[2024] IEHC 693

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

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

NOTICE PARTIES

(No. 6)

JUDGMENT of Humphreys J. delivered on Friday the 6th day of December 2024

Subject-matter of the dispute

1. This request for a preliminary ruling concerns the interpretation of Articles 5(1) and 9(1)(b) of, and paragraphs (f) and (h) of Annex I to, Directive 2001/42.

2. The request is being made in proceedings concerning a challenge by the applicant to the validity of Ireland's Fifth Nitrates Programme under Directive 91/676 and implementing measures, together with a challenge to the validity of Commission Implementing Decision 2022/696 which permits a derogation for Ireland which allows that, for each relevant farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, may exceed an amount of manure containing 170 kg N/ ha.

3. The wider legal context, facts and procedural history are as included in the judgment for reference in Case C-531/24 *An Taisce v Minister for Housing* made on 1 August 2024. The present reference relates to a separate module of the proceedings dealing with different issues from those the subject of the previous reference. Those issues were not adjourned pending the earlier reference, as noted in the judgment for reference itself under the heading of "Order" in that judgment.

Legal context

European Union law

Directive 91/676 and Commission Implementing Decision 2022/696

4. Article 3 of Directive 91/676 provides:

> "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.
>
> 2. Member States shall, within a two-year period following the notification of this Directive, 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 shall notify the Commission of this initial designation within six months.
>
> 3. When any waters identified by a Member State in accordance with paragraph 1 are affected by pollution from waters from another Member State draining directly or indirectly in to them, the Member States whose waters are affected may notify the other Member States and the Commission of the relevant facts.
>
> The Member States concerned shall organize, where appropriate with the Commission, the concertation necessary to identify the sources in question and the measures to be taken to protect the waters that are affected in order to ensure conformity with this Directive.
>
> 4. Member States shall review if necessary revise or add to the designation of vulnerable zones as appropriate, and at last every four years, to take into account changes and factors unforeseen at the time of the previous designation. They shall notify the Commission of any revision or addition to the designations within six months.
>
> 5. Member States shall be exempt from the obligation to identify specific vulnerable zones, if they establish and apply action programmes referred to in Article 5 in accordance with this Directive throughout their national territory."

5. Article 4 provides:

"Article 4

1. With the aim of providing for all waters a general level of protection against pollution, Member States shall, within a two-year period following the notification of this Directive:

(a) establish a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis, which should contain provisions covering at least the items mentioned in Annex II A;

(b) set up where necessary a programme, including the provision of training and information for farmers, promoting the application of the code(s) of good agricultural practice.

2. Member States shall submit to the Commission details of their codes of good agricultural practice and the Commission shall include information on these codes in the report referred to in Article 11. In the light of the information received, the Commission may, if it considers it necessary, make appropriate proposals to the Council."

6. Article 5 provides:

"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.

2. An action programme may relate to all vulnerable zones in the territory of a Member State or, where the Member State considers it appropriate, different programmes may be established for different vulnerable zones or parts of zones.

3. Action programmes shall take into account:

(a) available scientific and technical data, mainly with reference to respective nitrogen contributions originating from agricultural and other sources;

(b) environmental conditions in the relevant regions of the Member State concerned.

4. 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.

5. Member States shall moreover take, in the framework of the 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 referred to in paragraph 4 will not be sufficient for achieving the objectives specified in Article 1. In selecting these measures or actions, Member States shall take into account their effectiveness and their cost relative to other possible preventive measures.

6. Member States shall draw up and implement suitable monitoring programmes to assess the effectiveness of action programmes established pursuant to this Article.

Member States which apply Article 5 throughout their national territory shall monitor the nitrate content of waters (surface waters and groundwater) at selected measuring points which make it possible to establish the extent of nitrate pollution in the waters from agricultural sources.

7. Member States shall review and if necessary revise their action programmes, including any additional measures taken pursuant to paragraph 5, at least every four years. They shall inform the Commission of any changes to the action programmes."

7. Annex III is as follows:

"ANNEX III

MEASURES TO BE INCLUDED IN ACTION PROGRAMMES AS REFERRED TO IN ARTICLE 5 (4) (a)

1. The measures shall include rules relating to:

1. periods when the land application of certain types of fertilizer is prohibited;

2. the capacity of storage vessels for livestock manure; this capacity must exceed that required for storage throughout the longest period during which land application in the vulnerable zone is prohibited, except where it can be demonstrated to the competent authority that any quantity of manure in excess of the actual storage capacity will be disposed of in a manner which will not cause harm to the environment;

3. limitation of the land application of fertilizers, consistent with good agricultural practice and taking into account the characteristics of the vulnerable zone concerned, in particular:

(a) soil conditions, soil type and slope;

(b) climatic conditions, rainfall and irrigation;
(c) land use and agricultural practices, including crop rotation systems;
and to be based on a balance between:
(i) the foreseeable nitrogen requirements of the crops,
and
(ii) the nitrogen supply to the crops from the soil and from fertilization corresponding to:
— the amount of nitrogen present in the soil at the moment when the crop starts to use it to a significant degree (outstanding amounts at the end of winter),
— the supply of nitrogen through the net mineralization of the reserves of organic nitrogen in the soil,
— additions of nitrogen compounds from livestock manure,
— additions of nitrogen compounds from chemical and other fertilizers.

2. 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.
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 objectives criteria, for example:
— long growing seasons,
— crops with high nitrogen uptake,
— high net precipitation in the vulnerable zone,
— soils with exceptionally high denitrification capacity.
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).
3. Member States may calculate the amounts referred to in paragraph 2 on the basis of animal numbers.
4. Member States shall inform the Commission of the manner in which they are applying the provisions of paragraph 2. In the light of the information received, the Commission may, if it considers necessary, make appropriate proposals to the Council in accordance with Article 11."

8. On 22 October 2007, the Commission adopted Decision 2007/697 granting a derogation requested by Ireland pursuant to Directive 91/676 for the purpose of allowing the application of livestock manure up to a limit of 250 kg nitrogen/ha per year, under certain conditions, on farms with at least 80% grassland, in the context of the Irish Nitrates Action Programme ("**NAP**"), as implemented by Ireland by means of the European Communities (Good Agricultural Practices for Protection of Waters) Regulations 2006.

9. On 24 February 2011, the Commission adopted Decision 2011/127 amending Decision 2007/697 and extending the derogation until 31 December 2013, in the context of the Irish NAP as implemented by Ireland by means of the European Communities (Good Agricultural Practices for Protection of Waters) Regulations 2010.

10. On 27 February 2014, the Commission adopted Implementing Decision 2014/112 granting a derogation requested by Ireland pursuant to Directive 91/676 for the purpose of allowing the application of livestock manure up to a limit of 250 kg nitrogen/ha per year, under certain conditions, on farms with at least 80% grassland, in the context of the Irish NAP as implemented by Ireland by means of the European Communities (Good Agricultural Practices for Protection of Waters) Regulations 2014.

11. On 8 February 2018, the Commission adopted Implementing Decision (EU) 2018/209 granting a derogation requested by Ireland pursuant to Directive 91/676 for the purpose of allowing the application of livestock manure up to a limit of 250 kg nitrogen/ha per year, under certain conditions, on farms with at least 80% grassland, in the context of the Irish NAP as implemented by Ireland by means of the European Union (Good Agricultural Practices for Protection of Waters) Regulations 2017. Implementing Decision (EU) 2018/209 expired on 31 December 2021.

12. Recital 16 to Commission Implementing Decision (EU) 2022/696 provides:
"(16) After an examination of the request from Ireland in accordance with paragraph 2, third subparagraph, of Annex III to Directive 91/676/EEC, and in the light of the Irish Action

Programme coupled with the experience gained from the derogation provided for in Decision 2007/697/EC and Implementing Decisions 2014/112/EU and (EU) 2018/209, the Commission considers that the amount of manure proposed by Ireland, corresponding to 250 kg nitrogen/ha per year, will not prejudice the achievement of the objectives set out in Directive 91/676/EEC, subject to certain strict conditions that should apply to farmers covered by authorisation."

13. Recital 23 provides (notes omitted):

"(23) The derogation provided for in this Decision is without prejudice to the obligations of Ireland to apply Council Directive 92/43/EEC …, including the ruling of the Court of Justice of the European Union in Case C-293/17 Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu [ECLI:EU:C:2018:882], in particular on the interpretation of Article 6(3) of that Directive."

14. Article 1 of the decision provides:

"Derogation

The derogation requested by Ireland, by letter of 14 October 2021, for the purpose of allowing the application to the land of a higher amount of nitrogen from livestock manure than that provided for in paragraph 2, second subparagraph, first sentence, of Annex III to Directive 91/676/EEC, namely 170 kg nitrogen, is granted, subject to the conditions laid down in Articles 4 to 12 of this Decision."

15. Article 4 provides:

"Annual application and commitment

1. Grassland farmers who want to benefit from a derogation shall, each year, submit an application for an authorisation to apply livestock manure containing up to 250 kg nitrogen/ha per year to the competent authorities. The application shall contain a declaration stating that the grassland farmer will submit to the controls provided for in Article 11.

2. In the application referred to in paragraph 1, the applicant shall undertake, in writing, to fulfil the conditions laid down in Articles 6 to 9."

16. Article 5 provides:

"The granting of authorisations

Authorisations to apply an amount of livestock manure on grassland farms containing up to 250 kg nitrogen/ha per year shall be granted subject to the conditions laid down in Articles 6 to 9."

Directive 2001/42

17. Article 2 of Directive 2001/42 provides:

"Definitions

For the purposes of this Directive:

(a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

— which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

— which are required by legislative, regulatory or administrative provisions;

(b) 'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;

(c) 'environmental report' shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I;

(d) 'The public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups."

18. Article 3 provides:

"Scope

1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.
3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.
4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.
5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.
6. In the case-by-case examination and in specifying types of plans and programmes in accordance with paragraph 5, the authorities referred to in Article 6(3) shall be consulted.
7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public.
8. The following plans and programmes are not subject to this Directive:
— plans and programmes the sole purpose of which is to serve national defence or civil emergency,
— financial or budget plans and programmes.
9. This Directive does not apply to plans and programmes co-financed under the current respective programming periods(11) for Council Regulations (EC) No 1260/1999(12) and (EC) No 1257/1999(13)."

19. Article 5 provides:
"Environmental report
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."

20. Article 9 provides:
"Article 9
Information on the decision
1. Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed:
(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.
2. The detailed arrangements concerning the information referred to in paragraph 1 shall be determined by the Member States."

21. Article 10 provides:
"Monitoring

1. 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.
2. In order to comply with paragraph 1, existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication of monitoring."

22. Article 11 provides:

"Article 11
Relationship with other Community legislation
1. An environmental assessment carried out under this Directive shall be without prejudice to any requirements under Directive 85/337/EEC and to any other Community law requirements.
2. For plans and programmes for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, Member States may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation in order, inter alia, to avoid duplication of assessment.
3. For plans and programmes co-financed by the European Community, the environmental assessment in accordance with this Directive shall be carried out in conformity with the specific provisions in relevant Community legislation."

23. Annex I provides:

"ANNEX I
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:
(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;
(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;
(c) the environmental characteristics of areas likely to be significantly affected;
(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;
(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;
(f) 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;
(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;
(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;
(i) a description of the measures envisaged concerning monitoring in accordance with Article 10;
(j) a non-technical summary of the information provided under the above headings.
These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects."

Domestic law

24. Article 9 of S.I. No. 435 of 2004 - European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (https://www.irishstatutebook.ie/eli/2004/si/435/made/en/print), which has not been relevantly amended by S.I. No. 201 of 2011, the Planning and Development (Strategic Environmental Assessment) (Amendment) Regulations 2011 (https://www.irishstatutebook.ie/eli/2011/si/201/made/en/print), provides:

"9. (1) Subject to sub-article (2), an environmental assessment shall be carried out for all plans and programmes

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications and tourism, and which set the framework for future development consent of projects listed in Annexes I and II to the Environmental Impact Assessment Directive, or

(b) which are not directly connected with or necessary to the management of a European site but, either individually or in combination with other plans, are likely to have a significant effect on any such site.

(2) A plan or programme referred to in sub-article (1) which determines the use of a small area at local level or a minor modification to a plan or programme referred to in sub-article (1) shall require an environmental assessment only where the competent authority determines that it is likely to have significant effects on the environment and, for this purpose, the competent authority shall make any necessary determination.

(3) A competent authority shall determine whether plans and programmes other than those referred to in sub-article (1), which set the framework for future development consent of projects, are likely to have significant effects on the environment.

(4) A competent authority shall, in determining on a case by-case basis under sub-article (2) or (3) whether a plan or programme, or modification to a plan or programme, would or would not be likely to have significant effects on the environment, take account of relevant criteria set out in Schedule 1 and any submission or observation received in response to a notice under sub-article (5).

(5) Prior to making a decision under sub-article (2) or (3), a competent authority shall give notice in accordance with sub-article (6) to the following environmental authorities—

(a) the Environmental Protection Agency,

(b) where it appears to the competent authority that the plan or programme, or modification to a plan or programme, might have significant effects in relation to the architectural or archaeological heritage or to nature conservation, the Minister for the Environment, Heritage and Local Government,

(c) where it appears to the competent authority that the plan or programme, or modification to a plan or programme, might have significant effects on fisheries or the marine environment, the Minister for Communications, Marine and Natural Resources.

(6) A notice under sub-article (5) shall—

(a) state that the competent authority proposes to prepare a plan or programme, or to modify a plan or programme,

(b) state that the competent authority must decide whether the plan or programme, or modification to a plan or programme, would or would not be likely to have significant effects on the environment and that, in so doing, it must take account of relevant criteria set out in Schedule 1, and

(c) indicate that a submission or observation in relation to whether the proposed plan or programme, or modification to a plan or programme, would or would not be likely to have significant effects on the environment may be made to the authority within a specified period which shall be not less than 4 weeks from the date of the notice.

(7) As soon as practicable after making a determination under sub-article (2) or (3), the competent authority shall—

(a) make a copy of its decision, including, as appropriate, the reasons for not requiring an environmental assessment, available for public inspection at the offices of the competent authority during office hours, and

(b) notify its decision to any environmental authority which was notified under subarticle (5).

(8) In the case of—

(a) a plan or programme, or modification to a plan or programme, which requires an environmental assessment pursuant to sub-article (1),

(b) a plan or programme, or modification to a plan or programme, which a competent authority has determined, under sub-article (2) or (3), would be likely to have significant effects on the environment, or

(c) a review of a master plan for the Dublin Docklands Area under section 20 (1)(a) of the Dublin Docklands Development Authority Act 1997 ,

an environmental assessment shall be carried out by the competent authority of the plan or programme, or modification to a plan or programme, in accordance with the requirements of these Regulations.

(9) Subject to sub-article (10), the requirement to carry out an environmental assessment under this article applies to a plan or programme, or modification to a plan or programme, the first formal preparatory act of which occurs on or after 21 July 2004.

(10) Subject to sub-article (11), where the first formal preparatory act occurs before 21 July 2004 and the plan or programme, or modification to a plan or programme, is unlikely to be adopted before 20 July 2006, an environmental assessment shall be carried out of the plan

or programme, or modification to a plan or programme, in accordance with the requirements of these Regulations.

(11) The requirement to carry out an environmental assessment under sub-article (10) shall not apply where the competent authority decides that the carrying out of an environmental assessment would not be feasible and notice of any such decision shall be published in at least one newspaper with a sufficiently large circulation in the area covered by the plan or programme or modification to a plan or programme."

25. Article 11 provides:

"11. (1) Prior to making a decision on the scope and level of detail of the information to be included in an environmental report, the competent authority shall give notice in accordance with sub-article (2) to the environmental authorities specified in article 9(5), as appropriate.

(2) A notice under sub-article (1) shall—

(a) state that, as part of the preparation of a plan or programme, or modification to a plan or programme, the competent authority will prepare an environmental report of the likely significant effects on the environment of implementing the plan or programme, or modification to a plan or programme,

(b) state that the environmental report is required to include the information that may reasonably be required taking into account—

(i) current knowledge and methods of assessment,

(ii) the contents and level of detail in the plan or programme, or modification to a plan or programme,

(iii) the stage of the plan or programme, or modification to a plan or programme, in the decision-making process, and

(iv) the extent to which certain matters are more appropriately assessed at different levels in the decision-making process in order to avoid duplication of environmental assessment, and

(c) indicate that a submission or observation in relation to the scope and level of detail of the information to be included in the environmental report may be made to the competent authority within a specified period which shall be not less than 4 weeks from the date of the notice."

26. Article 12 provides:

"12. (1) Subject to sub-article (2), an environmental report under article 10 shall identify, describe and evaluate the likely significant effects on the environment of implementing the plan or programme, or modification to a plan or programme, and reasonable alternatives taking account of the objectives and the geographical scope of the plan or programme, or modification to a plan or programme, and for this purpose, the report shall—

(a) contain the information specified in Schedule 2,

(b) take account of any submission or observation received in response to a notice under article 11(1), and

(c) be of sufficient quality to meet the requirements of these Regulations.

(2) An environmental report shall include the information that may reasonably be required taking into account

(a) current knowledge and methods of assessment,

(b) the contents and level of detail in the plan or programme, or modification to a plan or programme,

(c) the stage of the plan or programme, or modification to a plan or programme, in the decision-making process, and

(d) the extent to which certain matters are more appropriately assessed at different levels in the decision-making process in order to avoid duplication of environmental assessment.

(3) The environmental report can either form part of the draft plan or programme, or modification to a plan or programme, or comprise a separate report."

27. Article 16 provides:

"16. (1) As soon as practicable after the adoption of a plan or programme, or modification to a plan or programme, the competent authority shall—

(a) send notice of adoption of, and a copy of, the plan or programme, or modification to a plan or programme, and a copy of the statement referred to in sub-article (2)(b) to the environmental authorities specified in article 9(5), as appropriate, and

(b) publish notice of the adoption of the plan or programme, or modification to a plan or programme, in at least one newspaper with a sufficiently large circulation in the area covered by the plan or programme, or modification to a plan or programme.

(2) A notice under sub-article (1)(b) shall state that

(a) a copy of the plan or programme, or modification to a plan or programme, is available for inspection at a stated place or places and at stated times and a copy shall be kept available for inspection accordingly, and
(b) a statement is also available for inspection which summarises—
(i) how environmental considerations have been integrated into the plan or programme, or modification to a plan or programme,
(ii) how
(I) the environmental report prepared pursuant to article 12,
(II) submissions and observations made to the competent authority in response to a notice under article 13, and
(III) any consultations under article 14,
have been taken into account during the preparation of the plan or programme, or modification to a plan or programme,
(iii) the reasons for choosing the plan or programme, or modification to a plan or programme, in the light of the other reasonable alternatives dealt with, and
(iv) the measures decided upon to monitor, in accordance with article 17, the significant environmental effects of implementation of the plan or programme, or modification to a plan or programme."

28. Schedule 2 provides:
"SCHEDULE 2
Article 12
Information to be contained in an environmental report
The following information shall be contained in an environmental report—
(a) An outline of the contents and main objectives of the plan or programme, or modification to a plan or programme, and relationship with other relevant plans or programmes;
(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme, or modification to a plan or programme,
(c) the environmental characteristics of areas likely to be significantly affected;
(d) any existing environmental problems which are relevant to the plan or programme, or modification to a plan or programme, including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to the Birds Directive or the Habitats Directive;
(e) the environmental protection objectives, established at international, European Union or national level, which are relevant to the plan or programme, or modification to a plan or programme, and the way those objectives and any environmental considerations have been taken into account during its preparation;
(f) 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;
(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme, or modification to a plan or programme;
(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;
(i) a description of the measures envisaged concerning monitoring of the significant environmental effects of implementation of the plan or programme, or modification to a plan or programme;
(j) a non-technical summary of the information provided under the above headings."

Facts

29. The first consultation on the current NAP occurred when the first respondent initiated a Fourth Review of Ireland's NAP – Stage 1 on 25 November 2020. The applicant made a submission on 14 January 2021.

30. The first respondent initiated a second public consultation on Ireland's NAP on 9 August 2021 with a deadline of 20 September 2021 for public submissions.

31. The applicant made a submission on 20 September 2021.

32. On 14 October 2021, Ireland submitted to the Commission a request for an extension of the derogation under paragraph (2), third subparagraph, of Annex III to Directive 91/676.

33. A third consultation period on the draft NAP focused on the draft NIS and draft Strategic Environmental Assessment ("**SEA**") report for the Programme then took place. The first respondent

published a NIS and SEA report (https://assets.gov.ie/207122/e4a5a9a8-bc5f-4370-9039-60d1e9005fef.pdf) for the Draft Fifth NAP on 14 December 2021 and invited further public submissions by 26 January 2022. The applicant made a submission on 26 January 2022.

34. Insofar as the applicant complained that the SEA report took an overly broad view of the concept of material assets, the referring court would not accept that, but in any event, the material assets concerned were in the nature of strategic infrastructure and so constitute material assets even on a narrow definition.

35. The alternative options were not considered in comparable detail in the SEA process.

36. The economic implications for material assets were considered in the SEA process, and were treated as outweighing of what might otherwise have been more environmentally friendly options. Thus the assessment under Directive 2001/42 here took into account and included an assessment of broader economic matters such as the value of material assets, 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 Ireland, the food supply chain, and the employment of a significant portion of the population.

37. On 9 March 2022, the first named respondent approved the Fifth NAP 2022-2025: (https://www.gov.ie/pdf/?file=https://assets.gov.ie/218449/f1a6725a-6269-442b-bff1-2730fe2dc06c.pdf#page=null). On the same date, the Minister signed S.I. No. 113 of 2022, the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022 ("the GAP Regulations").

38. In conformity with Article 5(2) of Directive 91/676, Ireland applies an action programme throughout its whole territory.

39. On 29 April 2022, the Commission extended the derogation previously granted to Ireland for the purposes of Paragraph 2 of Annex III to Directive 91/676.

Procedural history

40. The proceedings were initiated in the judicial review list on 31 May 2022. Leave was granted on 5 December 2022. Trustees of the Irish Farmers' Association ("**IFA**") and Irish Creamery Milk Suppliers Association ("**ICMSA**") were joined as notice parties, and opposition papers from the respondents and notice parties were delivered. Generally, the IFA and ICMSA supported the State opposition to the proceedings.

41. The referring court then disposed of pleading objections and dealt with factual findings and issues, and identified nine questions for reference, consisting of eight questions regarding the interpretation of EU law and one question regarding the validity of EU law, which were necessary for the disposal of the proceedings. The parties other than the IFA proposed answers to these questions as summarised below. Those questions are before the CJEU in Case C-531/24 *An Taisce*.

42. The judgment for reference in that module noted that a separate module had been adjourned pending other proceedings. That module has now been considered by the referring court and the present reference arises therefrom.

43. In those circumstances the referring court is staying the remainder of the proceedings and referring the questions below to the Court of Justice for a preliminary ruling.

The first question

44. The first question is:

> **65. Does Article 5(1) and/or 9(1)(b) of, and paragraph (f) of Annex I to, Directive 2001/42 have the effect that material assets cannot be treated as the factor effectively outweighing other factors including other effects on the environment, for the purposes of the assessment under Article 3(1) of that Directive and/or that the option with the least adverse effects on the environment must be selected as the preferred outcome of that assessment?**

45. The applicant submitted:

> "Material assets cannot be treated as a factor outweighing other factors. There is no requirement to select the option with the least effects on the environment but that selection can only occur once there has been a lawful assessment of all the relevant factors. Such an approach is not supported by the specific provisions referred to or by the Directive as a whole. …
>
> Both the plain and ordinary meaning of the language and the placing of material assets as a co-equal factor along with (for example) flora and water means that it is impossible to avoid a conclusion that material assets are not a separate factor but simply one of the environmental factors in respect of which information must be provided and ultimately assessed by the competent authority.
>
> 5. In considering 'material assets' in the EIA Directive, the CJEU stated in Case C-420/11 *Leth* (emphasis added):
>
> > '29 Consequently, 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. Accordingly, pursuant to Article 3 of that directive, an environmental impact assessment carried out in accordance with that article is one which identifies, describes and assesses the direct and indirect effects of noise on human beings in the event of use of a property affected by a project such as that at issue in the main proceedings.

30 It must therefore be held that the environmental impact assessment, as provided for in Article 3 of Directive 85/337, does not include the assessment of the effects which the project under examination has on the value of material assets.'

6. However it is readily apparent in the instant case that '*material assets*' was in fact used in the Environmental Report and Statement as a short-hand for identifying economic implications for individual farmers or aggregated farmers in the form of the agri-food industry, entirely divorced from any concern for 'critical infrastructure'.

7. This approach has nothing to do with environmental considerations. Non-environmental considerations should not be used to influence the outcome of the environmental assessment. …"

46. The State submitted:

"3. The Respondents' position is that there is no legal requirement to select the option with the least adverse effects on the environment and, tellingly, no legal requirement has been identified by the Applicant thus far in the proceedings.

4. Article 5(1) of the SEA Directive does not mandate the selection to be made but, rather, requires that the environmental report (i) identify; (ii) describe; and (iii) evaluate 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.

5. This is consistent with the Commission Guidance which provides that (§5.2):

'The environmental report is an important tool for integrating environmental considerations into the preparation and adoption of plans and programmes since it ensures that their likely significant effects on the environment are identified, described and assessed and taken into account in that process. The preparation of the environmental report and the integration of the environmental considerations into the preparation of plans and programmes form an iterative process that should contribute to more sustainable solutions in decision-making.'

6. This makes logical sense as an environmental assessment at an upstream, strategic level is a fundamentally different process from environmental assessment at a project level.

7. To the extent that the Applicant submits that the Respondents were obliged to select the reasonable alternative that scored the highest when judged against the Strategic Environmental Objectives, or that was the most environmentally friendly, this is incorrect as a matter of law. Moreover, it ignores the fact that:

(1) the SEA Directive contains procedural obligations only (see, e.g., EPA Guidance, §14, and by way of analogy, Case [C-9/22 - *An Bord Pleanála and Others (Site de St Teresa's Gardens)*], §§53-63);

(2) the Respondents must logically be entitled to have regard to policy or economic considerations when selecting the preferred alternative, and in weighing up the factors in determining whether reasonable alternatives were realistic and viable, and which option ought to be preferred;

(3) the claim that if all factors are weighted equally, the option with the highest number of 'positives' must be selected, is without legal basis and lacks practical rigour when considering the approach required to be adopted with respect to policy decisions of this complexity;

(4) the scoring matrix, conventionally used for these assessments, must be assessed within the context of the detailed narrative analysis of the potential positive and negative impacts, which presents a more nuanced picture.

8. The Applicant's plea also ignores the fact that the selection of the preferred alternative, being a decision taken by a specialist body and where competing policy objectives arise, is quintessentially a matter for the discretion of the Respondents.

…

10. In this regard, the Respondents note that in Case C-727/22 *Opinion of Advocate General Kokott* EU:C:2024:266, delivered on 21 March 2024, Advocate General Kokott stated that (§59):

'Conversely, the SEA Directive does not itself lay down any substantive criteria for selecting alternatives. It does not therefore require the competent authorities to select the option which has the least adverse effects on the environment. As has already been stated, the environmental assessment is intended only to ensure that

the selection is made taking into account possible significant effects on the environment.'."

47. The IFA and ICMSA agreed with the State's submission.

48. The referring court's proposed answer is No. The directive prescribes procedures and assessments but does not dictate outcomes. It is for the competent authorities of the Member State concerned to balance the differing elements of the environment (such as impact on material assets as against impact on the natural environment). Such an interpretation is consistent with the judgment of 9 March 2023, *An Bord Pleanála and Others (Site de St Teresa's Gardens)*, Case C-9/22, ECLI:EU:C:2023:176. The Directive specifies matters to be assessed but not the weight to be attached to such matters.

49. The relevance of the question is that the impacts on material assets were in effect treated as outweighing of what might otherwise have been more environmentally friendly options. The SEA report states at p. 114 that "From a purely environmental perspective Alternative S5 [no derogation] would be the preferred alternative but, notwithstanding this preference, Alternative S3 [a grassland farm derogation] presents the lowest economic barrier for the agri-food sector and is the alternative brought forward in the draft NAP". If material assets cannot be treated as outweighing other factors then such an assessment was not compliant with that interpretation.

The second question

50. The second question is:

Does Article 5(1) and/or 9(1)(b) of, and paragraph (h) of Annex I to, Directive 2001/42 have the effect that alternatives must be identified, described and evaluated in a comparable way for the purposes of the assessment under Article 3(1) of that Directive?

51. The applicant submitted:

"Yes. All reasonable alternatives have to have comparable levels of assessment.

...

2. The European Commission has published a guidance document on the implementation of the SEA Directive (the 'Commission Guidance'). The Applicant's case is, essentially, that the Commission Guidance is correct. It states:

> '[5.6] Article 5(1) gives the basic requirements for the environmental report. The tasks of the report are to identify, describe and evaluate the likely significant effects on the environment of the plan or programme and its reasonable alternatives. Annex I gives further provisions on which information must be provided concerning these effects. The studying of alternatives is an important element of the assessment and the Directive calls for a more comprehensive assessment of them than does the EIA Directive.'

3. The Commission Guidance continues:

> '[5.11] The obligation to identify, describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption.
>
> [5.12] In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives. The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well.'

4. The Commission Guidance has been followed by the courts of England and Wales in a series of cases.

5. Reliance is placed in the first instance on *Heard v. Broadland District* Council [[2012] EWHC 344 (Admin), https://www.bailii.org/ew/cases/EWHC/Admin/2012/344.html], cited in the next case.

6. In *Ashdown Forest Economic Development LLP v. Secretary of State for Communities and Local Government* [[2014] EWHC 406 (Admin), https://www.bailii.org/ew/cases/EWHC/Admin/2014/406.html], Sales J. said:

> '[97] A plan-making authority has an obligation under the SEA Directive to conduct an equal examination of alternatives which it regards as reasonable alternatives to its preferred option (interpreting the Directive in a purposive way, as indicated by the Commission in its guidance: see Heard v. Broadland District Council at [71]).'

7. In *R. (Friends of the Earth England, Wales and Northern Ireland Limited) v. Welsh Ministers* [[2015] EWHC 776 (Admin), https://www.bailii.org/ew/cases/EWHC/Admin/2015/776.html], Hickinbottom J. stated:

> '[12] The SEA Directive is expressly procedural in nature (see recital (9)). It does not impose any substantive duties on the relevant authority: it rather seeks to improve the quality of decision-making for development by requiring the authority to assess the potential environmental effects of a particular plan or programme before its adoption. Its aim is to ensure that future planning decisions are not constrained by earlier strategic decisions; so that article 5 of the SEA Directive requires that the likely significant environmental effects of a 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'. Those options must be the subject of public consultation in the form of a report with the draft plan or programme (article 6); and, before the adoption of the plan or programme, the results of that consultation must be taken into account by the relevant authority (article 8). The environmental evaluation of those alternatives must be on a comparable basis to the evaluation of the preferred option.'

8. Hickinbottom J. set out a series of propositions concerning 'reasonable alternatives', for the purposes of Article 5(1). The Court is invited to consider them in full, but (viii) is the most important:

> '(viii) Although the SEA Directive is focused on the preferred plan, it makes no distinction between the assessment requirements for that plan (including all options within it) and any reasonable alternatives to that plan. The potential significant effects of that plan, and any reasonable alternatives, have to be identified, described and evaluated in a comparable way.'

9. …

10. For the sake of completeness, it proposed to address the Court of Appeal decision in [*Friends of the Irish Environment v. The Government of Ireland and Others* [2021] IECA 317 (Unreported, Court of Appeal, Costello J., 26th November 2021), https://www.courts.ie/acc/alfresco/f4ba22c7-773d-4f64-851a-4916751fd08a/2021_IECA_317%20(Unapproved).pdf/pdf#view=fitH]. It is submitted that there is no basis in the Directive for a 'comparable' assessment to be carried out initially and then some sort of separate and later full assessment to be carried out on the preferred option.

11. The basis for this conclusion – in particular para 210 - was as follows. First, the CoA relied on Annex 1, paragraph (h) of the SEA Directive. Annex 1 sets out the '*Information referred to in Article 5(1)*', which includes:

> '(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information'.

12. The CoA appears to have accepted the State's argument that this wording indicates that there was no obligation to subject the alternatives to full strategic environmental assessment, such as was done for the preferred option. This is an error. …

14. Second, the CoA did not, with respect, address the impact of the UK authorities. It noted the principles identified in those authorities but then neglected to apply them to the Applicant's case. …

15. … the CoA ignored the subsequent extensive treatment of the preferred Option in Chapter 8, because in the previous chapter there was an equivalence of treatment. There is no authority for this approach in the authorities or the Directive – the obligation is to assess equally the preferred option and the reasonable alternatives. …"

52. The State submitted:

"1. Articles 5(1) and/or 9(1)(b) and paragraph (h) of Annex I of Directive 2001/42 do not have the effect that alternatives must be identified, described and evaluated in a comparable way for the purposes of the assessment under Article 3(1).

2. There is no support for the Applicant's contended interpretation in the SEA Directive itself, nor could a teleological interpretation of the SEA Directive assist. There is also no support in the authorities for the approach that the Applicant contends is required.

...

4. The Respondents' position is that there is nothing in the terms of the SEA Directive to suggest a legislative intention that alternatives be assessed to the same degree as the preferred option.

5. The Environmental Report is the report prepared for the purposes of providing information to the public on, and facilitating an assessment of, the likely significant environmental effects of the draft NAP. The assessment of reasonable alternatives is addressed in Chapter 7 of the report. Five strategic alternatives and four modal alternatives were considered.

6. In reality, the position taken by the Applicant would result in an obligation that the likely significant environmental effects of reasonable alternatives must be assessed in the same way and to the same extent as the likely significant environmental effects of the draft NAP.

7. The consequence of this position is that all reasonable alternatives, once considered at any stage of the SEA process, would be required to be progressed to full assessment. However, to be fully assessed to the same extent as the draft NAP, an alternative must also be fully developed. So the logic of the Applicant's position would require not only multiple Chapter 8 assessments, but also the preparation of multiple draft NAPs.

8. The Respondents submit that this cannot be correct.

9. *First*, the Directive clearly envisages that only one draft plan or programme would be prepared. Article 6, which sets out consultation obligations, provides:

> 'The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.
>
> The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.'

10. Equally, Article 7, which deals with transboundary consultations, clearly envisages only one draft plan or programme being forwarded to the other Member State.

11. Second, throughout the SEA Directive, the obligation to carry out an environmental assessment (being a strategic environmental assessment, or 'full' SEA) arises with respect to the plan or programme only. This is clear from the text of Articles 1, 3(1), and 5(1) and Annex I.

12. Third, although the CJEU has not, to date, determined the issues raised in this question, the *dicta* of the Court on the assessment of alternatives that is available treats the assessment of the environmental effects of the draft plan or programme, and the assessment of reasonable alternatives, disjunctively.

13. In C-474/10 *Department of the Environment for Northern Ireland v Seaport (NI) Ltd and Others* [ECLI:EU:C:2011:681], the CJEU stated (§35):

> 'As stated in recital 15 in the preamble to Directive 2001/42, the requirement, under Article 6(3) of that directive, to designate such authorities for the purposes of their consultation in connection with the adoption of a plan or programme likely to have environmental effects within the meaning of that directive is intended to contribute to more transparent decision making and seeks, particularly, to ensure that where an authority, which does not necessarily have environmental expertise or responsibilities, envisages adopting such a plan or programme, the report on its environmental effects, which must accompany that plan or that programme, and that plan or programme take due account of such effects and that reasonable alternatives to that plan or programme are objectively considered.'

14. Fourth, the Respondents do not accept that the Commission Guidance (referred to at §57 of the Amended Statement of Grounds) founds any legal basis for an obligation on a competent authority to subject reasonable alternatives to the strategic option selected to a commensurate level of analysis, let alone a level which requires a '*full SEA*'.

15. In any event, the Commission Guidance is not binding, does not stipulate the content of such comparable assessment and, moreover, was not relied on by the Commission in submissions before the CJEU at the hearing of the Reference in *Friends* on 8 November 2023.

16. Fifth, the Respondents consider that the correct approach was identified in *Friends of the Irish Environment CLG v. Government of Ireland and Ors* [2021] IECA 317 …

18. *Sixth*, on the merits, the Respondents maintain, for inter alia the reasons pleaded at §§156 – 159 of the Statement of Opposition, that the assessment of reasonable alternatives, being identified and considered in Chapter 7 of the SEA Environmental Report, and the comparable assessment of those reasonable alternatives, complied with the obligation under the SEA Directive, and, in particular, Article 5(1), to consider and assess such reasonable alternatives.

> 19. *Seventh*, the Respondents note the recent Opinion in Case C-727/22 *Opinion of Advocate General Kokott* EU:C:2024:266, delivered on 21 March 2024 where Advocate General Kokott held that the SEA Directive does not prevent the environmental assessment of the preferred option being more detailed than the environmental assessment of the other alternatives dealt. The Respondents submit that this conclusion is correct as a matter of law. …
>
> 21. However, in the interests of clarity, the Respondents note that they do not consider that the Opinion of Advocate General Kokott correctly determined the matter as to the level of assessment of reasonable alternatives that is required by the SEA Directive."

53. The IFA and ICMSA agreed with the State's submission.

54. The referring court's proposed answer is Yes. This issue is addressed in the European Commission Guidance on the implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/7527027a-126a-49e2-92ef-3aac8159fbf6/details?download=true), which states at para. 5.12 that "[t]he essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way".

55. The relevance of the question is that the likely significant effects of the plan or programme and the alternatives were not identified, described and evaluated in a comparable way. While there is some although incompletely comparable treatment in chapter 7 of the SEA report, chapter 8 analyses the preferred option only. If the Directive requires comparable consideration, then the assessment here was in breach of that requirement.

Order

56. For the foregoing reasons, it is ordered that:

(i) the questions set out in this judgment be referred to the CJEU pursuant to Article 267 TFEU;

(ii) the CJEU be requested to note that the notice parties who are natural persons have requested the referring court to inform the CJEU that they do not wish their names to be anonymised for the purposes of the proceedings in the CJEU and therefore that all such persons can be named by the CJEU including by way of the publication of materials or of the judgment of that court; and

(iii) the substantive determination of the proceedings be adjourned pending the judgment of the CJEU, without prejudice to the determination of any appropriate procedural or interlocutory issues in the meantime.