provisions of Union law have to be interpreted in light of these fundamental rights.'

109. It is well established that national courts have a crucial role in protecting EU fundamental rights, and, accordingly, are obliged to have regard to, and to apply, such rights. In C-224/01 Köbler v Austria ECLI:EU:C:2003:513, the CJEU stated (§33):

'In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.'

Right to Work (Article 15 of the Charter)

110. Article 15 of the Charter provides:

'1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.'

111. Long before the adoption of the Charter, the freedom to pursue an occupation of one's choice was held to be protected under EU law.

112. In Case 234/85 Keller [1986] ECR 2897, the then ECJ stated:

'the freedom to pursue one's trade or profession is part of the general principles of law, the observance of which it ensures. Just as, in the public interest, limitations are laid down on the exercise of that right by the Member States, it is protected within the Community legal order only subject to the limits justified by the general objectives pursued by the Community, on condition that the substance of the right is left untouched.'

113. While recognising the freedom is not absolute, in that its subject to limitation, it is important to note any such limitation: i) must be in furtherance of the public interest; ii) it must be justified by the general objectives of Union; and iii) it must leave the substance of the right untouched (per Article 52 of the Charter).

114. In other words, if a legal measure were so burdensome that it raised existential threats to the economic viability for the practice by many persons of an occupation (even if it remained theoretically possible to pursue that occupation) there would be a strong case not only that Article 15 of the Charter had been disproportionately interfered with, but that the very essence or substance of the right itself had been transgressed. Such a situation is of a different genus to a situation where a certain occupation ceases to become profitable due to economic or market factors such as loss of demand or unavailability of supplies. The distinction is where the legal measure (or legal act, which could include a judgment) itself brings about the difficulty.

115. If, and to the extent that, An Taisce seeks or presses for relief in these which would pose a substantial threat to the economic viability of dairy farming in Ireland, it is the ICMSA's position that Irish farmers' right to work under Article 15 would be disproportionately interfered with. Accordingly, it is submitted that such an interpretation could not lawfully be acceded to.

Evidence bearing upon farmers' right to work

116. In his affidavit, the then President of the ICMSA, Mr. McCormack outlined numerous concerns regarding the viability of dairy farming as a profession if the Nitrates Directive Derogation ceased to be available.

117. Mr McCormack noted (§6): 'Some 6,900 farmers applied for a derogation in 2022. The ICMSA expects the number of such applications to increase in 2023.'

118. He noted (§48):

'I say and believe that very serious consequences would ensue for many farmers and farming families, and for the rural economy more generally, were the derogation to be removed or placed in jeopardy.'

119. In particular, if the Derogation were to be imperilled consequent upon the grant of any relief in these proceedings, many dairy farmers would incur unsustainable levels of debt which would make the profession of a dairy farmer unworkable.

120. Mr McCormack further averred at §54:

'if all derogation farmers were stocked to the maximum level of 250kg N per hectare and had to reduce their stocking rate to 170kg N per hectare, this would mean that stock levels on their farms would have to reduce by close to 50%.'

121. This would result in a need to reduce cow numbers which would give rise to further losses. With the assistance of data supplied by the Irish Cattle Breeding Federation, Mr McCormack illustrated by way of a table the losses which would occur to Irish farmers if the cow numbers were reduced by 20% to be €1,057,199,060 and by 10% to be €528,599,530.

122. This data is borne out by ICMSA members' perspectives of how any loss of the Derogation could affect their livelihoods. Although the maximum limit of the derogation has now been reduced to 220kg N per hectare, the data illustrates that further losses would be borne if farmers were bound to reduce their rate to 170kg N per hectare.

123. Mr O'Dwyer who runs a family farm with 79 cows in Roseborough, Co. Tipperary averred in his affidavit (§7):

'My debt level per cow is, at present €837. If my farm was not in receipt of a derogation the number of cows I would be able to milk would be 47, a raw reduction in cow numbers of 32 from my herd's present size or a reduction of over 40%. Additionally my debt per cow would increase to €1,413. The figure on cow reduction is based on the assumption that other stock numbers would remain at 2022 levels.'

124. Mr O'Dwyer further averred (§8):

> 'Consequently, any steps which would place in jeopardy the derogation which has been granted to Ireland, could have significant adverse implications for me, my farm, and my family. In particular, I believe that my total net margin would be reduced by 41%.'

125. In addition, another ICMSA member, Mr Keohane - who runs a family farm in West Cork with approximately 200 acres, which had approximately 166 cows in 2022 - also attested to the importance of the derogation.

126. Mr Keohane averred (§7):

> 'My debt level per cow is, at present, €6,000. If my farm was not in receipt of a derogation, the number of cows I would be able to milk would be 82, a raw reduction in cow numbers of 84 from my herd's present size, or a reduction of over 50%. Additionally, my debt per cow would increase to €12,130. The figure on cow reduction is based on the assumption that other stock numbers would remain at 2022 levels.'

127. Accordingly, it is submitted that if the Derogation were imperilled as a result of any relief which might be granted in these proceedings, a disproportionate interference with Irish farmers' right to work could occur.

128. As the above affidavits illustrate, this would not only undercut the economic viability of the sector, but would also produce adverse effects on families, the local community and Ireland's cultural heritage which are undeniably more difficult to measure (see e.g. §57 of Mr. McCormack's Affidavit, already quoted above).

Freedom to conduct a business (Article 16, Charter)

129. Article 16 of the Charter provides:

> 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.'

130. Case C-426 Alemo-Herron EU:C:2013:521 held the freedom to conduct a business would be disproportionately interfered with if a transferee was prevented from participating in pay negotiations with its employees' collective bargaining body. The CJEU held (§35):

> 'In those circumstances, the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.'

131. Although the present facts are of course different, it is submitted that this case illustrates that serious reductions upon one's operating freedom are liable to affect the very essence of the Article 16 right.

132. In C-201/15 Aget Iraklis ECLI:EU:C:2016:972 a company sought an annulment of a ministerial decision which refused to authorise collective redundancies following an opinion from the Supreme Labour Council advising against it. The applicant argued the decision infringed Directive 98/59 and Articles 49 and 63 TFEU read in conjunction with Article 16 of the Charter

133. The CJEU held the decision undoubtedly interfered with applicant's freedom to conduct a business and then went on to consider whether the interference was justified. The Court said the decision concerned a 'sensitive area' which sought to strike a fair balance between the interests of workers and of employment, and those relating the 'freedom of economic operators to conduct a business' in particular protection against unjustified dismissal (§90).

134. The CJEU, held, in applying identical reasoning to its analysis of the Treaty provisions and Article 16 of the Charter, that a prohibition on effecting collective redundancies in pursuit of an economic aim cannot justify a restriction on Article 16 (§§97 and 103).

135. This case accordingly, once again, underscores the fundamental importance of protecting the guarantee of freedom of business in the Union.

Evidence regarding farmers' freedom to conduct a business

136. For similar reasons to those already set out above in relation to the right of work, the ICMSA contends that if the derogation were imperilled consequent upon any relief that might be granted in these proceedings their freedom to conduct a business would be disproportionately interfered with. Moreover, the statements noted above from Case 230-78 SpA Eridiana regarding the importance of agricultural productivity and ensuring the availability of supplies at reasonable prices to the consumer would all be unjustifiably undermined.

137. The Fifth NAP, in itself, has posed substantial difficulties for dairy farmers. As Mr McCormack avers at §§40-41 of his affidavit:

> 'Some of the changes under the 5th NAP are already hugely significant from an economic perspective for farmers. To take just one example, §68(ii) of Mr. Flynn's

> Affidavit refers to 'cow banding' or three new excretion rates for cattle being introduced in 2023.
>
> Moreover, it is proposed under the 5th NAP to reduce the relevant figure of 250kg nitrogen / ha per year, to 220kg nitrogen / ha per year, under certain circumstances.'

138. The stark consequences of the diminishing allowance regarding stocking rates is illustrated at §50 of Mr McCormack's affidavit:

> 'Without a derogation, a farmer with a stocking rate above 170kgs of N per hectare will have the following options: a. Reduce livestock numbers; b. Export slurry; c. Buy or lease additional land.'

139. It is submitted that one of the implications of the fundamental guarantee of freedom to conduct a business under the Charter is that entrepreneurs are incentivised to take risks and invest in their businesses, as the guarantee provides an assurance that such bona fide endeavours will not be unjustly stymied but rather will be protected by the Union.

140. The affidavits of Mr Keohane and Mr O'Dwyer both disclose substantial investments in their respective farms. It is a common practice to avail of debt-financing to run a farm and Mr Keohane and Mr O'Dwyer both attest to a significant debt per cow. Such debts would substantially increase on both farms if they were not in receipt of the derogation and if they were compelled to sell cows.

141. Beyond the two deponents, the reference to the National Farm Survey at §§35-36 of Mr McCormack's affidavit discloses a trend of large degree of investment and consequent debt burdens across the farming sector as a whole:

> 'The National Farm Survey outlines the level of investment on Irish farms in 2021, and, among other things, reveals the following:-
>
> a) On-farm investment increased by 46% in 2021. On aggregate, this totalled over €1.49 billion across the farms represented by the survey.
>
> b) Investment on dairy farms was highest; at an average spend of €45,320 per farm in 2021. Investment on dairy farms accounted for almost half of total investment in 2021 and was up 36 percent compared to 2020.
>
> c) The level of investment by dairy farmers in the last 7 years is over €3 billion resulting in increased employment in rural areas and economic activity.
>
> Other points emerging from the 2021 National Farm Survey include the following:
>
> a. Two-thirds of Dairy farms had borrowings in 2021, compared to one-third (approximately) of Cattle farms.
>
> b. When farms without debt are excluded, the average Dairy farm debt in 2021 increased by 20% year-on-year to €139,031.
>
> c. The majority of farm related debt was classified as medium to long-term in 2021 (72%), with a further 18% relating to hired purchase or leasing and the remaining 8% considered to be short-term debt e.g. overdrafts.
>
> d. On average, 77% of Dairy farm debt was considered medium to long-term.'

142. Accordingly, any imperilling of the Derogation could have a devastating effect not only on the businesses of farmers but may also expose them to the risk of personal insolvency/bankruptcy or at least the possible risk of having to sell land assets.

143. Were such an eventuality to arise, not, as a result of market conditions, or even government policy, but rather from strained and unsound interpretations of EU legislative instruments, it is submitted that this would give rise to a disproportionate interference with farmers' freedom to conduct their businesses under Article 16.

Right to property (Article 17, Charter)

144. Farmers also possess property rights under Article 17 of the Charter. Article 17 states:

> '1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'

145. In Case 44/79 Hauer [1979] ECR 3727, the then ECJ held that measures seeking to control the use of the property are only permitted in certain circumstances (§19):

> 'Thus the protocol accepts in principle the legality of restrictions upon the use of property, whilst at the same time limiting those restrictions to the extent to which they are deemed 'necessary' by a State for the protection of the 'general interest'.'

146. In Hauer, a restriction on planting new vines was held to be justified as it had the legitimate aim of establishing (§25):

> 'a lasting balance on the wine market at a price level which is profitable for producers and fair to consumers and, secondly, to obtain an improvement in the quality of

wines marketed, in order to attain that double objective of quantitative balance and qualitative improvement…'

147. As Hauer clarifies, measures requiring controls on a landowner's use of property amount to an interference with the landowner's property rights under Article 17. The decisive question, however, is whether that interference is justified with respect to the objectives pursued by the relevant measure. Here, the Union legislature has legislated for a derogation from the requirement for 170 N/kg, which, of itself, lucidly indicates that such a requirement is not necessary in all circumstances.

148. If relief were to be granted which imperilled the Derogation, a disproportionate interference with ICMSA members' property rights under Article 17 could ensue.

Evidence relevant to farmers' property rights

149. As was stated at §50 of Mr McCormack's affidavit, dairy farmers will be forced to buy/lease more land or export slurry to maintain the same number of cows in the event of a reduced allowance.

150. This reality illustrates the degree to which the income earning ability per hectare of dairy farmers will be substantially reduced. Contrary to cases such as Case C-283/11 Sky Osterreich - where a relatively slight interference with Sky's property rights arose, and the Charter was held not to be breached - the interference possibly arising here would be of a radically different order. It would amount to an assault on the raison d'être for dairy farmers' possessing such landholdings, namely the cultivation of those for dairy farming purposes.

151. Moreover, §49 of Mr McCormack's affidavit states:

'The consequences of cow banding in 2023 provides an insight into just one of the likely outcomes of Ireland not having a derogation. Cow banding in 2023 has resulted in an over-heated land market and more land moving into dairy as farmers need more land for the same number of cows.'

Proportionality as a general principle of EU law

152. Lenaerts and van Nuffel, EU Constitutional Law (Oxford, 2022) comment at §5.035:

'The principle of proportionality also guides the Court of Justice in resolving possible conflicts between objectives of Union policy, such as between agricultural policy and fundamental rights including the right to property and freedom of expression or between several fundamental rights in order to strike a 'fair balance between them'.'

153. It is submitted that this clearly extends to the legal obligations and instruments (largely of a procedural nature) which An Taisce relies upon in these proceedings, as well as what An Taisce asserts to be the consequences of any breach of such Union law.

154. A 'fair balance' should be struck. It is not the case that one aspect of Union policy – here environmental protection – has been afforded paramountcy over everything else.

155. No fair balance would be struck here by the invalidation of the NAP on account of the essentially procedural points raised by An Taisce.

156. Moreover, Article 5(4) TEU states:

'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'

157. This, of itself, reveals that a singular focus upon environmental considerations to the exclusion of all else would not be appropriate or permissible. Applying the principle of proportionality must admit of a weighing in the balance any adverse effects upon farmers, the agri-food sector and/or rural economies and communities. Moreover, proportionality entails that, where interests are to be balanced, an outcome in which one interest is not abrogated or unduly subrogated to another should be striven for.

158. ICMSA accepts, as it must, that rights under the Charter are not absolute and can be balanced with other interests such as environmental protection.

159. However, here, on the other side of the 'proportionality ledger', it is reasonable to surmise that any removal or disapplication of the nitrates derogation would have a minimal effect on improving water quality in Ireland. As Mr McCormack states at §41 of his affidavit, referring to the Teagasc report, the reduction under Fifth NAP to reduce to the figure of 250kg N / ha per year, to 220kg N / ha per year 'will have a very limited impact on water quality. Page 6 of the said report indicates that there would only be a 3.6% reduction in N leaching as a consequence of the move from 250 to 220kgs of N.'

160. Moreover, as §30 of ICSMA's Statement of Opposition has noted, taking a longer-term view, even the possible environmental consequences of alternatives could be unhappy ones. That option could include many family farms being at risk of becoming unviable. In that event, such family farms would be liable, and perhaps even likely, to be taken over by larger farms."

81. My decision is as follows. There appear to be essentially three issues as follows:

(i) the domestic law power of the court to refuse relief or in particular to refuse *certiorari*;
(ii) the limitation on that power in the case of breach of EU law; and
(iii) the domestic law power of the court to grant relief not specifically claimed as an alternative to the relief that is claimed.

82. The first issue is a matter of domestic law. Judicial review is a discretionary remedy. The court can therefore in principle decline to make any order or in particular decline to make an order of *certiorari*, provided that that is the lawfully correct step to take. Indeed there are situations where a court has a discretion to make no order even where there is a breach of a constitutional provision: *McMenamin v. Ireland* 1997 WJSC-SC 1557, [1996] 3 I.R. 100, [1994] 2 I.L.R.M. 368, [1996] 12 JIC 1902 (Hamilton C.J.). In considering such discretion the court can take into account all of the circumstances including matters such as the general principle (as a matter of EU law) of proportionality, and/or prejudice to third parties including by reference to any applicable rights and interests of others, including under the Charter of Fundamental Rights, in particular the right to work under art. 15, to conduct a business under art. 16, and to property under art. 17, and/or Union policies generally including the CAP under art. 39 TFEU and Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021. Of course, circumstances favouring relief such as the overriding need for environmental protection will also be relevant. And a discretion in judicial review is not an at-large matter – it must be exercised on a fairly limited basis as set out in existing domestic jurisprudence.

83. On the second issue, there is no dispute between the applicant and the State on the proposition that insofar as there is a discretion vested in a national court by domestic law to:

(i) decline to grant relief at all, or
(ii) decline to make any order that affects the validity of a measure under challenge,

such discretion is only exercisable if and to the extent that the judgment and order of the court effectively remedies the effects of any breach of EU law (if there is a breach, which is denied by the opposing parties). EU law is clear that the obligation to remedy the effects of any breach of EU law: art. 4(3) TEU, Case, and see e.g., judgment of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraphs 31 and 32, judgment of 12 November 2019, *Commission v Ireland (Derrybrien Wind Farm)*, C-261/18, EU:C:2019:955, judgment of 25 June 2020, *A & Others v Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen*, C-24/19, ECLI:EU:C:2020:503. Of course that only applies if there is a breach and if there are effects, both of which are inevitably denied by the opposing parties. Thus there is no EU law issue for reference. The ICMSA agrees with the State. The IFA didn't raise any issue about this having been given the opportunity to do so – silence is acquiescence. So there is no issue remaining for the court to decide.

84. The third issue is also one of domestic law. As regards alternative remedies, the law is clear that the court can grant an unpleaded relief (e.g., in this instance, perhaps an order directing further assessments) as long as the relief remains within the scope of the pleaded grounds: *Concerned Residents of Treascon v. An Bord Pleanála* [2024] IESC 28 *per* Murray J. The State and ICMSA didn't dispute that either. Again the IFA didn't take up the opportunity to clarify if it was raising any issue, so this can also be decided now.

85. Indeed this isn't just a standard case of potentially granting alternative relief. It is a case where the opposing parties will be asking for alternative relief rather than the *certiorari* that the applicant is looking for. An opposing party can't play Catch-22 by submitting that alternative relief is more appropriate and also opposing such relief on the grounds that it is not pleaded. Fortunately the State didn't try to go down that route, but they did bridle somewhat at my formulation of the court not being in a position to refuse such relief *proposed by a respondent* on the grounds that it is not pleaded. But the notion of the court being precluded from creating a Catch-22 follows from the fact that the alternative relief in the scenario we are talking about is something that the opposing parties are urging on the court, as opposed to a more conventional situation where an applicant is asking the court for a relief not pleaded. In the latter and more normal case, it makes more sense to think in terms of a *power* to grant unpleaded relief.

86. So the domestic legal position here is that if the grant of a remedy is otherwise appropriate (which is denied by the opposing parties), and if the opposing parties persuade the court that a relief other than that pleaded would be more appropriate, the court may not refuse to grant such a remedy within the scope of the case as defined by the pleaded grounds but alternative to the relief pleaded (e.g. an order directing further assessments) on the basis that the applicant only pleaded an order quashing the decision and did not plead the remedy that is contended to be more appropriate by an opposing party.

87. On the foregoing basis there is no issue outstanding and thus no need for a reference under this heading.

Issue 75(a) – ninth question – validity of Commission decision

88. Issue 75(a) is:

"75. (a) If the answers to the previous issues have the consequence that the adoption of the NAP involved a breach of directives 92/43, 2000/60 and/or 2001/42, is Commission decision 2022/696 invalid?"

89. The applicant submitted:

"Concise answer

The validity of the Commission decision is exclusively a matter for the CJEU. The issue for this Court is whether it has doubt as to the validity of the Commission decision.

Acte clair

The need to refer if the Court has doubt as to the validity of the Commission decision is acte clair.

Detailed answer

172. Recitals 9 and 10 of the Commission Implementing Decision indicate that Ireland has adopted a new National Action Programme with additional reinforced measures to comply with the objectives of the Nitrates Directive; and that Ireland applies this action programme throughout the entire territory in conformance with Article 5 of the Nitrates Directive.

173. Article 14 of the Commission Implementing Decision states: 'This Decision shall apply in the context of the Irish Action Programme as implemented in the Statutory Instrument No 113 of 2022, European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022.'

174. Therefore, it is doubtful in light of Recital 9 and Article 14 that the Commission Implementing Decision would continue to be valid if there was a breach of the Habitats Directive, the WFD or the SEA Directive.

175. While the High Court does not have jurisdiction to determine whether the Commission Implementing Decision is valid in that eventuality, if it shares the Applicant's doubts in that regard it is required to make a preliminary reference to the Court of Justice pursuant to Article 267 TFEU asking the Court of Justice to determine whether the Commission Implementing Decision is valid in light of the quashing of the NAP.

176. The legal test which the Applicant must meet in order for the matter to be referred is clear – this Court must share the doubts of the Applicant. The question is succinctly summarised in the 2019 version of the 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings' at §7:

> 'It follows, moreover, from settled case-law that although national courts and tribunals may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court has exclusive jurisdiction to declare such acts invalid. When it has doubts about the validity of such an act, a court or tribunal of a Member State must therefore refer the matter to the Court, stating the reasons why it has such doubts.'

177. The relevant threshold in respect of this issue is readily identifiable. The applicable principles were helpfully identified, albeit in a different context in Dempsey v An Bord Pleanála . Simons J found that Krizan Case C-416/10 (§64) had identified the jurisdiction in the following terms (references excluded):

> As regards the other aspects of the first question referred, it is settled case-law that Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case
>
> …
>
> A reference for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether that reference is appropriate and necessary'

178. However, the reference did not proceed for reasons explained in a later judgment .

179. Similar sentiments were reflected by CJEU in British American Tobacco at §34:

> 'In that regard, it is to be remembered that when a question on the validity of a measure adopted by the Community institutions is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and consequently whether it should request the Court to rule on that question. Accordingly, where the national court's questions relate to the validity of a provision of Community law, the Court is obliged in principle to give a ruling (Case C-408/95 Eurotunnel and Others [1997] ECR I-6315, paragraph 19).'

180. As per the State's Opposition (§176) 'Having an NAP in place is a pre-requisite to the granting of a derogation and the derogation will apply in the context of that NAP.'

181. The threshold that the Applicant has to meet is to raise a doubt in the Court's mind such that the matter has to be referred to the Court of Justice. In circumstances where the Derogation expressly relies on the NAP, if the adoption of the NAP involved a breach of the Habitats Directive, the WFD or the SEA Directive that raises (at the very least) a doubt whether the Derogation remains valid."

90. The State submitted:

"I. Summary

235. If the answers to the previous issues have the consequence that the adoption of the NAP involved a breach of the Habitats Directive, WFD and/or SEA Directive, the Commission Implementing Decision (EU) 2022/696 of 29 April 2022 granting a derogation requested by Ireland pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (the 'Commission Decision') nonetheless remains valid.

236. The Applicant's challenge is an extraordinary validity challenge without basis in national law or EU law. Each of the Directives is addressed to the Member States, and not the Commission. The Commission Decision itself states that it shall 'apply in the context of the [NAP]' (Article 14 of the Decision). Accordingly, the validity of the Commission Decision is not affected if the adoption of the NAP were to be found to have breached a Directive. The validity of the Commission Decision may be reviewed against standards which the Commission itself was obliged to comply with when making, and directly concerning, that decision, namely those relevant substantive and procedural requirements entailed by the Nitrates Directive, none of which is relied on by the Applicant. Further, that the Applicant contends Core Ground 4 as being live only if it succeeds in obtaining primary relief underscores that Core Ground 4 is irrelevant.

II. Acte Clair

237. The Respondents accept that Issue 75(a) is not acte clair.

III. Substantive submissions

238. If the answers to the previous issues have the consequence that the adoption of the NAP involved a breach of the Habitats Directive, WFD and/or SEA Directive, the Commission Decision remains valid.

239. By the Applicant's pleaded case in the Statement of Grounds, it is clear that (§64) '[t]his Core Ground is consequential on the Applicant succeeding in having the NAP quashed'.

240. The Respondents accept that in a preliminary reference pursuant to Article 267 TFEU concerning the validity of an EU Act, the referring national court is not limited to the grounds specified in an action for annulment pursuant to Article 263(2) TFEU: Lenaerts, Gutman and Nowak, 'EU Procedural Law' (2nd ed., OUP, 2023), §10.14.

241. That being so, the Respondents nevertheless submit that the grounds for seeking annulment in Article 263(2) TFEU are instructive in guiding this Court's assessment of Issue 75(a).

242. Article 263(1)–(2) TFEU provides that:

> 'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.
>
> It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.
>
> …'

243. The Applicant has not identified a lack of competence on the part of the European Commission, an infringement of an essential procedural requirement, an infringement of the Treaties, an infringement of any rule of law relating to the application of the Treaties or a misuse of powers by the European Commission.

244. Rather, the Applicant in the Statement of Grounds at §65 pleads that '[t]he consequence of the Court quashing the NAP is that the [Commission Decision] is invalid since it depends on the validity of the NAP'.

245. However, the Applicant's challenge is an extraordinary validity challenge, without basis in either national law or EU law. Each of the Directives – Habitats Directive, WFD and SEA Directive - is addressed to the Member States, and not the Commission.

246. In the present proceedings, the Applicant does not suggest that the Commission Decision is not validly authorised by its parent in the main legislation: paragraph 2 of Annex III in the Nitrates Directive.

247. Rather, the Applicant's position is that the Commission Decision depends on the validity of the NAP because the Commission Decision refers to the NAP, which is entirely artificial.

248. In this regard:

(1) Recital 9 explains that Ireland has adopted the NAP; and

(2) Article 14 provides that the Commission Decision shall apply in the context of the NAP.

249. With respect to Recital 9, the artificiality of the Applicant's position can be seen by analogy with the jurisprudence of the CJEU relating to the interpretation of recitals. In Case C-162/97 Nilsson and Others [1998] ECR I-7477, the CJEU stated that (§54):

> 'It must be stated that the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question.'

250. As a recital in an EU law has no binding legal force and cannot be used as a ground to derogate from the actual provisions of the EU law in question, the Applicant's proposition that the validity of the Commission Decision depends on the validity of the text in Recital 9 is unfounded.

251. The Commission Decision itself states that it shall 'apply in the context of the [NAP]' (Article 14 of the Decision). Accordingly, the validity of the Commission Decision is not affected if the adoption of the NAP were to be found to have breached a Directive. The validity of the Commission Decision may be reviewed against standards which the Commission itself was obliged to comply with when making, and directly concerning, that decision, namely those relevant substantive and procedural requirements entailed by the Nitrates Directive, none of which is relied on by the Applicant

252. The Respondents' position is that quashing the NAP and/or the GAP Regulations would entail consequences for the implementation of the Commission Decision and application of the derogation pending remedial measures coming into effect. However, it is denied that the validity of the Commission Decision would be affected.

253. The Respondents submit that the Applicant contends Core Ground 4 as being live only if it succeeds in obtaining its primary relief underscores that Core Ground 4 is irrelevant.

254. In a different context, in C-203/15 Tele2 Sverige EU:C:2016:970, the CJEU held that (§§130–132):

> 'However, in accordance with the Court's settled case-law, the justification for making a request for a preliminary ruling is not for advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law (see, to that effect, judgments of 24 April 2012, Kamberaj, C-571/10, EU:C:2012:233, paragraph 41; of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 42, and of 27 February 2014, Pohotovosť, C-470/12, EU:C:2014:101 paragraph 29).
>
> In this case, in view of the considerations set out, in particular, in paragraphs 128 and 129 of the present judgment, the question whether the protection conferred by Articles 7 and 8 of the Charter is wider than that guaranteed in Article 8 of the ECHR is not such as to affect the interpretation of Directive 2002/58, read in the light of the Charter, which is the matter in dispute in the proceedings in Case C-698/15.
>
> Accordingly, it does not appear that an answer to the second question in Case C-698/15 can provide any interpretation of points of EU law that is required for the resolution, in the light of that law, of that dispute.' (Emphasis added).

255. To this end, while it is solely for this Court to determine both the need for a preliminary reference and the relevance of the questions it submits to the CJEU, the CJEU retains a jurisdiction to rebut the presumption that a question referred for a preliminary ruling is relevant in exceptional cases: Case C-617/10 Åklagaren v Hans Åkerberg Fransson EU:C:2013:105, §40

256. The Respondents respectfully submit that a preliminary reference in respect of Core Ground 4 is not necessary for the effective resolution of the within proceedings.

257. Further, at §69 of the Statement of Grounds, the Applicant pleads that:

> 'While the High Court does not have jurisdiction to determine whether the Commission Implementing Decision is valid in that eventuality, if it shares the Applicant's doubts in that regard it is required to make a preliminary reference to the Court of Justice pursuant to Article 267 TFEU asking the Court of Justice to

determine whether the Commission Implementing Decision is valid in light of the quashing of the NAP.' (Emphasis added).

258. The Applicant has not pleaded that Core Ground 4 is consequential on a finding that the adoption of the NAP involved a breach of the Habitats Directive, WFD and/or SEA Directive.

259. In circumstances in which this Court held in the No. 2 Judgment ([2024] IEHC 248) that §196(ix) there could be a final Module IV on remedies and remaining issues in due course if it becomes necessary, the Respondents respectfully submit that any referral of a question concerning the validity of the Commission Decision ought not occur until after the Court has given judgment in respect of Module IV and concluded that the NAP should be quashed."

91. The ICMSA submitted:

"161. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §235 to §259."

92. My decision is as follows. There are three basic sub-issues to be addressed – must I refer this, if not, can I refer this, and if I am permitted but not obliged to refer, should I refer this? To avoid undue repetition, these will be addressed in the formal judgment for reference but the bottom line is that the question is going to be referred. Further details will be set out in that judgment.

Issue 75(b) – *Eurobolt* jurisdiction

93. Issue 75(b) is:

"(b) Should the court seek any information from the Commission (and/or other EU institutions) under the *Eurobolt* jurisdiction (judgment of 3 July 2019, *Eurobolt BV*, C-644/17, ECLI:EU:C:2019:555) prior to deciding on whether the issue of the validity of Commission decision 2022/696 should be referred?

[Note if any party suggests an affirmative answer to this, their submission should set out an outline of the nature of the questions to be posed, bearing in mind that this would ultimately be a matter for the court if this option were to be pursued]"

94. The applicant submitted:

"183. The Applicant does not (at this point anyway) propose any questions for the Commission (and/or other EU institutions)."

95. The State submitted:

"I. Summary

260. The Respondents does not consider that this Court should seek information from the European Commission prior to deciding on whether the issue of the validity of Commission Decision should be referred.

II. Acte Clair

261. A response as to whether Issue 75(b) is acte clair is not necessary.

III. Substantive submission

262. The Respondents do not consider that this Court should seek information from the European Commission prior to deciding on whether the issue of the validity of Commission Decision should be referred."

96. The ICMSA submitted:

"162. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §260 to §262."

97. My decision is as follows. One can see a compelling argument that like the discretion to refer, a court has discretion to invoke *Eurobolt* on its own motion, but it can still have regard to the position of the parties. In the absence of any request from any party to do so here, I would not proposed to invoke that jurisdiction in this particular case. Had anyone wanted me to do that I would have been inclined to hold off on a reference and obtain the Commission's perspectives and assistance on some of the issues, but as I say nobody suggested that. So the breaking of any new procedural ground in that regard will have to await some other case.

Summary

98. In outline summary, without taking from the more specific terms of this judgment:

(i) 9 of the 12 questions in this module seem appropriate for reference to the CJEU, with some potential re-wording, especially given that almost all of those are agreed not to be *acte clair*;

(ii) as regards the other 3 questions:

(a). the question at issue 46(b) is not in fact in dispute;

(b). the question at issue 69(a) is not in dispute as a European proposition and can be resolved now as a domestic proposition;

(c). as regards issue 75(b), in the absence of a request to invoke the *Eurobolt* jurisdiction I do not propose to do so here, although it would have been open to the court in principle to do so *motu proprio*.

(iii) as regards the State's proposed additional question, that was adequately covered by issue 46(a) but in any event no longer arises on the facts;

Order

99. For the foregoing reasons, it is ordered that:

(i) there be in principle a reference to the CJEU which will be addressed in a separate judgment and order for reference;

(ii) the parties be required to complete the CJEU contact sheet set out in guidance notes to Practice Direction HC126 within 7 days and submit that sheet to the List Registrar copying the relevant judicial assistant;

(iii) the natural persons who are parties in their capacity as trustees be required to inform the court by Friday 26th July 2024 (by email the List Registrar copying the relevant judicial assistant) as to whether they wish their names to be anonymised for the purposes of the CJEU proceedings and judgment;

(iv) the parties be directed to prepare agreed electronic books of necessary pleadings for the CJEU (not including authorities or written submissions) in accordance with technical requirements set out in Practice Direction HC126 and guidance notes and generally comply with such guidance notes so that all papers are received by the List Registrar by 31st July 2024;

(v) the parties be required to comply with the directions to keep the referring court informed of progress of the reference as set out in para. 100(vii) of *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265, [2021] 5 JIC 2704;

(vi) the matter be listed for mention on 9th September 2024 to confirm progress; and

(vii) the costs of the proceedings to date be reserved until further order.