[2019] IEHC 646

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2019 No. 222 J.R.**

**BETWEEN**

**FRIENDS OF THE IRISH ENVIRONMENT LIMITED**

**APPLICANT**

**AND**

**MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND ENVIRONMENT**

**MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT**

**IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Garrett Simons delivered on 20 September 2019.**

**Summary**

1. These judicial review proceedings seek to challenge the manner in which large-scale peat extraction is regulated under national law. The Applicant contends that legislative amendments introduced in January 2019 are inconsistent with EU environmental law. The legislative amendments have the effect of exempting peat extraction that involves an area of greater than 30 hectares from the requirement to obtain planning permission. Peat extraction on this scale will, instead, be subject to licensing by the Environmental Protection Agency.

2. Whereas the exemption from the requirement to obtain planning permission came into immediate effect in January 2019, there is to be a lengthy transitional period before the licensing regime comes into full force and effect. Peat extraction is to be allowed to continue during the interregnum between the cessation of control under the planning legislation, and the coming into force of the licensing regime. Developers who hold neither a planning permission nor a licence are to be allowed to continue carrying out peat extraction unabated during this transitional period. The only qualifying criteria is that the peat extraction was being carried on immediately prior to 25 January 2019.

3. The Applicant maintains that the amended legislation involves a "flagrant breach" of the Environmental Impact Assessment Directive ("***the EIA Directive***") and the Habitats Directive. The Applicant has described the transitional period under the Ministerial Regulations as amounting to an "enforcement holiday". As an aside, it is noted that the

European Commission has expressed concerns about the further delay in the application of the EIA Directive, describing the legislation as leaving a legal limbo. It seems that the Commission issued a Letter of Formal Notice to Ireland on 26 July 2019.

4. The Applicant also says that the failure to conduct an environmental assessment of the impacts of the legislative amendments prior to their adoption represents a breach of the requirements of the Strategic Environmental Assessment Directive.

5. The legislative amendments have been introduced by way of Ministerial Regulations. This gives rise to a further ground of complaint on the part of the Applicant. It is alleged that this use of secondary legislation to amend primary legislation is impermissible. The Ministerial Regulations are said to go beyond the mere implementation of "principles and policies" set out in the EU Directives, and that primary legislation was therefore required.

6. The Applicant makes a final argument to the effect that the extension of the period of grace during which peat extraction may be carried out to include the pendency of an application for judicial review represents an unwarranted interference with judicial independence.

7. For the reasons set out in detail in this judgment, I have concluded that the application for judicial review should be granted on certain grounds. By way of outline only, my principal findings are as follows.

8. First, the form of regularisation procedure provided for under the amended legislation is inconsistent with the EIA Directive and the Habitats Directive. Whereas a Member State does enjoy a limited discretion to make provision for the regularisation of development projects which have been carried out in breach of the requirements of either or both of the EU Directives, the amended legislation exceeds this discretion. The offending features of the amended legislation include, first, the absence of any possibility of suspending peat extraction during the transitional period; secondly, the absence of exceptional circumstances which justify affording developers who have carried out—and continue to carry out—development in breach of EU law an opportunity to regularise their legal status; and, finally, the absence of proper legislative provisions to ensure that any assessment is both prospective and retrospective.

9. The shortcomings of the amended legislation are similar to the "old" planning legislation which had been condemned by the Court of Justice of the European Union ("***the CJEU***") in Case C-215/06, *Commission v. Ireland*. The regime purports to leave projects, which have not been properly authorised or assessed for the purposes of the EIA Directive and the Habitats Directive, undisturbed.

10. Secondly, the use of secondary legislation to amend primary legislation is, in the circumstances of this case, impermissible. Secondary legislation which is inconsistent with EU legislation cannot be said to give effect to the "principles and policies" contained in the EU legislation. Nor can it be said to be "incidental, supplementary and

consequential" to the EU legislation or "necessitated" by the Irish State's membership of the European Union.

11. Even if—contrary to the finding above—the Ministerial Regulations could be said to be consistent with the EIA Directive and the Habitats Directive, the use of secondary legislation would still be impermissible. If the EIA Directive and Habitats Directive did allow the broad discretion to Member States contended for on the part of the State Respondents, then the policy choices permitted under the Directives should have been made by the Oireachtas through the enactment of primary legislation. The Ministerial Regulations entail a number of policy choices which are not only significant in objective terms, but actually cut across primary legislation which had been enacted by the Oireachtas for the precise purpose of giving effect to the two EU Directives.

12. Thirdly, the grounds of challenge based on the Strategic Environmental Assessment Directive are rejected. There was no legal obligation to carry out an environmental assessment of the Ministerial Regulations prior to their adoption. This is because same do not set the "framework" for development consent of EIA projects.

13. Finally, the complaint of interference with judicial independence is not made out.

**Procedural history**

14. The within proceedings were instituted on 12 April 2019. Shortly thereafter, the Applicant issued a motion seeking interlocutory relief restraining the implementation of the Ministerial Regulations. This motion was allocated an expedited hearing date by the presiding judge in the Judicial Review List (Noonan J.). The application for interlocutory relief was heard and determined in July 2019, and was the subject of a written judgment, *Friends of the Irish Environment Ltd. v. Minister for Communications, Climate Action and the Environment* [2019] IEHC 555. A limited form of stay was granted.

15. An expedited hearing date was then fixed for the substantive application for judicial review, and the application was heard before me over three days commencing on Wednesday, 4 September 2019.

16. For the sake of completeness, it should be noted that no objection has been taken to the *locus standi* or standing of the Applicant to maintain these proceedings. Presumably, this is because of the generous standing afforded to environmental non-governmental organisations under article 11 of the EIA Directive, which, in turn, reflects the provisions of the Aarhus Convention.

**Structure of this judgment**

17. In an attempt to make this judgment more readable, it is proposed to structure it as follows. Part 1 will set out the relevant legislative framework both pre-and post- the

introduction of the Ministerial Regulations in January 2019. Part 2 will address each of the four principal grounds of challenge advanced on behalf of the Applicant. Part 3 will address the form of order to be made.

**Part 1**

**The legislative framework pre- and post- January 2019**

**Overview of the ministerial regulations**

18. These judicial review proceedings seek to set aside two statutory instruments made in January 2019, namely (i) the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019 (S.I. No. 4 of 2019), and (ii) the Planning and Development Act 2000 (Exempted Development) Regulations 2019 (S.I. No. 12 of 2019). For ease of exposition, I will refer to these two statutory instruments collectively as "***the Ministerial Regulations***".

19. The ultimate ambition of the Ministerial Regulations is that peat extraction which requires assessment for the purposes of the EIA Directive will be subject to a single development consent to be issued by a single competent authority, namely the Environmental Protection Agency ("***the EPA***"). The new regime is to apply to the extraction of peat that involves an area of 30 hectares or more.

20. This represents a major change from the pre- January 2019 legislative regime whereby peat extraction had, generally, been regulated under the Planning and Development Act 2000 ("***the PDA 2000***"). (There had been a parallel obligation to obtain an integrated pollution control licence from the EPA in the case of the extraction of peat in the course of business which involves an area exceeding 50 hectares. See paragraph 38 below).

21. The first of the two Ministerial Regulations has been made pursuant to section 3 of the European Communities Act 1972. This first set of regulations purports to introduce a series of amendments to *primary* legislation, namely the Environmental Protection Agency Act 1992 ("***the EPA Act 1992***"). It also purports to make a single amendment to the PDA 2000. One of the issues which falls for determination in these judicial review proceedings is whether the use of secondary legislation to amend primary legislation is justified on the basis that the content of the regulations is "necessitated by the obligations of membership of the European Union" for the purposes of Article 29.4.6° of the Constitution of Ireland. This will require consideration of whether the Ministerial Regulations do no more than fill in the details of "principles and policies" contained in the EIA Directive and the Habitats Directive.

22. The second of the two Ministerial Regulations has been made pursuant to section 4(4A) of the PDA 2000. Section 4(4A) reads as follows.

> "(4A) Notwithstanding subsection (4), the Minister may make regulations prescribing development or any class of development that is—

(a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and

(b) as respects which an environmental impact assessment or an appropriate assessment is required,

to be exempted development."

23. The Minister for Housing, Planning and Local Government has prescribed the following class of development for this purpose.

"8H. (1) Peat extraction within the meaning of the Act of 1992 shall be exempted development.

(2) Development necessary to enable compliance with a condition attached to a licence or revised licence under Part IV of the Act of 1992 to carry on peat extraction referred to in paragraph (1) shall be exempted development.

(3) In this article 'Act of 1992' means the Environmental Protection Agency Act 1992 (No. 7 of 1992)."

24. The fact that the same definition of "peat extraction" is used in both the amended Environmental Protection Agency Act 1992 and the Ministerial Regulations has the effect that the extraction of peat that involves an area of 30 hectares or more (i) is immediately exempt from the requirement to obtain planning permission; and (ii) will ultimately be subject to licensing by the EPA.

25. The transitional provisions give rise to a lacuna in the governance of peat extraction whereby the existing legislative regime under the PDA 2000 is disapplied with immediate effect, notwithstanding that the new licensing regime has not yet come into full force and effect. It is common case that many developers carrying out peat extraction had failed to comply with the (now defunct) requirement to apply for and obtain planning permission. In many instances, therefore, peat extraction is currently being carried out without the benefit of either a planning permission or a licence.

**Peat extraction and planning legislation**

26. To assist the reader in understanding the legal effect of the Ministerial Regulations, it is necessary first to say something about the regulatory controls governing peat extraction under national law.

27. Peat extraction had traditionally been free from control under the planning legislation. Section 4 of the Local Government (Planning & Development) Act 1963 had provided that development consisting of the use of any land for the purposes of "agriculture" was exempt from the requirement to obtain planning permission. The definition of "agriculture" included the use of land for turbary.

28. It was necessary to amend domestic law in order to give effect to the original version of the EIA Directive, Directive 85/337/EC. The deadline for implementation of this version of the EIA Directive had been 27 June 1988. The benefit of "exempted development" under section 4 of the Local Government (Planning & Development) Act 1963 was disapplied in the case of "peat extraction which would involve a new or extended area of 50 hectares or more". (See Local Government (Planning & Development) Regulations 1990). The carrying out of an environmental impact assessment was mandatory for peat extraction on this scale. (See EC (Environmental Impact Assessment) Regulations 1989).

29. The 50 hectares threshold was criticised in Case C-392/96, *Commission v. Ireland*. Following on from the judgment of the CJEU in that case, the thresholds for peat extraction under national law were revised downwards. The threshold for exempted development was reduced to 10 hectares, and the threshold for a mandatory environmental impact assessment was reduced to 30 hectares. (The definition of "agriculture" under the PDA 2000 omits any reference to turbary). The exempted development threshold was subsequently qualified by the Planning and Development Regulations 2005, and the Planning and Development (Amendment) (No. 2) Regulations 2011.

30. One of the curious features of the approach initially taken to peat extraction under domestic legislation is that a distinction had been drawn between existing peat extraction, and peat extraction involving "new or extended" areas. Although not stated in express terms, the assumption underlying the legislation seems to have been that existing peat extraction did not have to comply with the EIA Directive. In order to benefit from this special treatment under domestic law, all that was necessary was that the drainage of the bogland had commenced prior to the coming into force of the relevant parts of the Planning and Development Regulations 2001 on 21 January 2002. (See Planning and Development Regulations 2005). Thus, it was not necessary even that the peat extraction had commenced prior to the implementation date for the EIA Directive on 27 June 1988.

31. The generous treatment afforded to peat extraction under domestic law has since been rolled back by amendments introduced under the Environment (Miscellaneous Provisions) Act 2011 as follows.

**(i) Benefit of exempted development disapplied**

32. It is now provided that development shall not be exempted development under the Planning and Development Regulations if an environmental impact assessment for the purposes of the EIA Directive or an appropriate assessment for the purposes of the Habitats Directive is required. See section 4(4) of the PDA 2000. Under the transitional provisions, the loss of the benefit of exempted development does not apply where the development is completed not later than twelve months after the date of the commencement of the legislative amendment. Put otherwise, developers were allowed a further period of grace until 21 September 2012 during which they could either "complete" their development or apply for planning permission. From that date forward,

any development—including peat extraction—which required environmental impact assessment or appropriate assessment was subject to a requirement to obtain planning permission.

33. The implications of this change in the law for peat extraction have been considered in detail by the High Court (Meenan J.) in *Bulrush Horticulture Ltd. v. An Bord Pleanála (No. 1)* [2018] IEHC 58. Those proceedings came before the High Court by way of an application for judicial review of a declaration made by An Bord Pleanála pursuant to section 5 of the PDA 2000. The Board had ruled that the development involved in continued works to extract peat from a site in County Westmeath required both an environmental impact assessment and an appropriate assessment. The peat extraction thus lost the benefit of exempted development which it had previously enjoyed under the Planning and Development Regulations. The Board's declaration is dated April 2013.

34. The developer sought to challenge An Bord Pleanála's declaration. One of the grounds of challenge had been that the Board, in finding that the EIA Directive applied to peat extraction which had (allegedly) commenced prior to the coming into force of domestic legislation which gave effect to the EIA Directive, had erred in law. It was contended on behalf of the developers that the requirement for an EIA only arose in the context of development which involved a "new or extended" area. The developers relied in support of this argument on case law of the CJEU to the effect that where a consent application had been pending before a competent authority *prior to* the coming into force of the EIA Directive, then the consent application was not subject to the EIA Directive. This argument was rejected as follows by the High Court.

> "41. Both Bulrush and Westland relied upon a number of decisions of the European Court of Justice in support of their submission that neither an Environmental Impact Assessment nor an appropriate assessment was required. These decisions included *Commission v. Germany*, Case C-431/92, *Burgemeester v. Gedeputeerde Staaten Noord Holland*, Case C-81/96, the *Commission v. Austria Case* C-209-04 and *Stadt Penburg v. Germany*, Case C-2206-08. These cases are generally referred to as the 'Pipeline Cases'. The principles distilled from these decisions are illustrated in *Stadt Papenburg v. Bundesrepublik Deutschland*, Case C-226/08. In this case, a local authority (Stadt Papenburg) issued consent to a shipyard to carry out dredging of the River Ems to allow access from a shipyard to the sea in 1994. This decision had the effect of granting permission for future dredging operations. In 2006 the German government indicated that parts of the River Ems situated down river could be accepted as a possible site of community interest within the meaning of the "Habitats Directive". The local authority brought legal proceedings seeking to prevent the defendant giving its agreement to the inclusion of part of the River in a list of sites of community interest. The local authority was concerned that if parts of the river were included in the list, the dredging operations required for

the shipyard would in the future and in every case thereafter have to undergo an Appropriate Assessment as required by the Habitats Directive.

42. The European Court of Justice held that if the dredging works could be considered as constituting a single operation then the works could be considered to be one and the same project for the purposes of Article 6 of the Habitats Directive. In that case, the project had been authorised before the expiry of the time limit for transposition of the Habitats Directive and, as such, was not subject to the requirement for an Appropriate Assessment under the said Directive.

43. In my opinion, the decision in *Stadt Papenburg* and other 'Pipeline Cases' are of no assistance to Bulrush or Westland. These cases cover situations were permission or consent for a project had been sought before the expiry of the time limit for transposing the Directive in question. This is not the case here. Neither Bulrush nor Westland had any planning permission pending during the time allowed for the transposition of either the Environmental Impact Directive or the Habitats Directive. In my view, the submissions made by both Bulrush and Westland that they are, in effect, 'Pipeline Projects' is an aspect of the more general submission that the relevant legislation offends the principle against legislation being retrospective."

35. The High Court also confirmed that the amendments introduced under the Environment (Miscellaneous Provisions) Act 2011 did not have an impermissible retrospective effect.

36. The High Court subsequently refused leave to appeal to the Court of Appeal, holding that one of the principal requirements for certifying leave to appeal, i.e. that the law in question stands in a state of uncertainty, had not been met. See *Bulrush Horticultural Ltd. v. An Bord Pleanála (No. 2)* [2018] IEHC 808.

**(ii) No time-limit on enforcement proceedings seeking cessation orders**

37. The restrictions on the availability of the benefit of exempted development introduced under the Environment (Miscellaneous Provisions) Act 2011 (discussed above) had been complemented by another amendment under that Act. More specifically, the time-limits governing the taking of enforcement action in respect of unauthorised peat extraction were amended. The general position under the PDA 2000 is that there is a seven-year time-limit on the taking of enforcement proceedings. In the case of development in respect of which no planning permission has been obtained, the seven-year time-limit generally runs from the date upon which the unauthorised development first commenced. This seven-year time-limit is, however, modified in the case of peat extraction. An application may be made at any time for an order directing the *cessation* of unauthorised peat extraction. (A seven-year time-limit continues to apply to *mandatory orders*

requiring the reinstatement of lands). A similar time-limit applies to quarrying activities. See, generally, *McCoy v. Shillelagh Quarries Ltd.* [2015] IEHC 838, [86].

**IPC licensing regime: position prior to january 2019**

38. The legal position, prior to the adoption of the Ministerial Regulations in January 2019, had been that certain large-scale peat extraction was subject to licensing by the EPA under Part IV of the Environmental Protection Agency Act 1992. The licensing regime had existed in parallel to the requirement to obtain planning permission.

39. The relevant threshold for the purposes of a licence application had read as follows.

> "1.4 The extraction of peat in the course of business which involves an area exceeding 50 hectares."

40. This threshold represented the gateway to the licensing regime. The EPA did not have jurisdiction to entertain a licence application unless this threshold had been exceeded. Once a licence application had been made, the EPA then had—since 2012—jurisdiction to screen the application for the purposes of the EIA Directive and the Habitats Directive. Unless and until the threshold of 50 hectares had been exceeded, however, the EPA had no jurisdiction to entertain a licence application. Thus, in the hypothetical case of an existing peat extraction development which fell below the threshold of 50 hectares, a licence application to the EPA would not have been required even if a screening determination *would have* indicated that the proposed development was likely to have a significant effect on the environment and/or a European Site, and, consequently, would have triggered a requirement for assessment as a matter of EU law.

41. Put shortly, those projects which had required an IPC licence under domestic law pre-January 2019 had represented merely a subset of those which require assessment for the purposes of the EIA Directive and the Habitats Directive.

42. The application of this 50 hectares threshold had proved difficult in practice. See, for example, the judgment of the High Court (Barrett J.) in *Environmental Protection Agency v. Harte Peat Ltd.* [2014] IEHC 308; [2015] 1 I.R. 462.

43. It should also be noted that the CJEU had found that there was a lacuna in the pre- 2012 version of the EPA Act 1992 in that the EPA did not have jurisdiction to call for the submission of an environmental impact statement in the absence of a parallel application for planning permission. (See Case C-50/09, *Commission v. Ireland*).

**Legislative regime pre- January 2019**

44. The legal position in respect of peat extraction prior to the operative date of the Ministerial Regulations in January 2019 can thus be summarised as follows.

(i). There was an obligation to obtain planning permission in respect of any peat extraction project which requires assessment under either the EIA Directive or the Habitats Directive. An EIA had been mandatory, under domestic law, where the

peat extraction would involve a "new or extended" area of 30 hectares or more. (See Planning and Development Regulations 2001, Schedule 5, Part 2, paragraph 2(a)). In the case of sub-threshold development, a screening determination would have to be made by reference to the detailed criteria set out at Schedule 7 of the Planning and Development Regulations 2001. A screening determination for the purposes of article 6(3) of the Habitats Directive would also have to be undertaken.

(ii). Peat extraction which was being carried out without the benefit of planning permission, where required, was vulnerable to enforcement proceedings. Any person is entitled to apply for orders pursuant to section 160 of the PDA 2000. There is no time-limit on an application seeking an order which requires the *cessation* of peat extraction. A planning authority is empowered to serve an enforcement notice and/or to apply for orders pursuant to section 160 of the PDA 2000. Where a complaint is made and (i) a planning authority establishes, following an investigation, that unauthorised development (other than development that is of a trivial or minor nature) is being carried out, and (ii) the person who has carried out or is carrying out the development has not proceeded to remedy the position, then the authority is *obliged* to issue an enforcement notice and/or to make an application pursuant to section 160 unless there are compelling reasons for not doing so. (See section 153(7) of the PDA 2000 (as inserted by the Environment (Miscellaneous Provisions) Act 2011)).

(iii). Section 5 of the PDA 2000 provides a simple procedure whereby the question of whether a particular development (including peat extraction) requires planning permission can be determined, initially, by the planning authority and, thereafter, on review by An Bord Pleanála. By way of example, the proceedings in *Bulrush Horticultural Ltd. v. An Bord Pleanála* (discussed at paragraph 33 above) arose out of a section 5 declaration made by An Bord Pleanála in respect of peat extraction. A section 5 declaration, which has not been challenged by way of judicial review, can be relied upon to ground enforcement proceedings. (See *Killross Properties Ltd v. Electricity Supply Board* [2016] IECA 207; [2016] 1 I.R. 541).

(iv). In the event that a developer carrying out peat extraction wished to regularise the planning status of the activity—for example, in response to the threat of enforcement proceedings—then the substitute consent procedure under Part XA of the PDA 2000 would have to be invoked. Relevantly, there is no automatic entitlement to apply for substitute consent; rather, a developer has to apply first to An Bord Pleanála for leave to make an application for substitute consent. The Board may only grant leave to apply if it is satisfied that "exceptional circumstances" exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

(v). In parallel to the planning legislation, certain large-scale peat extraction involving an area in excess of 50 hectares was subject to licensing by the EPA under Part IV of the Environmental Protection Agency Act 1992.

**legislative regime post- January 2019**

45. The operative date of the Ministerial Regulations is 25 January 2019. The legislative regime post-January 2019 can be summarised as follows.

(i). Peat extraction that involves an area of 30 hectares or more is immediately exempt from the requirement to obtain planning permission. This has the consequence that the enforcement mechanisms under the PDA 2000; the section 5 reference procedure; and the substitute consent procedure, all no longer apply.

(ii). Peat extraction which falls short of the threshold of 30 hectares is, in principle, subject to a requirement to obtain planning permission. It should be noted, however, that peat extraction in a "new or extended" area of less than 10 hectares is exempted development, subject always to section 4(4) of the PDA 2000.

(iii). Peat extraction that involves an area of 30 hectares or more requires an IPC licence from the EPA. Under the transitional provisions, however, an unlicensed developer is entitled to continue to carry on peat extraction. This is subject to a requirement to make a licence application not later than eighteen months after 25 January 2019. Provided a licence application is made within time, the peat extraction can then continue until such time as the licence application is determined. If the licence application is refused, and that refusal is challenged by the developer in judicial review proceedings, then peat extraction can continue until such time as the judicial review is determined by a final judgment. (See section 82B(7) of the Environmental Protection Agency Act 1992 (as inserted by the Ministerial Regulations)).

**Parliamentary intervention / primary legislation**

46. One of the grounds of objection made by the Applicant is that the Ministerial Regulations go beyond the mere implementation of "principles and policies" set out in the EU Directives, and instead entail the making of policy decisions.

47. As discussed in more detail at paragraphs 137 *et seq*. below, it is relevant to the determination of the question of whether it is permissible to amend primary legislation by way of secondary legislation to consider whether the content of the secondary legislation cuts across policy issues which have previously been the subject of parliamentary intervention by way of primary legislation. Accordingly, it may be useful at this stage to summarise the engagement of the Oireachtas with precisely the same type of policy issues which now feature in the Ministerial Regulations.

48. The parliamentary intervention of most immediate relevance is the introduction of a form of retrospective development consent under the Planning and Development (Amendment) Act 2010. This primary legislation was enacted in the aftermath of the judgment of the CJEU in Case C-215/06, *Commission v. Ireland*. The judgment had condemned the legislative regime governing retention planning permission under the original version of the PDA 2000. The CJEU was especially critical of the fact that retention planning permission could be obtained without any necessity to demonstrate "exceptional circumstances", and that the effect of a retention planning permission equated to that of a conventional planning permission.

49. The Planning and Development (Amendment) Act 2010 prohibited the grant of retention planning permission in respect of projects which should have been—but were not—subject to an EIA or to a screening for EIA prior to the commencement of works. The 2010 Act introduced instead a form of retrospective development consent for EIA projects. This form of development consent has been labelled as "substitute consent". Crucially, the regime governing the grant of substitute consent is much more stringent than that which had governed the grant of retention planning permission or that which would govern peat extraction under the impugned Ministerial Regulations.

50. The key features of the substitute consent regime are as follows.

    (i). There is no automatic entitlement to apply for substitute consent. In most instances, a developer will have to apply to An Bord Pleanála for "leave to apply" for substitute consent. Leave will only be granted where exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent. The concept of "exceptional circumstances" is defined under section 177D of the PDA 2000. The definition is set out in full at paragraph 163 below.

    (ii). A separate gateway to the substitute consent regime has been provided for in the case of certain quarries. There are no special rules applicable to peat extraction.

    (iii). An Bord Pleanála is empowered to issue a direction to the developer to cease activity or operations pending the determination of an application for substitute consent. (See section 177J of the PDA 2000). The Board may issue a direction where it forms the opinion that the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European Site.

    (iv). Where An Bord Pleanála grants substitute consent, it can impose conditions *inter alia* relating to remediation of all or part of the site on which the development the subject of the grant of substitute consent is situated. (See section 177K(3)(b) of the PDA 2000).

    (v). Where An Bord Pleanála either refuses an application for leave to apply for substitute consent, or refuses to grant substitute consent, it may issue a direction

to the developer (a) to cease activity or operations or (b) to take remedial measures. The remedial measures may include measures to restore the site to a safe and environmentally sustainable condition; and to avoid the deterioration of natural habitats and the habitats of species or the disturbance of the species in a European Site. (See section 177L of the PDA 2000).

51. The second legislative intervention of note is the enactment of the Environment (Miscellaneous Provisions) Act 2011. As discussed at paragraph 37 above, development shall not be exempted development under the Planning and Development Regulations if an environmental impact assessment for the purposes of the EIA Directive or an appropriate assessment for the purposes of the Habitats Directive is required. See section 4(4) of the PDA 2000. From 21 September 2012 forward, any development—including peat extraction—which required environmental impact assessment or appropriate assessment was subject to a requirement to obtain planning permission.

**Part 2**

**Detailed Discussion of Grounds of Challenge**

**(1). regularisation procedure / ex post facto assessment**

52. The Ministerial Regulations purport to put in place a new licensing regime which will allow for the regularisation of peat extraction which has been carried out in breach of the requirements of the EIA Directive and the Habitats Directive. This licensing regime is intended to replace the existing regularisation procedure provided for under Part XA of the PDA 2000, i.e. the substitute consent regime. A developer who has been carrying out unauthorised peat extraction will be able to apply for a licence under an amended Part IV of the EPA Act 1992 instead of having to apply for substitute consent.

53. The Applicant makes a series of criticisms of the new licensing regime. The gravamen of the Applicant's complaint, however, is that the form of regularisation procedure provided for is inconsistent with the requirements of the EIA Directive and the Habitats Directive.

54. In order to properly understand this complaint, it is necessary to consider briefly the requirements of the EIA Directive and the Habitats Directive; and to outline the extent of a Member State's discretion to regularise development projects which have been carried out in breach of those requirements.

55. Each of the two Directives imposes a requirement to apply for and to obtain development consent *prior to* the commencement of development works.

**(i) EIA Directive**

56. The EIA Directive obliges Member States to adopt all measures necessary to ensure that prescribed projects are made subject to a requirement to obtain development consent. This obligation was implicit in the original version of the EIA Directive (Directive 85/337/EC) and was made express by the amendments introduced in 1997 (Directive 97/11/EC).

57. An EIA must be carried out *prior to* the commencement of development works. See Case C-215/06, *Commission v. Ireland* ("*Derrybrien No. 1*") as follows.

> "51. Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.
>
> 52. That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment."

58. Since 16 May 2017, Member States have been under an express obligation to provide effective, proportionate and dissuasive penalties. See article 10A of the EIA Directive (as inserted by Directive 2014/52/EU).

> "10A. Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive."

59. The carrying out of an EIA is mandatory in the case of projects listed in Annex I of the EIA Directive. In the case of projects listed in Annex II, the Member State must determine either on a case-by-case basis, or by the use of thresholds or criteria, whether the project is likely to have a significant effect on the environment. If this screening determination is "positive", then an EIA must be carried out.

60. A Member State has a limited discretion as to the identification of projects under Annex II which are likely to have a significant effect on the environment and, accordingly, to require development consent. (See, for example, Case C-72/95, *Kraaijeveld*). The threshold for peat extraction above which the carrying out of an EIA is mandatory had been fixed under national law as follows: "Peat extraction which would involve a new or extended area of 30 hectares". (See Planning and Development Regulations 2001, Schedule 5). Under the impugned regulations, the qualifying words "new or extended" have been removed and the amended threshold is now fixed as follows: "Peat extraction that involves an area of 30 hectares".

61. The parties were agreed at the hearing before me that peat extraction on the scale regulated by the Ministerial Regulations must, as a matter of EU law, be subject to a requirement to obtain development consent. Indeed, the State respondents could scarcely contend otherwise in circumstances where their justification for relying on secondary—as opposed to primary—legislation is predicated upon an argument that the legislative amendments were "necessitated" by EU law. (See paragraph 81 of the written legal submissions). It is implicit in this argument that the carrying out of an EIA is mandatory in respect of the category of development identified, namely peat extraction involving an area of more than 30 hectares.

**(ii). Habitats Directive**

62. The Habitats Directive is drafted in much less detailed terms than the EIA Directive. Article 6(3) of the Habitats Directive provides that any project which is likely to have a significant effect on a European Site must be subject to an "appropriate assessment". It is implicit in this that projects which are likely to have a significant effect must be subject to a form of development consent. A Member State may not systematically and generally exempt certain categories of projects from the obligation requiring an appropriate assessment to be undertaken of their implications for European Sites. (See Case C-538/09, *Commission v. Belgium*).

63. As in the case of the EIA Directive, the application for development consent (the agreement of the project) must be made, and the appropriate assessment, if required, must be carried out, *prior to* the commencement of development works. (See Case C-411/17, *Inter-Environnement Wallonnie*).

**Case law on regularisation procedure**

64. The case law of the CJEU establishes that a Member State has a limited discretion to allow for the regularisation of development projects which have been carried out in breach of the requirements of the EIA Directive and the Habitats Directive. Notwithstanding that the Directives require that the assessment must be carried out prior to commencement of development, it may be possible to regularise the status of a project by carrying out an *ex post facto* assessment. To be compliant with EU law, however, the regularisation procedure must meet certain minimum criteria. First, it must not offer an opportunity to developers to circumvent EU law and must remain the exception. Secondly, the *ex post facto* assessment must have regard to both the historic and prospective impacts of the project. Thirdly, the more recent case law indicates that the regularisation procedure must, at the very least, allow for the *possibility* of the suspension of development works and the activity pending the carrying out of the *ex post facto* assessment. As discussed presently, the State respondents dispute that this last requirement is a feature of EU law. (See paragraph 71 *et seq.* below).

65. It is proposed to consider the Ministerial Regulations by reference to each of these three broad criteria. It should be noted from the outset, however, that the principal criticism made of the Ministerial Regulations by the Applicant is directed to the transitional provisions. Accordingly, the discussion of the third of the criteria identified above will be

much lengthier than that in respect of the first two criteria. I propose to address this issue first. In other words, I will take this third criteria out of turn.

***(i) Suspension pending regularisation procedure***

66. The principal criticism made of the Ministerial Regulations concerns the transitional provisions thereunder. One of the directors of the Applicant, Mr Tony Lowes, in his affidavit of 9 April 2019, has identified four examples of what he describes as "industrial scale" peat extraction which it is alleged would be permitted to continue during the transitional period under the Ministerial Regulations.

67. Mr Lowes has also exhibited, as part of a later affidavit, a letter dated 29 April 2019 from the European Commission.

> "We are aware of this new legislation which was communicated to us by the Irish authorities in January 2019. Whilst we welcome the creation of the new regime which it is hoped will finally bring Ireland's wide ranging peat extraction activities into line with EU law, we share your concerns about the further delay that is now created in the application of Directive 2011/92/EU on environmental impact assessment (EIA). As a result of these concerns we have written formally to the Irish authorities raising these concerns. In particular, we remain concerned about the continued lack of application of the law to peat extraction activities despite last year's national court ruling in the Bulrush and Westland case. Furthermore, the judgment of the Court of Justice against Ireland in Case C-392/96, in September 1999 concerning the failure by Ireland to correctly transpose the original EIA Directive 85/337/EEC with regard to peat extraction activities was closed in December 2005 after the adoption of the Planning and Development Regulations 2005 (S.I. 364 of 2005) and the subsequent completion of designations of the Natural Heritage Areas to protect peat bog sites. It appears that the new legislation now deletes that legislation leaving a legal limbo until this new regime starts to apply."

68. It seems that the European Commission has since issued a Letter of Formal Notice to Ireland on 26 July 2019.

69. Leading counsel on behalf of the Applicant, James Devlin, SC, submits that a Member State is obliged to nullify the unlawful consequences of a breach of the EIA Directive and the Habitats Directive. This obligation, it is said, extends to the suspension or the revocation of a development consent which has been granted in breach of the EU Directives. Counsel draws attention to the fact that the breach which the Ministerial Regulations purport to regularise is an even more fundamental breach, in that it involves a failure to apply for and obtain development consent. The effect of the transitional provisions, it is submitted, is that compliance with the requirements of the EU Directives

is to be put on hold for the transitional period, i.e. there is to be yet a *further* delay in achieving compliance following upon numerous years of non-compliance.

70. Counsel relies on the very recent judgment of the Grand Chamber of the CJEU in Case C-411/17, *Inter-Environnement Wallonnie*. The judgment addressed the consequences of a failure to comply with the EIA Directive and the Habitats Directive as follows.

> "169. 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.
>
> 170. 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).
>
> 171. That obligation is also incumbent on national courts before which an action against a national measure including such a consent has been brought. The detailed procedural rules applicable to such actions are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (the principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (the principle of effectiveness) (see, to that effect, judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraph 45 and the case-law cited).
>
> 172 . 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 project adopted in breach of the obligation to carry out an environmental assessment (see, to that effect, judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre Wallonne*, C-41/11, EU:C:2012:103, paragraph 46 and the case-law cited).
>
> 173. 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).

174. 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).

175. 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).

176. 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.

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)."

71. In response, leading counsel on behalf of the State respondents, Niamh Hyland, SC, submitted that EU law did not inevitably require that a development consent which had been granted in breach of the EIA Directive or the Habitats Directive must be suspended pending the carrying out of a regularisation procedure. Counsel further submitted that such a requirement would represent a radical change in the case law and would be inconsistent with the principle of the procedural autonomy of the Member States. Counsel cited, by way of example, the judgment in Case C-348/15, *Stadt Wiener* where the CJEU held that it is compatible with EU law to lay down, in the interests of legal certainty, reasonable time-limits for proceedings which seek to annul development consents issued in breach of the EIA Directive. It would be difficult, counsel suggested, to reconcile this holding with the proposition that there must be an immediate cessation of development works in order to apply to regularise a project.

72. Counsel submitted that, on its correct interpretation, the overall meaning of the judgment in Case C-411/17 is not that there is inevitably an obligation to suspend or annul a project. The judgment does not impose a stand-alone obligation on a Member State in a prescriptive fashion to suspend or annul a project. That was not the question which the CJEU had been asked in the preliminary reference and that is not the answer that the CJEU gave.

**Discussion**

73. Approaching the matter from first principles, an attractive argument can be made that the discretion of a Member State to provide for a regularisation procedure should extend to discretion to permit the carrying out of development works or the continuation of activities pending the carrying out of an *ex post facto* assessment. For example, it might be unduly harsh to a developer who had applied for and obtained a development consent in good faith, only for that consent to be set aside subsequently as a result in a deficiency in national law, to be automatically required to suspend any development works or activities pending an application to regularise the status of the project. A Member State should, arguably, be entitled to balance the principles of legal certainty and legitimate expectations of the developers against the objectives of the EIA Directive and the Habitats Directive.

74. This is the approach which had been recommended by Advocate General Kokott in Case C-411/17.

> "209. Nevertheless, such decisions are not necessarily contrary in substance to EU law when they are adopted in breach of procedural requirements of EU law. EU law does not therefore preclude national legislation

which, in certain cases, permits the regularisation of operations or measures which are unlawful in the light of EU law.

210. Bearing in mind this possibility, it could be disproportionate in some cases, on the basis of a finding of a procedural error, to eliminate the effects of the decision concerned, with the result that the activity at issue can no longer be carried out at least temporarily. Rather, it could be necessary to weigh up the conflicting interests and, in some cases, to maintain the effects of the decision until it is subsequently regularised.

211. However, a good degree of caution must be exercised.

212. The possibility of a posteriori regularisation is limited to exceptional cases and may not offer the opportunity to circumvent EU law or dispense with applying it. However, there would be a danger of circumvention especially if before regularisation the effect of decisions adopted in breach of procedural rules was maintained too generously.

213. It must also be ensured that maintenance of the effects of a decision taken without the necessary environmental assessment does not result in environmental damage which the environmental assessment is specifically intended to prevent.

214. Consequently, the effects of such a decision may be maintained only if, on the basis of the available information and the applicable provisions, it is highly likely that the decision will be confirmed in the same form following the retrospective carrying out of the environmental assessment. If, however, there is reasonable doubt as to such confirmation, maintaining the effects should be ruled out. Crucial to the assessment are the substantive conditions for the exercise of the activity in question, in this case, aside from the applicable rules governing the operation of nuclear power stations, Article 6 of the Habitats Directive for example."

*Footnotes omitted.

75. As appears, the Advocate General recommended a pragmatic approach which would leave over a limited discretion to the Member States as to whether to allow the development works or activities, which had been authorised under a subsequently invalidated development consent, to continue pending the completion of a regularisation procedure.

76. The CJEU in its judgment seems to have taken a more hard-line approach. It is difficult to read paragraph 172 of the judgment in Case C-411/17 as meaning anything other than that a national court is required to suspend or annul development works or operations

where a project has been adopted in breach of the requirement to carry out an environmental impact assessment. The only exception permitted to this requirement is in the types of circumstances outlined at paragraphs [177] to [179] of the judgment, i.e. a temporary suspension of the ousting effect of EU law may be allowed where there are overriding considerations relating to the protection of the environment or relating to the security of electricity supply.

77. This outcome is not perhaps as radical as the submissions on behalf of the State respondents might suggest. A requirement to suspend had been presaged as early as January 2004 with the delivery of the judgment in Case C-201/02, *Wells*. See, in particular, paragraph 65 of that judgment as follows.

> "65. Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and WWF and Others, cited above, paragraph 70). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337."

78. The more recent case law places much emphasis on whether national law provides for the suspension of development works or activities. The judgment in Case C-215/06, *Commission v. Ireland* held that the provision then made under Irish law for retention planning permission deprived the enforcement system of any effectiveness. The judgment was critical of the fact that it was possible to leave projects, which were not properly authorised, undisturbed provided that an application for retention planning permission was made before the commencement of enforcement proceedings.

> "74. It is undisputed that, in Ireland, the absence of an environmental impact assessment required by Directive 85/337 as amended can be remedied by obtaining a retention permission which makes it possible, in particular, to leave projects which were not properly authorised undisturbed, provided that the application for such a permission is made before the commencement of enforcement proceedings.
>
> 75. The consequence of that possibility, as indeed Ireland recognises, may be that the competent authorities do not take action to suspend or put an end to a project that is within the scope of Directive 85/337 as amended and is being carried out or has already been carried out with no regard to the requirements relating to development consent and to

an environmental impact assessment prior to issue of that development consent, and that they refrain from initiating the enforcement procedure provided for by the PDA, in relation to which Ireland points out that the powers are discretionary.

76. The inadequacy of the enforcement system set up by Ireland is accordingly demonstrated inasmuch as the existence of retention permission deprives it of any effectiveness, and that inadequacy is the direct consequence of the Member State's failure to fulfil its obligations which was found in the course of consideration of the first two pleas in law."

79. In Case C-196/16, *Comune di Corridonia*, the CJEU laid emphasis on the fact that the activities of the biogas plants the subject of the national proceedings had been suspended. The CJEU cited this as one of a number of features which favourably distinguished the Italian legislation from the Irish legislation condemned in Case C-215/06, *Commission v. Ireland*. See paragraph 41 of the judgment in Case C-196/16 as follows.

"41. It is for the referring court to assess whether the legislation at issue in the main proceedings satisfies those requirements. It is, however, appropriate to mention to the referring court that the facts that the undertakings concerned took the necessary steps to arrange for, if need be, an assessment of the environmental impact of their projects to be carried out, that the refusal of the competent authorities to accede to those requests was based on national rules, the incompatibility of which with EU law was only subsequently established by a ruling of the Corte costituzionale (Constitutional Court), and that the activities of the plants concerned were suspended appear rather to indicate that the regularisations carried out were not permitted under national law in conditions similar to those in the case leading to the judgment of 3 July 2008, *Commission v Ireland* (C-215/06, EU:C:2008:380, paragraph 61), and did not attempt to circumvent rules of EU law."

80. As appears, express attention was drawn to the fact that the Italian regularisation procedure allowed for the possibility of the suspension of the development consent.

81. At all events, it is not necessary for the purposes of the resolution of the present case for this court to reach a definitive view on whether or not there is a mandatory requirement to suspend development works or activities pending the carrying out of a regularisation procedure. This is because even if there is no *mandatory* requirement, there can be no doubt but that national law must, at the very least, provide for the *possibility* of suspension. National law must provide some mechanism for weighing up the conflicting interests and to ensure that the carrying out of development in ongoing breach of the EIA

Directive and the Habitats Directive does not result in environmental damage which the assessment is specifically intended to prevent. This was the approach which had been recommended by Advocate General Kokott in Case C-411/17, *Inter-Environnment Wallonie*.

82. It is also the approach which had been adopted under national law prior to January 2019. The regularisation procedure provided for under national law, i.e. the substitute consent regime under Part XA of the PDA 2000, expressly provides for the possibility of issuing a direction requiring a developer to cease activity or operations. This possibility arises at two stages of the procedure. First, a direction can be issued pending the determination of the application for substitute consent. Secondly, a direction can be issued consequential to the refusal of the application for substitute consent. The legal test governing the decision of whether or not to issue either type of direction is the same: the competent authority, An Bord Pleanála, must consider whether the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European Site.

83. There are no equivalent provisions under the post- January 2019 regime. The practical effect of the transitional provisions is that a developer, who had prior to January 2019 commenced peat extraction that involves an area of more than 30 hectares, is entitled to continue that activity for a minimum period of eighteen months notwithstanding that the developer does not have either a licence or a planning permission for the activity. The enforcement provisions under neither the PDA 2000 nor the EPA Act 1992 apply during this period. The period during which the activity can be carried out is extended in the event that a licence application is made within eighteen months of January 2019.

84. The post- January 2019 legislative regime thus suffers from the same type of deficiency which had been condemned by the CJEU in Case C-215/06, *Commission v. Ireland*. The regime purports to leave projects, which have not been properly authorised or assessed for the purposes of the EIA Directive, undisturbed. Indeed, in one respect the post- January 2019 regime is worse, in that enforcement action is not legally possible during the transitional period. By contrast, under the regime for retention planning permission, unauthorised projects were, in principle, amenable to enforcement action even if, as the CJEU found, the competent authorities, in practice, often refrained from initiating enforcement action.

85. Given the similarity between the post- January 2019 regime and that condemned in Case C-215/06, *Commission v. Ireland*, it is obvious that the introduction of the transitional provisions represents a breach of the EIA Directive. The transitional provisions exceed the limits of the discretion afforded to a Member State to provide for the regularisation of projects which have been carried out in contravention of the requirement to obtain development consent and to submit to an environmental impact assessment. The absence of any possibility for the suspension of ongoing peat extraction during the transitional period undermines the effectiveness of the EIA Directive and is contrary to EU

law. The procedural autonomy of a Member State is subject to the principle of effectiveness.

86. The position in respect of the Habitats Directive is potentially even more serious. In contrast to the EIA Directive, the Habitats Directive imposes substantive or qualitative requirements in the context of development consents. The national competent authorities are generally precluded from granting consent for projects which would adversely affect the integrity of a European Site. (This is subject to the specific requirements of article 6(4) of the Habitats Directive). A Member State is not entitled to exempt *a priori* categories of development from the requirements of the Habitats Directive. See Case C-241/08, *Commission v. France*. Yet this is precisely what the Ministerial Regulations purport to do, albeit that the exemption is for a transitional period rather than on a permanent basis. Peat extraction is to be allowed to continue on a temporary basis in circumstances where the activity is not subject to any development consent or operating conditions. The absence of a legislative provision whereby development works or activities can be suspended pending the final determination of an application for a licence gives rise to a risk that damage might be caused to a European Site.

**Licensed v. unlicensed peat extraction**

87. There was some debate before me as to whether a meaningful distinction can be drawn between the position of developers who held a licence as of January 2019, and those developers who did not. It will be recalled that development consisting of the extraction of peat in the course of business which involves an area exceeding 50 hectares has been subject to an obligation to apply for a licence since June 1999.

88. The Ministerial Regulations afford a longer transitional period to a developer who had been carrying out peat extraction as of January 2019 in accordance with a licence or revised licence issued by the EPA. A period of thirty-six months is allowed for the making of an application for a (new) licence.

89. The rationale for saying that there must be an *automatic* suspension of activities pending the completion of a regularisation procedure is less compelling in circumstances where a developer already holds a licence, albeit one granted at a time when the EPA did not have statutory power to carry out an environmental impact assessment in the absence of a parallel application for planning permission. (See Case C-50/09, *Commission v. Ireland*). First, the ongoing peat extraction will be subject to the requirement to comply with the conditions under the existing licence. This is to be contrasted with the position of unlicensed peat extraction: such activity is, seemingly, to remain unregulated during the transitional period.

90. Secondly, the conduct of applying for and obtaining a licence demonstrates good faith on the part of a developer. As against this, it should be noted that peat extraction which is likely to have a significant effect on the environment and/or a significant effect on a European Site has been subject to a statutory requirement to obtain planning permission since, at the very latest, September 2012. The holding of a licence did not obviate the

necessity to apply for and to obtain planning permission following on from the amendments introduced to section 4 of the PDA 2000 by the Environment (Miscellaneous Provisions) Act 2011. In principle, therefore, the holder of an existing licence might nevertheless have been carrying out peat extraction in breach of national law for a lengthy period of time. (Of course, this would depend on the precise circumstances of the particular project. There is no evidence before the court on these factual issues, and this judgment does not purport to make any findings in this regard).

91. The points of distinction identified above between licensed and unlicensed activities are, in principle, matters which could be taken into account in deciding whether or not, in any particular case, peat extraction should be suspended pending the determination of an application for a (new style) licence. The difficulty, of course, is that the post- January 2019 legislative regime does not allow for the consideration of the individual circumstances of any particular peat extraction activity. Rather, the blanket approach adopted under the Ministerial Regulations is that both licensed and unlicensed activities can continue during the transitional period. It is the absence of any statutory mechanism by which the conflicting interests of the developer and the objectives of the EIA Directive and the Habitats Directive can be weighed up that is fatal to the validity of the transitional provisions. Even in the case of a licensed activity, it cannot be assumed *a priori* that to allow peat extraction to continue for a period of in excess of thirty-six months will not necessarily have any adverse environmental effects.

**Summary**

92. My conclusions in respect of the transitional provisions can be summarised as follows. First, it is a requirement of EU law that, at the very least, there be a possibility of suspending development works and activities pending the determination of an application for retrospective development consent. Secondly, the absence of any such provision under the Ministerial Regulations renders same inconsistent with the requirements of the EIA Directive and the Habitats Directive. This inconsistency arises in the case of the treatment of both the licensed and unlicensed peat extraction.

***(ii) No opportunity for circumvention / Exceptional circumstances***

93. The case law indicates that a regularisation procedure must not offer an opportunity to circumvent EU environmental legislation nor to dispense with applying it. The regularisation procedure should also remain the exception. See Case C-215/06, *Commission v. Ireland*, [57] and [58].

94. Some guidance as to the type of regularisation procedure which will pass muster under EU law can be obtained by examining the features of national legislation which has been considered by the CJEU. The judgment of most immediate relevance is that in Case C-215/06, *Commission v. Ireland*. The judgment was delivered in respect of infringement proceedings taken against Ireland concerning the provision then made under national law for the grant of retention planning permission. The legislation has since been amended, principally by the Planning and Development (Amendment) Act 2010. The shorthand "*the pre-2010 planning legislation*" will be used to describe the former legislation.

95. The CJEU condemned the provision made for retention planning permission under the pre-2010 planning legislation. The CJEU singled out the following features of the legislation for particular criticism. First, an application for retention planning permission could be made without there being any requirement to demonstrate exceptional circumstances. Secondly, a retention planning permission equated to a conventional planning permission. Thirdly, there was no obligation to cease development works pending the determination of the application for retention planning permission.

96. The CJEU held (i) that the pre-2010 planning legislation offered an opportunity to circumvent the EIA Directive, and (ii) that the availability of retention planning permission deprived the enforcement system set up by Ireland of any effectiveness.

97. An example of a regularisation procedure which falls on the other side of the line is provided by Case C-196/16, *Comune di Corridonia*. The case came before the CJEU by way of a reference for a preliminary ruling from an Italian Regional Administrative Court. The reference concerned the legitimacy of an *ex post facto* assessment carried out in respect of two power generating plants. The plants generated electricity on the basis of biogas obtained from the anaerobic digestion of biomass. The developers had complied with national law by submitting to a preliminary examination as to the need for an environmental assessment of the proposed projects. The competent authorities had decided that no assessment was required. The national rules relied upon were *subsequently* held to be incompatible with EU law by the Italian Constitutional Court. At this time, the construction of the projects, i.e. the two biogas plants, had been completed. The operation of the plants was then suspended pending the carrying out of an environmental impact assessment.

98. The CJEU, while emphasising that it was ultimately a matter for the national court to determine whether the regularisation procedure at issue was consistent with the EIA Directive, identified a number of factors of the regime which it considered relevant as follows. First, the developers had complied with the (then) national legislation. Secondly, the operation of the plants had been suspended pending the regularisation procedure. The CJEU gave a strong hint to the referring court that these factors meant that the Italian legislation compared favourably to the pre-2010 planning legislation which had been condemned in Case C-215/06.

**Application of these principles**

99. The case law discussed under the previous heading indicates that the type of considerations to be taken into account in determining whether or not a regularisation procedure is compatible with EU law include (i) whether the developer had acted in good faith in seeking to comply with national law; and (ii) whether national law makes provision for the suspension of development works or activities pending the carrying out of the regularisation procedure. This second requirement has been examined exhaustively earlier in this judgment and that analysis applies *mutatis mutandis* to the discussion of whether the regularisation procedure introduced by the Ministerial

Regulations facilitates the circumvention of the requirements of the EIA Directive and the Habitats Directive.

100. Applying the principles in the case law to the facts of the present case, I am satisfied that the intended use of the licensing regime under Part IV of the EPA Act 1992 to allow for the regularisation of ongoing peat extraction which has been—and continues to be—carried out in breach of the requirements of the EIA Directive and the Habitats Directive exceeds the limited discretion afforded to a Member State. The intended regularisation procedure suffers from almost all of the deficiencies inherent in the pre-2010 planning legislation condemned by the CJEU in Case C-215/06, *Commission v. Ireland*. In fact, in certain significant respects, the regularisation procedure is even more deficient.

101. The principal deficiencies of the regularisation procedure are as follows.

102. First, the very requirement to apply for and obtain a development consent is to be disapplied for a significant period of time. At least under the pre-2010 planning legislation, a legal obligation to apply for and obtain planning permission remained in force. A developer was thus on legal hazard of being subject to enforcement action, even if, in practice, many local authorities chose not to institute enforcement proceedings. By contrast, a developer who had commenced peat extraction prior to January 2019 in breach of the EIA Directive and the Habitats Directive is to be allowed to carry on the activity. Such a developer is to be relieved of the legal obligation even to make an application for development consent for a further period of eighteen months. Once the application is made, the developer is entitled to carry out peat extraction without any conditions attached thereto pending the determination of the licence application and any judicial review proceedings. This process could take years.

103. Counsel on behalf of the State respondents gamely submitted that there was a meaningful distinction to be drawn between the *disapplication* of the requirement to apply for and obtain development consent, and a temporary *deferral* of same. It was further submitted that whereas the former would represent a breach of EU law (by reference to the principles in Case C-72/95, *Kraaijeveld*), the latter represents the permissible exercise of the Member State's discretion to regularise unauthorised development.

104. I have already outlined my reasons for finding that the absence of any provision under the intended licensing regime for possible suspension of peat extraction exceeds the limits of a Member State's discretion. (See paragraphs 66 *et seq.* above). The absence of such a provision may also be analysed by reference to the question of whether the licensing regime facilitates the *circumvention* of the requirements of the EIA Directive and the Habitats Directive. To allow, as the Ministerial Regulations purport to do, unauthorised development to be continued for a further period of time, which is measured in years rather than months, can only be described as a circumvention of the requirements of the two Directives.

105. Secondly, a licence granted by the EPA *ex post facto* is treated as having precisely the same legal effect as a development consent granted prior to the commencement of

development. Unlike the position in respect of substitute consent under Part XA of PDA 2000, there is no express entitlement on the part of the competent authority, namely the EPA, to impose remedial type conditions. There is no express statutory basis upon which an unlicensed developer can be required to remediate or reinstate lands to their condition prior to the commencement of the unauthorised development. In short, there is no sanction for the developer having failed to apply for development consent prior to the commencement of development works.

106. Thirdly, the regularisation procedure does not meet the "exceptional circumstances" requirement under EU law. To qualify for the regularisation procedure, the developer simply has to have been carrying out peat extraction prior to January 2019. The entitlement to apply for retrospective development consent is thus available to *any* person who had been carrying out unauthorised peat extraction on a scale in excess of the threshold of 30 hectares. There is no necessity for any inquiry as to matters such as the *bona fides* of the developer, nor as to whether the very ability to carry out a meaningful environmental impact assessment has been undermined by the previous unauthorised development.

107. Counsel on behalf of the State respondents sought to argue that peat extraction is *sui generis* and that, accordingly, the special treatment for the entire category is justified as an exceptional circumstance. A number of factors were identified as being relevant in this regard. These have been summarised as follows at pages 18 and 19 of the written legal submissions filed on behalf of the State respondents on 2 September 2019.

108. In the case of the single developer who currently holds IPC licences, namely Bord na Móna, the following factors are relied upon.

> "• The long history of Bord na Móna's peat extraction activities, much of which was carried out at a time when peat extraction was considered to be exempt from planning permission;
>
> • The fact that, since the time when the EPA was empowered to carry out an EIA in its own right (2012), the planning status of peat extraction has largely been uncertain due to litigation;
>
> • The uniquely extensive geographic area covered by Bord na Móna bogs; and
>
> • The fact that certain environmental impacts had in fact been considered by the EPA in granting the licences at issue and a variety of environmental licence conditions had been imposed and were being monitored."

109. In the case of unlicensed developers, the following factors are relied upon.

> "a. It was necessary for these extractors to prepare an IPC licence application and, accompanying that, an Environmental Impact Assessment Report ("EIAR");

b. The optimum period for carrying out surveys upon which such EIARs are based is a 12-month period in order, in accordance with relevant EPA and European Commission guidance, to take account of the seasonal impacts of peat extraction, which enables a 4-season survey of the site to take place in order to establish a baseline for the assessment of the likely effects of the activity on the local environment; and

c. There had been some significant uncertainty about the regulatory status of industrial peat extraction prior to the Challenge to Legislation."

110. The relevance, if any, of the distinction between those developers who currently hold licences from the EPA and those who do not has already been discussed at paragraph 87 *et seq*. above. The point has been made that the licences currently held by Bord na Móna were granted at a time when national law did not empower the EPA to carry out an environment impact assessment in circumstances where the development was not subject to a parallel requirement to obtain planning permission. The legislative gap in this regard had been condemned by the CJEU in Case C-50/09, *Commission v. Ireland*. The point has also been made that the fact that a developer might hold a licence from the EPA does not *per se* obviate the necessity to hold planning permission. Again, it is reiterated that no finding is made that this is the case in respect of any of the licensed activities carried on by Bord na Móna.

111. At its height, the fact that a developer currently holds a licence is something which could certainly be weighed in the balance in determining whether or not peat extraction would have to be suspended pending the carrying out of a regularisation procedure. It does not obviate the necessity upon a Member State to put in place legislative measures which at least allow for the *possibility* of suspension.

112. The other factors relied upon in respect of Bord na Móna could not constitute exceptional circumstances such as to justify, without more, an entitlement on the part of the developer to apply to regularise the status of any development carried out in breach of the requirements of the EIA Directive and the Habitats Directive. That peat extraction has been carried out for a lengthy period of time over a uniquely extensive geographic area is a factor which militates *against* a finding of exceptional circumstances. The temporal and geographical scale give added urgency to ensuring that the activity is properly regulated.

113. Insofar as the alleged legal uncertainty is concerned, it is well established that a Member State is not entitled to rely on its own default as a reason for failing to comply with EU law. In any event, no attempt has been made to explain what the alleged legal uncertainty is. As discussed earlier, the planning legislation was amended under the Environment (Miscellaneous Provisions) Act 2011 to impose an obligation to obtain planning permission in the case of development in respect of which an environmental impact assessment or an appropriate assessment is required. The implications of this legislative amendment for peat extraction were expressly addressed by An Bord Pleanála in two section 5 declarations published in April 2013. A legal challenge to these

declarations was dismissed by the High Court in 2018, and leave to appeal to the Court of Appeal was refused precisely because the legal position was not uncertain. See paragraph 34 *et seq*. above.

114. Finally, the fact that the preparation of the necessary paperwork for an application for retention planning permission—and, in particular, the preparation of a four-season environmental impact assessment report—cannot justify allowing peat extraction to continue in the interim. At most, it indicates that the lead time for the determination of an application will be lengthy. It does not follow as a corollary that unauthorised peat extraction should be allowed to continue in the interim.

***(iii) Assessment must be retrospective and prospective***

115. The judgment in Case C-196/16, *Comune di Corridonia* indicates that the assessment must be both retrospective and prospective. It is not permissible to confine the assessment to the *future* effects of the project. This requirement is expressly provided for under the pre- January 2019 legislative regime. More specifically, express provision is made under Part XA of the PDA 2000 for the preparation of what is described as a "remedial" environmental impact assessment report, and a "remedial" Natura impact statement. These reports must identify the significant effects, if any, on the environment or the European Site, which have occurred or which are occurring or which can reasonably be expected to occur because the development the subject of the application for substitute consent was carried out. The reports must also identify any appropriate remedial measures undertaken or proposed to be undertaken by the applicant for substitute consent to remedy any significant adverse effects on the environment or the European Site. (See sections 177F and 177G of the PDA 2000).

116. There is also express provision for the imposition of conditions relating to *remediation* of all or part of the site on which the development the subject of the grant of substitute consent is situated. (See section 177K(3) of the PDA 2000).

117. Where An Bord Pleanála refuses to grant substitute consent, it may issue a direction to the developer (a) to cease activity or operations or (b) to take remedial measures. The remedial measures may include measures to restore the site to a safe and environmentally sustainable condition; and to avoid the deterioration of natural habitats and the habitats of species or the disturbance of the species in a European Site. (See section 177L of the PDA 2000).

118. There are no equivalent provisions to be found under the EPA Act 1992, even as amended by the Ministerial Regulations. Counsel on behalf of the State respondents submitted, however, that the amended legislation should be interpreted in a manner which is consistent or sympathetic with EU law, and that on this interpretation similar provisions can, in effect, be "read in" to the EPA Act 1992.

119. With respect, the obligation to transpose a directive is to do so in clear and precise terms. This point has previously been made in the specific context of the EIA Directive by the CJEU in Case C-50/09, *Commission v. Ireland*.

> "46. Whilst it is true that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, in particular, Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, paragraph 54 and the case-law cited), the fact remains that, according to equally settled case-law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, in particular, *Commission v Ireland*, paragraph 55 and the case-law cited)."

120. The legislative amendments introduced by the Ministerial Regulations fail to transpose properly the EIA Directive and the Habitats Directive. This is because the new licensing regime for peat extraction has simply been bolted-on to the existing IPC licensing regime, with no amendments made to reflect the requirements prescribed under EU law for the grant of *retrospective* development consent.

**Remedy for breach of EIA Directive and Habitats Directive**

121. For the reasons set out above, I have concluded that the regularisation procedure introduced for peat extraction under the Ministerial Regulations is inconsistent with the requirements of the EIA Directive and the Habitats Directive. More specifically, the proposed licensing regime exceeds the limits of the discretion afforded to a Member State to provide a regularisation procedure for development which has been carried out in breach of the requirements of the two Directives.

122. The next issue to be considered, therefore, is the nature of the remedy to be granted. One of the unusual features of this case is that the legislative provisions in place *prior to* the making of the Ministerial Regulations in January 2019 appear to have been largely compliant with the requirements of EU law. The substitute consent regime appears to have all of the hallmarks of a proper regularisation procedure. These have been outlined in detail at paragraph 50 above.

123. (For the avoidance of doubt, this judgment has nothing to say in respect of the very specific complaint made in a number of judicial review proceedings that the special treatment of *quarrying activities* is inconsistent with EU law. Any determination as to whether such special treatment is legitimate is a matter to be addressed in those other proceedings).

124. Certainly insofar as the regulation of peat extraction is concerned, the Ministerial Regulations entailed a retrograde step. Were this court to make an order *disapplying* the

Ministerial Regulations, then this would appear to have the effect of restoring the previously compliant legislative regime.

125. The case law discussed earlier indicates that a national court has an obligation to disapply national legislation which is in conflict with EU law. As explained presently, however, it is possible that a similar result might be achieved by reliance on the national law principle of *ultra vires.* I return to this issue at paragraphs 206 *et seq*. below.

**(2). article 15 / use of secondary legislation**

126. Up until this point in the judgment, consideration of the Applicant's case has been confined to the allegation that the Ministerial Regulations are inconsistent with EU Law. This, however, is only one strand of the Applicant's case. The Applicant advances a related argument to the effect that the making of the Ministerial Regulations is *ultra vires* insofar as it involves the use of secondary legislation to amend primary legislation. It will be recalled that the first of the two Ministerial Regulations, namely the EU (Environmental Impact Assessment) (Peat Extraction) Regulations 2019, purports to make a number of amendments to the EPA Act 1992 and a single amendment to the PDA 2000.

127. The Applicant contends that the Ministerial Regulations are *ultra vires* on the grounds that they trespass upon the exclusive legislative function of the Oireachtas. For ease of reference, I propose to describe this argument as "*the Article 15.2 argument*". It should be noted, however, that this shorthand is not entirely accurate. This is because, strictly speaking, a trespass upon the legislative function would result in the Ministerial Regulations being set aside as *ultra vires* the European Communities Act 1972, rather than struck down as unconstitutional by reference to Article 15.2.

128. The State respondents' answer to this argument is to say that the amendments to the primary legislation are "necessitated" by EU law, or, in the alternative, that the effective enforcement of EU law is "incidental, supplementary or consequential" to the obligations arising from the EIA Directive and Habitats Directive. (See page 25 of the written legal submissions of 2 September 2019). The phrase "incidental, supplementary or consequential" echoes the language of section 3 of the European Communities Act 1972.

129. The State respondents submit, in effect, that the Irish State enjoys very limited discretion as to the manner in which it must implement the EIA Directive and the Habitats Directive. Such choices as remain to be made do not involve the making of policy, and, accordingly, do not require to be done by way of primary legislation enacted by the Oireachtas.

**Judicial self-restraint**

130. Before embarking upon any consideration of the detail of this second head of challenge, it is necessary first to address the following procedural point raised on behalf of the State respondents. Counsel submitted that this court should have regard to the principle of judicial self-restraint, and, accordingly, should only determine what she characterised as the constitutional issues in the event that it is necessary to do so. Put otherwise, counsel suggested that the court should approach the issues in the following sequence: first, the

EU law issues should be considered, and, it is only if the court's decision in relation to same is not dispositive of the proceedings, that the court should then move on to consider the constitutional issues.

131. The term "judicial self-restraint" is a shorthand for the principle that a court should only determine a challenge to the constitutional validity of legislation if necessary to do so. The principle has been stated with enviable clarity by the Supreme Court in *State (P. Woods) v. Attorney General* [1969] I.R. 385 (at 399/400).

> "The necessity for the Courts to exercise self-restraint in the exercise of their constitutional jurisdiction to review legislation is due in part to the inherent limitations of the judicial process. When a court is presented with the question of the constitutionality of a legislative enactment, it can do only one of two things; it can find it to be constitutional, or it can strike it down as unconstitutional. If it finds it to be constitutional, it merely gives to an already valid law a judicial imprimatur. If it declares it to be unconstitutional, it holds it to be a nullity; it leaves a void where what purported to be a statutory provision was; but it cannot fill that void. It unmakes what was put forth as a law by the legislature but, unlike the legislature, it cannot enact a law in its place. It is clear that if this power, which may seem abrogative and quasi-legislative, were used indiscriminately it would tend to upset the structure of government: *Rescue Army v. Municipal Court*. […]"

132. Part of this passage has been cited with approval by the Supreme Court in its very recent judgment in *Mohan v. Ireland and the Attorney General* [2019] IESC 18; [2019] 2 I.L.R.M. 1. The judgment in *Mohan* was concerned with the *locus standi* requirement, and not with the principle of judicial self-restraint in general. Nevertheless, the judgment is of assistance in that it identifies the justification for prudential limitations on claims challenging the validity of legislation by reference to the Constitution.

> "11. The decision in *Cahill v. Sutton* [1980] I.R. 269 contains an important discussion on the justification for a rule of *locus standi* (and, indeed, for the other prudential limitations on claims challenging the validity of legislation by reference to the Constitution). Standing is not, as a general rule, established by a simple desire to challenge legislation, no matter how strongly the putative claimant believes the provision to be repugnant to the Constitution. It is now clear that there is no *actio popularis* (a right on the part of a citizen to challenge the validity of legislation without showing any effect upon him or her, or any greater interest than that of being a citizen) in Irish constitutional law, although, of course, some jurisdictions do permit such claims. Rather, in Irish law, it is necessary to show some adverse effect on the plaintiff either actual or anticipated. Part of the rationale for this rule is

discussed in *Cahill v. Sutton*. Public general legislation exists because a majority of the members of the Oireachtas considered, at some stage, that the legislation was in the public interest. The particular provision challenged may indeed still operate entirely beneficially and helpfully for the great majority of cases. If such a provision is invalidated, it is, in principle, of no effect in law and the area is left unregulated, with the result that citizens may be deprived of the benefit of the provision. The invalidity of legislation is therefore a very significant disruption of the legal order which operates in a blunt and, essentially, negative way. It simply removes a law or an aspect of the law, can put nothing in its place, and yet can throw into question transactions taken on foot of the provision. As Henchy J. in the High Court put it more than a decade earlier in *State (Woods) v. Attorney General* [1969] I.R. 385, at p. 399:-

> 'It unmakes what was put forth as a law by the legislature but, unlike the legislature, it cannot enact a law in its place. It is clear that if this power, which may seem abrogative and quasi-legislative, were used indiscriminately it would tend to upset the structure of government.'."

133. Having carefully considered whether the principle of judicial self-restraint might be applied to the present case, I have concluded that it does not apply for the following reasons. First, there is no *alternative* argument advanced by the Applicant which would allow the proceedings to be determined on a narrow ground without having to determine the validity of the Ministerial Regulations. Rather, the entire thrust of the proceedings is to set aside the Ministerial Regulations. The case can be distinguished from many other planning and environmental cases where the thrust of the proceedings is directed to a decision to grant development consent, and any challenge to the underlying legislation is made in the alternative only. In such cases, a court will endeavour to determine the proceedings on narrow administrative law grounds before embarking upon a consideration of the challenge to the underlying legislation.

134. Secondly, the approach advocated for on behalf of the State respondents would not, in any event, avoid the necessity of making a ruling on the validity of the Ministerial Regulations. It will be recalled that the submission is that the EU law issues should be determined first. Of course, if these issues are determined in favour of the Applicant, then this will bring about precisely the type of outcome that the principle of judicial self-restraint is intended to avoid, i.e. the setting aside of legislation. The making of the Ministerial Regulations would have been found to be *ultra vires* the European Communities Act 1972. Secondary legislation which is inconsistent with EU legislation cannot be said to be "incidental, supplementary and consequential" to the EU legislation or "necessitated" by the Irish State's membership of the European Union. Were the court to move on to a consideration of the Article 15.2 argument, this would not actually make

matters any worse. The mischief which the principle of judicial self-restraint is intended to address is that of setting aside legislation unnecessarily. It makes little practical difference whether the Ministerial Regulations are to be set aside solely by reference to EU law or by reference to both EU law and the Article 15.2 argument. The "disruption of the legal order" inherent in setting aside legislation—which the principle of judicial self-restraint is intended to avoid unless necessary to adjudicate on the proceedings—will have arisen in either event.

135. Thirdly, and perhaps most importantly, the EU law grounds and the Article 15.2 argument are so enmeshed that same cannot be separated out. The critical issue which this court has to determine is to identify the limits of a Member State's discretion to provide a procedure whereby the status of projects carried out in breach of the requirements of the EIA Directive and the Habitats Directive can be regularised. The determination of this issue will be largely dispositive of the proceedings. If, as the Applicant contends, the discretion is narrow, then the Ministerial Regulations are liable to be set aside on the basis that they exceed the limits of the Member State's discretion. Conversely, if, as the State respondents contend, the discretion is a very broad one, then the Ministerial Regulations are liable to be set aside on the basis of the Article 15.2 argument. The two arguments are, in a sense, the mirror image of each other. It would be artificial to address one argument but not the other.

136. Fourthly, it seems preferable that the High Court should seek to address both the EU law issues and the Article 15.2 argument now, lest there be an appeal to the Court of Appeal. If the High Court were to decide the present case solely by reference to the EU law issues, only for its decision to be set aside subsequently on appeal, then it might be necessary to remit the matter to the High Court for a rehearing and determination on the Article 15.2 argument. This would further delay the resolution of the dispute between the parties. Given the urgency of the case, it seems preferable to avoid this contingency by addressing both issues now. This would allow the parties to bring all relevant issues before the Court of Appeal.

**Overview of the "principles and policies" test**

137. In order to put the competing arguments of the parties in context, it may be helpful to take a step back, and to outline briefly the manner in which European Directives are transposed into the domestic legal order.

138. European Directives, such as the EIA Directive and the Habitats Directive, are not normally directly applicable in the domestic legal order of a Member State, but instead require to be transposed by way of national legislation. (This is subject to a possible exception in the case of those provisions of a Directive which have "direct effect", but that concept is not immediately relevant to this aspect of the present case). The CJEU has consistently held that the provisions of a Directive must be implemented into the domestic legal order with "unquestionable binding force", and with the specificity, precision and clarity required in order to satisfy the need for legal certainty. (See, for example, Case C-50/09, *Commission v. Ireland*).

139. The introduction of national implementing legislation is, therefore, *necessary* to transpose Directives into the domestic legal order. EU law is largely indifferent to whether such national legislation is primary or secondary legislation, provided that it is legally binding. The distinction between primary and secondary legislation is, however, a matter of great significance under Irish constitutional law. This significance arises as a consequence of the fact that legislative power is exclusively vested in the Oireachtas. Article 15.2.1° of the Constitution of Ireland reads as follows.

> "1° The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

140. It is well established in the case law that this does not preclude the delegation by the Oireachtas of a power to make *secondary* legislation. This is subject to the proviso that the parent legislation must contain a sufficient statement of "principles and policies" to guide the delegate in making the secondary legislation.

141. This approach has been applied, in modified form, to secondary legislation which is made for the purposes of implementing EU legislation. In effect, the EU legislation is treated as the parent legislation. It is constitutionally permissible to employ *secondary* legislation to implement EU legislation provided that the secondary legislation does no more than fill in the details of "principles and policies" contained in the European Community or European Union legislation. If, however, the European legislation leaves over significant policy choices to the Member States, then primary legislation may be required as a matter of constitutional law.

142. The precise mechanism by which transposition of EU legislation is achieved is via the European Communities Act 1972 (as amended). This Act authorises the use of secondary legislation to give effect to EU legislation, including European Directives. Section 2 provides that acts adopted by the institutions of the European Union (and by the institutions of what was formerly the European Communities) shall be part of the domestic law of the State under the conditions laid down in the treaties governing the European Union.

143. Section 3 of the European Communities Act 1972 insofar as relevant provides as follows.

> "3.(1) A Minister of State may make regulations for enabling section 2 of this Act to have full effect.
>
> (2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act)."

144. As appears, regulations under the section can, in principle, be used to repeal or amend other legislation, including primary legislation.

145. The Supreme Court in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 held that these powers are constitutional by reference to what was then Article 29.4.5° of the Constitution of Ireland. See page 351/52 of the reported judgment as follows.

> "The power to make regulations contained in section 3, sub-s. 1 of the Act of 1972 is exclusively confined to the making of regulations for one purpose, and one purpose only, that of enabling s. 2 of the Act to have full effect. Section 2 of the Act which provides for the application of the Community law and acts as binding on the State and as part of the domestic law subject to conditions laid down in the Treaty which, of course, include its primacy, is the major or fundamental obligation necessitated by membership of the Community. The power of regulation-making, therefore, contained in s. 3 is prima facie a power which is part of the necessary machinery which became a duty of the State upon its joining the Community and therefore necessitated by that membership.
>
> The Court is satisfied that, having regard to the number of Community laws, acts done and measures adopted which either have to be facilitated in their direct application to the law of the State or have to be implemented by appropriate action into the law of the State, the obligation of membership would necessitate facilitating of these activities, in some instances, at least, and possibly in a great majority of instances, by the making of ministerial regulation rather than legislation of the Oireachtas.
>
> The Court is accordingly satisfied that the power to make regulations in the form in which it is contained in s. 3, sub-s. 2 of the Act of 1972 is necessitated by the obligations of membership by the State of the Communities and now of the Union and is therefore by virtue of Article 29, s. 4, sub-ss. 3, 4 and 5 immune from constitutional challenge."

146. In its subsequent judgment in *Maher v. Minister for Agriculture* [2001] IESC 32, [2001] 2 I.R. 139, the Supreme Court reiterated that there are limits to the entitlement to make regulations under the European Communities Act 1972. In particular, if regulations went further than simply *implementing* details of principles or policies to be found in a European Directive or Regulation, and instead *determined* such principles or policies, then such regulations would be *ultra vires*.

147. Fennelly J. summarised the findings in *Meagher* as follows. (See page 254 of the reported judgment in *Maher*).

> "*Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 is clear authority for the proposition that, where a provision of Community law imposes obligations on the State, leaving no room (or perhaps no significant room) for choice, then Article 15.2.1 of the Constitution is not infringed by the use of ministerial regulation to implement it. Both the judgment of the court and that of Denham J. expressly preserve the force of that provision, as it has been interpreted, for cases where such an obligation does not exist. The 'principles and policies' test applies *mutatis mutandis* where the delegated legislation represents an exercise of a power or discretion arising from Community law secondary legislation. It applies with particular clarity to the case of directives where Article 249(EC) leaves the choice of forms and methods to the member states."

148. Keane C.J. stated that it was "almost beyond argument" that the choice of a statutory instrument—rather than primary legislation—as a vehicle for implementing the detailed rules required under EU legislation was not in any sense "necessitated" by the obligations of membership of what was then the European Community (now the European Union). (See pages 181/82 of the reported judgment in *Maher*).

149. The Chief Justice went on to state that the "essential inquiry" must be as to whether the making of the impugned regulations was in breach of Article 15.2. This involved an application of the test in *City View Press Ltd. v. An Comhairle Oiliúna* [1980] I.R. 381, treating the relevant EU legislation as the "parent legislation". (See page 183 of the reported judgment in *Maher*).

> "However, in applying that test to a case in which the regulation is made in purported exercise of the powers of the first respondent under s. 3 of the Act of 1972, it must be borne in mind that while the parent statute is the Act of 1972, the relevant principles and policies cannot be derived from that Act, having regard to the very general terms in which it is couched. In each case, it is necessary to look to the directive or regulation and, it may be, the treaties in order to reach a conclusion as to whether the statutory instrument does no more than fill in the details of principles and policies contained in the European Community or European Union legislation."

150. As illustrated by the case law, whereas the "principles and policies" test can be shortly stated, its application in practice is not always straightforward. Even in the leading case of *Maher* itself, Keane C.J. expressed himself as having experienced "some difficulty" in arriving at a conclusion as to how the issue was to be resolved in the circumstances of the case, but was ultimately persuaded by a detailed analysis of the relevant European Regulation in question that the choices as to policy available to the Member States had, in truth, been reduced almost to "vanishing point".

151. More recently, the "principles and policies" test has been described as "not without its difficulties" and as "somewhat elusive" in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75; [2017] 3 I.R. 751. O'Donnell J., delivering the judgment of the Supreme Court, emphasised that the entire concept of subordinate regulation depends upon and contemplates a delegate making decisions between a range of options.

> "39. However, it is in my view an error to approach the issue on the basis that the parent legislation must be scoured to provide detailed guidance for the subordinate rule maker. As observed in *Bederev v Ireland*, *Attorney General* [2016] IESC 34, every delegate must make some choice. If the parent legislation dictated the outcome, then there would be no benefit gained by the delegation of the task to the subordinate: the parent legislation could, and therefore should, include the provision in the first place. Thus the entire concept of subordinate regulation depends upon and contemplates decisions being made between a range of options. Any decision involves consideration of what the decision-maker considers is the best solution in the circumstances. The question is the scope of the decision making left to the subordinate rule maker.
>
> 40. The test can be approached negatively. Is the area of rule making delegated, so broad as to constitute a trespass by the delegate or subordinate on an area reserved to the Oireachtas by Article 15.2.1? This involves a consideration of a number of factors including the function of the parent legislation and the area in which the subordinate has freedom of action. An apparently wide delegation may be limited by principles and policies clearly discernible in the legislation. On the other hand, a very narrow area of delegation may require very little in terms of principles and policies in parent legislation, on the basis that by delegating an area with only a limited number of possible solutions the Oireachtas was plainly satisfied that any one of those outcomes could be chosen consistent with the policy of the Act, and properly be decided on by a subordinate body which might have access to further detailed information, or indeed on the basis that the outcome might be more easily adjusted within the scope left to the subordinate, in the light of changing circumstances. To take a simple example, if a body is given authority to fix all the terms of a licence, that is a power which may on its face appear unlimited, and it may be necessary to consider if there are sufficient policies and principles in the parent legislation to narrow the scope of subordinate decision making, and guide the decision-maker. If however the delegation is merely to fix a licence fee within a minimum and maximum already identified, it may follow that the Oireachtas has already contemplated a range of possible outcomes and considered them compatible with the statutory objective, and was content to leave the decision as to what precise point within that scale

was the most appropriate in the light of changing circumstances, to a subordinate body. It would not be necessary to look in addition for detailed principles and policies to guide that task."

152. O'Donnell J. also drew attention to the fact that section 3 of the European Communities Act 1972 sets its own test. Regulations under the section may contain "such incidental, supplementary and consequential provisions" as appear to the Minister making the regulations to be necessary. O'Donnell J. indicated that it can be useful to approach the question in this way.

153. The judgment went on then to analyse the EU Regulations at issue. The Supreme Court held that the choices remaining to the Member States were "severely limited" in terms of the overall regulatory scheme. A choice does not imply a capacity to determine policy. The matters dealt with under the secondary legislation were "incidental, supplemental and consequential" to the provisions of the EU Regulations, and raised no issue of broad policy that required a determination by the Oireachtas.

**Application of the "principles and policies" test**

154. The case law discussed above prescribes the legal test for determining, in any particular instance, whether the use of secondary legislation to transpose EU legislation is permissible, or whether it trespasses upon the exclusive legislative function of the Oireachtas. The application of this test entails identifying the *extent* of the policy choices, if any, left over to the Member States under the relevant EU legislation. If there are significant policy decisions to be made by the Member States, then it will not be permissible, as a matter of constitutional law, to rely on secondary legislation. Conversely, if the discretion to be exercised is so constrained by principles and policies set out in the EU legislation as to leave no real choice to a Member State, then the use of secondary legislation will be legitimate. As Keane C.J. put it pithily in *Maher*, the discretion may have been reduced almost to "vanishing point".

155. In the circumstances of the present case, the State respondents find themselves caught in a pincer movement. In order to defend the charge that the Ministerial Regulations are inconsistent with the EIA Directive and the Habitats Directive, the State respondents have had to argue that the two Directives confer a very broad discretion upon the Member States. On the State respondents' analysis, this discretion extends to allowing a Member State to *disapply* the requirement to comply with the two Directives for a lengthy period, to be measured in years rather than months. This choice is, seemingly, afforded to the Member States notwithstanding that they were required to have implemented the two Directives in full decades ago.

156. Yet in order to defend the separate charge that the Ministerial Regulations trespass upon the exclusive legislative function of the Oireachtas, the State respondents have had to downplay the discretion afforded under the two Directives. In particular, it has been argued that there are no significant policy choices left over to the Member States.

157. These two positions are irreconcilable. For the reasons set out in detail earlier in this judgment, I have concluded that the discretion afforded to the Member States to provide for a regularisation procedure is limited, and that the Ministerial Regulations exceed that discretion. It follows that the Ministerial Regulations are inconsistent with the EIA Directive and the Habitats Directive. If this conclusion is correct, then the making of the Ministerial Regulations is *ultra vires* the European Communities Act 1972. Secondary legislation which is inconsistent with EU legislation cannot be said to give effect to the "principles and policies" contained in the EU legislation. Nor can it be said to be "incidental, supplementary and consequential" to the EU legislation or "necessitated" by the Irish State's membership of the European Union. Rather, it is contrary to EU law.

158. Lest I be incorrect in these conclusions, I propose to address the alternative argument, namely that the Ministerial Regulations trespass upon the exclusive legislative function of the Oireachtas. It bears repeating that the Article 15.2 argument will only ever be relevant if the content of the Ministerial Regulations is *consistent* with EU law. Put otherwise, the working assumption for any analysis of the Article 15.2 argument must be that EU law affords a Member State, such as Ireland, a significant discretion as to the precise form of regularisation procedure which it may introduce for the purposes of the EIA Directive and the Habitats Directive.

159. During the course of argument before me, much energy was expended in arguing that the Ministerial Regulations contain measures which were *within* the range of choices open to the Member States under the two EU Directives. Whereas this is directly relevant to the question of whether the Ministerial Regulations are consistent with EU law, it is not the correct legal test for the purposes of the Article 15.2 argument. It is a *sine qua non* to the exercise of the power to make regulations under the European Communities Act 1972 that the regulations are consistent with EU law. A set of regulations which are consistent with EU law may nevertheless be invalid as a matter of national constitutional law precisely because they take the form of *secondary* rather than primary legislation. Put otherwise, EU law is concerned with the content of the measure. Provided that the content is consistent with EU law, it is largely a matter of indifference to the EU legal order as to whether same has been introduced by way of primary or by way of secondary legislation. For the purposes of Article 15.2 of the Constitution of Ireland, however, that distinction is crucial.

160. The Ministerial Regulations entail a number of policy choices which are not only significant in objective terms, but which actually cut across primary legislation which has been enacted by the Oireachtas for the precise purpose of giving effect to the two EU Directives. This may be illustrated by reference to the following two examples.

161. The first and most obvious policy choice under the Ministerial Regulations is that peat extraction is now to benefit from a uniquely generous regularisation procedure. A developer who has been carrying out unauthorised peat extraction is to be entitled to apply for development consent retrospectively, without any requirement to demonstrate "exceptional circumstances" as defined. This puts such development in a privileged

position when compared to all other categories of EIA projects. All other EIA projects (save quarries) are subject to the full rigours of Part XA of the PDA 2000. Quarrying activities may access the substitute consent procedure via a different gateway, i.e. section 261A, but are still subject to the possibility of a direction to cease operations or activities under section 177J. The modified treatment of quarrying activity is supposedly justified by reference to the fact that such development had been subject to an earlier regulatory intervention under section 261 of the PDA 2000. Even then, a quarry operator is required to demonstrate that the works had the benefit of some form of authorisation, either an old planning permission or a pre-1964 user.

162. The preferential treatment afforded to peat extraction under the Ministerial Regulations is not a policy choice which can be said to be "necessitated" by EU law. EU law does not mandate that any particular category of project is to have access to a regularisation procedure on more favourable terms than all other projects. This choice to prefer peat extraction is one which can only be justified by reliance upon an argument that Member States enjoy a very broad discretion under the EIA Directive and the Habitats Directive. The exercise of such a broad discretion entails policy-making, and is something which is reserved to the Oireachtas. This is especially so given that the Oireachtas has expressly addressed the position of peat extraction, and has enacted legislation which indicates that it is to be subject to a *more rigorous* enforcement regime than all other development (bar quarrying activity). As explained at paragraph 37 above, the seven-year time-limit on enforcement proceedings has been modified in the case of peat extraction. An application may be made at any time for an order directing the *cessation* of unauthorised peat extraction. (See Environment (Miscellaneous Provisions) Act 2011).

163. The special treatment afforded to peat extraction also cuts across the legal test introduced by the Oireachtas under the Planning and Development (Amendment) Act 2010 which identifies the type of exceptional circumstances which would justify the regularisation of projects which have been carried out in breach of the EIA Directive and/or the Habitats Directive. The criteria governing an application for leave to apply for substitute consent are defined under section 177D(2) of the PDA 2000 as follows.

> "(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:
>
> (a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
>
> (b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
>
> (c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

(e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

(f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

(g) such other matters as the Board considers relevant."

164. As appears, the issues identified by the Oireachtas as relevant include the *bona fides* of a developer, i.e. whether a developer had or could reasonably have had a belief that the development was not unauthorised; and whether either the ability to carry out an assessment or to provide for public participation in such an assessment has been substantially impaired as a result of the carrying out of the development.

165. The blanket treatment of unauthorised peat extraction provided for under the Ministerial Regulations is inconsistent with the nuanced approach endorsed by the Oireachtas.

166. The Ministerial Regulations, if allowed stand, would produce an outcome contrary to that intended by the Oireachtas. Peat extraction would move from being one of the most strictly regulated categories of development to the least regulated. It would represent a serious breach of the separation of powers, and a disregard of Article 15.2, were this to happen.

167. A second example of a broad policy decision purportedly made under the Ministerial Regulations is in respect of the balance to be struck between environmental protection and the interests of developers. The Ministerial Regulations purport to recalibrate the regularisation procedure in favour of developers. There is, for example, no possibility of enforcement action against unauthorised peat extraction pending the making of and determination of licence applications. This approach is in marked contrast to the sophisticated regime which the Oireachtas had put in place under Part XA of the PDA 2000. This regime expressly allows An Bord Pleanála to direct the developer to cease activity or operations. The removal of this possibility in the case of peat extraction represents a significant *change* in policy which could only lawfully be made by the Oireachtas.

**Summary**

168. As the case law discussed earlier indicates, in some instances it can be difficult to identify the line between merely implementing policy, and actually making policy. As O'Donnell J. emphasised in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75;

[2017] 3 I.R. 751, every delegate of a power to make secondary legislation must make some choice, and a choice does not imply a capacity to determine policy.

169. In the case of the Ministerial Regulations, however, the application of the legal test is straightforward. The choices made are significant and trespass upon matters which have already been the subject of law-making by the Oireachtas. The position can be contrasted with that posited by Denham J. in *Meagher*. The secondary legislation at issue in that case was upheld on the basis that to require primary legislation would be "artificial" and would result in a "sterile debate" before the Oireachtas. This was because there was no "policy or principle which can be altered by the Oireachtas". See *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 at 367 as follows.

> "In the Directives herein the policies and principles have been determined. Thus there is no role of determining policies or principles for the Oireachtas. While the Directive must be implemented there is no policy or principle which can be altered by the Oireachtas, it is already binding as to the result to be achieved.
>
> That being the case the role of the Oireachtas in such a situation would be sterile. To require the Oireachtas to legislate would be artificial. It would be able solely to have a debate as to what has already been decided, which debate would act as a source of information. Such a sterile debate would take up Dail and Senate time and act only as a window on community directives for the members of the Oireachtas and the nation. That is not a role envisaged for the Oireachtas in the Constitution.
>
> Consequently, solely because the Minister is making a regulation which repeals a statute, does not of itself invalidate the regulation which as a vehicle, as a choice, can be intra vires the Constitution under Art. 29.4. To say that the regulations breach Art. 15.2.1 simply because it repeals or amends a statute is to hold the false premise that the Minister is determining principles or policy."

170. By contrast—and on the working assumption that the EU Directives confer the very wide discretion contended for by the State respondents—there are genuine policy choices to be made. Not only could these be meaningfully debated by the Oireachtas, these very issues have already been the subject of primary legislation.

171. Finally, for the avoidance of any doubt, this judgment is not intended to suggest that secondary legislation can never be employed to transpose EU environmental legislation. This can only be determined by considering the extent of the discretion left over to the Member States in each instance. A practical example of the type of EU legislative provisions which might properly be transposed by way of secondary legislation is to be found in Directive 2014/52/EU. This Directive made a number of amendments to the

previous version of the EIA Directive. In some instances, the amendments were highly specific and left little choice to the Member States. For example, a new definition of "environmental impact assessment" has been introduced under Directive 2014/52/EU. Given that a Member State is required to implement such provisions faithfully (see, by analogy, Case C-50/09, *Commission v. Ireland*), it would seem legitimate to do so by way of secondary legislation.

172. An example of the proper use of secondary legislation to implement aspects of the Habitats Directive is provided by *O'Connor v. Director of Public Prosecutions* [2015] IEHC 558; [2015] 2 I.R. 71. The High Court (O'Malley J.) concluded that the choice left over to the Member State had been narrowed down.

> "[89] In those circumstances, it seems to me that the introduction of criminal sanctions, almost 20 years after the Habitats Directive came into being, can fairly be said to have been necessary for the proper implementation of that directive. The fact that it does not, in terms, call for the creation of criminal offences is not, in my view, decisive, since directives by their nature leave the choice of implementation methods to the member states. No authority has been referred to which might suggest that criminal sanctions cannot be created unless the 'parent' directive calls for them. Other measures to bring a stop to the deterioration of raised bogs have been tried. If they have not succeeded, as appears to be the case, then the choices of the State as to how the Habitats Directive is to be implemented may narrow down to the point where the criminal law has to be invoked. In my view that situation has been reached in relation to this issue. It is not open to the State to stand by and permit further damage to be done – that would be a breach of its legal obligations under the Habitats Directive."

173. By way of contrast, the policy choices purportedly made under the Ministerial Regulations in the present case are broad, and, unlike those at issue in *O'Connor*, operate to *preclude* the taking of enforcement action for the transitional period.

### (3). Strategic environmental assessment directive

174. I turn now to consider the Applicant's argument that the making of the Ministerial Regulations should have been subject to an assessment for the purposes of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("*the Strategic Environmental Assessment Directive*" or "*the SEA Directive*"). This argument can be disposed of shortly in circumstances where, for the reasons explained below, I am satisfied that the Ministerial Regulations do not set the framework for future development consent. The Ministerial Regulations do not, therefore, trigger the requirement for an assessment.

175. The SEA Directive applies to certain types of plans and programmes. In brief, to trigger the requirement for an assessment under the SEA Directive, a measure—to use a neutral

term—must, first, meet the definition of "plans and programmes" prescribed under article 2, and, secondly, must fulfil one or more of the criteria prescribed under article 3. As discussed presently, the parties are in disagreement as to whether the Ministerial Regulations fulfil either of these qualifying criteria.

176. The term "plans and programmes" is defined as follows by article 2(a) of the SEA 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;"

177. The circumstances in which a strategic assessment is required are then set out at article 3. The dispute between the parties to the present case centres principally on the interpretation of article 3(2) as follows.

> "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."

***Submissions of the parties***

178. Leading counsel on behalf of the Applicant, James Devlin, SC, submits that the Ministerial Regulations fulfil the conditions under articles 2 and 3 of the SEA Directive. Counsel draws attention to the fact that the condition under article 3(2) that the plan or programme must be "required" by legislative, regulatory or administrative provisions has been given an expansive interpretation. It was held in Case C-567/10, *Inter-Environment Bruxelles* that any plan or programme whose adoption is *regulated* by national legislative

or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as "required" for the purposes of the SEA Directive. On this interpretation, it is said that it is not necessary that the making of the plan or programme be *compulsory*.

179. The condition under article 3 of the SEA Directive is said to have been met in that the Ministerial Regulations set the framework for future development consents of a category of project under the EIA Directive, i.e. peat extraction. Counsel placed emphasis on the fact that—as a result of the Ministerial Regulations—a consent application for peat extraction will not now be determined by reference to the development plan. This is because, unlike the position under the PDA 2000, the EPA in determining a licence application is not under an express statutory obligation to have regard to the development plan for the area. This, it is suggested, represents a change in the criteria and detailed rules for the grant of development consent.

180. In response, leading counsel on behalf of the State respondents, Niamh Hyland, SC, helpfully summarised the grounds for saying that an assessment is not required under two broad headings as follows. First, it was submitted that the making of the Ministerial Regulations is not "required" under national law. Rather, Ministers have a discretion as to whether or not to invoke the power under section 3 of the European Communities Act 1972 to make regulations. Counsel submits that it is not sufficient that the making of regulations are "regulated" by the 1972 Act. Reference was made to the European Commission Guidance on the Strategic Environmental Assessment Directive (2003), in particular at §3.4 to §3.31.

181. Reliance was also placed in this regard on the judgment of the UK Supreme Court in *R. (On the application of HS2 Action Alliance Ltd) v. The Secretary of State for Transport* [2014] UKSC 3. That judgment had been sharply critical of the judgment of the CJEU in Case C-567/10, *Inter-Environment Bruxelles* which had given an expansive interpretation to the concept of "required".

182. Counsel opened in particular the following passages from the judgment of Neuberger SCJ.

> "[183] However that may be, the [CJEU] concluded that 'required' means 'regulated', so as to catch even cases where no plan was required to be prepared. The only reasons it gave were (at para 29) that to read 'required' as meaning 'required' would 'have the consequence of restricting considerably the scope of the scrutiny' or (at para 30) 'compromise, in part, the practical effect of the directive, having regard to its objective, which consists in providing a high level of protection of the environment' and 'thus run counter to the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment …'
>
> [184] If, instead of 'required', one must read the word 'regulated', the question arises what it means. Is it sufficient that legislative,

> regulatory or administrative provisions grant powers to some authority wide enough to permit a plan or programme to be prepared? Or must such provisions actually refer to a possibility that such a plan or programme will be prepared? Or must they specify points and/or conditions that such a plan or programme, if prepared, must address and/or fulfil? The Chamber referred (at para 31) to provisions which 'determine the competent authorities for adopting them [i.e. the relevant plan or programme] and the procedure for preparing them'.
>
> [185] If this is what is meant by 'regulated', then not all plans and programmes can on any view be covered by the SEA Directive, and the desire for comprehensive regulation of plans and programmes 'likely to have significant effects on the environment' cannot be met. In any event, it follows from the fact that the SEA Directive only applies to plans and programmes 'which set the framework for future development consent of projects', that it is not exhaustive and does not cover every form of plan and programme simply because it could be said to be likely to have significant environmental effects: see Lord Carnwath and Lord Reed's judgments. The SEA Directive and its terms must be read as a whole.
>
> [186] Any condition attached to the scope or application of a legislative measure is capable of affecting its impact. As we have already noted, legislators cannot always agree everything that the most ardent supporters of its general objectives would like them to have achieved. On the court's own approach, the SEA Directive cannot and does not cover all plans and programmes. They must be 'regulated' by legislative, regulatory or administrative provisions."

183. Counsel submitted that the term "required" meant that something more was necessary than simply that a particular measure was taken pursuant to a legislative provision. Rather, the legislative provision must actually refer to a possibility that such a plan or programme will be prepared.

184. Secondly, it was submitted that the Ministerial Regulations do not set the framework for future development consent of EIA projects. The legislative amendments introduced by the Ministerial Regulations merely established a broad procedural scheme within which development consents could be granted. The legislative amendments do not guide the choices which the EPA must make in respect of licence applications. They do not represent a strategic framework, and there is nothing concrete which could be the subject of an environmental assessment.

185. Finally, counsel confirmed that the State respondents were not making the case that *legislation* could never be subject to strategic assessment.

***Findings of the court***

186. As is apparent from the summary of the submissions of the parties above, there are two principal areas of dispute in respect of the SEA Directive. The first concerns the meaning of the condition, under article 2, that a plan or programme must be "required" by legislative, regulatory or administrative provisions. The second concerns the concept, under article 3, of setting the framework for future development consent for EIA projects. I propose to address these in reverse order.

187. The CJEU has considered what is meant by the concept of setting the framework for future development consent in a number of judgements. The principles are summarised as follows in the recent judgment in Case C-305/18, *Verdi Ambiente* (8 May 2019).

> "50. As to whether national legislation, such as that at issue in the main proceedings, sets the framework for future development consent of projects, it must be noted that, according to settled case-law, the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment (judgments of 27 October 2016, *D'Oultremont and Others*, C-290/15, EU:C:2016:816, paragraph 49; of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraph 53; and of 7 June 2018, *Thybaut and Others*, C-160/17, EU:C:2018:401, paragraph 54).
>
> 51. In that regard, the words 'a significant body of criteria and detailed rules' must be understood qualitatively. It is necessary to avoid strategies which may be designed to circumvent the obligations laid down in the SEA Directive by splitting measures, thereby reducing the practical effect of that directive (judgments of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraph 55, and of 7 June 2018, *Thybaut and Others*, C-160/17, EU:C:2018:401, paragraph 55).
>
> 52. Such an interpretation of the notion of 'plans and programmes', which not only includes their preparation but also their modification, is intended to ensure that provisions which are likely to have significant environmental effects are subject to an environmental assessment (see, to that effect, judgment of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraphs 54 and 58)."

188. As appears, the legal test is whether the measure establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation [of development consents] for

projects likely to have significant effects on the environment. The rules are to be considered qualitatively (rather than quantitively).

189. A sense of the type of rules and procedures which trigger the requirement for a strategic assessment can be obtained by examining the detail of the national measures at issue in the four leading cases of the CJEU as follows.

(i). C-290/15, *D'Oultremont*

This case concerned a regulatory order which contained various provisions which had to be complied with when administrative consent was being granted for the installation and operation of wind turbines. The regulatory order addressed matters such as the location of wind turbines in relation to housing; technical standards; operating conditions (particularly shadow flicker); the prevention of accidents and fires; noise level standards; and restoration and financial collateral for wind turbines.

(ii). Case C-671/16, *Inter-Environnement Bruxelles*

This case concerned regional zoned town planning regulations. The contested measure contained detailed rules capable of having significant effects on the urban environment. These included *inter alia* provisions concerning the number, location, height and surface area of buildings; construction-free spaces; rainwater collection, including the construction of stormwater collection tanks and storage tanks; and the design of buildings in line with their potential use.

(iii). Case C-160/17, *Thybaut*

This case concerned the adoption of a town planning measure described as a "consolidation area". The national court which had made the reference to the CJEU explained that a "consolidation area" differed from an "urban development plan". It appears that the principal legal consequences of designating an area as a "consolidation area" were as follows: first, a different competent authority is empowered to issue planning permission; secondly, planning permission for land within the area may *depart* from other plans and programmes (including the sectoral plan, the municipal development plan, local planning rules or an alignment plan); and, thirdly, immovable property within a "consolidation area" may be expropriated in the public interest.

Notwithstanding that the designation of a "consolidation area" did not in itself lay down any *positive* requirements, it did, however, allow for derogation from existing plans and programmes which had themselves been subject to assessment for the purposes of the SEA Directive. The CJEU suggested that given that a "consolidation area" amends the framework laid down by those plans and programmes, the designation of a "consolidation area" comes within the scope of article 2(a) and article 3(2)(a) of the SEA Directive.

(iv). Case C-305/18, *Verdi Ambiente*

The national legislation at issue in this case comprised primary legislation and secondary legislation which revised upwards the capacity of existing waste incineration facilities, and which provided for the construction of new installations. The national legislation allowed for the determination of the number, capacity and regional location of incineration installations to be constructed.

The CJEU rejected an argument that the national legislation did not constitute a framework of reference. The fact that national legislation expressed some abstract ideas, and pursued an objective of transforming the existing framework was held to be illustrative of its planning and programming aspect and did not prevent it from being included in the definition of "plans and programmes".

190. As appears from the summary of the case law above, national rules or legislation which have been held to constitute a plan or programme typically contain criteria which are more specific than those to be found under the Ministerial Regulations. The purported effect of the Ministerial Regulations is to transfer the regulation of peat extraction from the PDA 2000 to the EPA Act 1992. (This transfer will only be fully achieved following a lengthy transitional period). This will have the result that the statutory criteria against which an application for development consent is to be determined will be different. The most striking difference is in relation to the role of the development plan. A decision on an application for planning permission under the PDA 2000 must have regard to the development plan. By contrast, there is no express statutory requirement upon the EPA to have regard to the development plan.

191. Notwithstanding this difference, I am not satisfied that the legislative amendments brought about by the Ministerial Regulations can be said to set the "framework" for future development consent in respect of peat extraction. The legislation is not specific in relation either to the geographical area or the nature of the development itself. Rather, the alleged amendments are confined to the procedural requirements for an application for development consent. Whereas the EPA must, of course, have regard to the statutory considerations, this does not establish the legislation as a plan or programme.

192. The matter can be tested by asking what issues could usefully be taken into account were a strategic assessment to be carried out in respect of the Ministerial Regulations. The Ministerial Regulations consist of a small number of pages setting out legislative amendments. They consist of what might be described as "black letter" law. The legislative amendments are concerned largely with the *procedures* governing the licensing regime. There is nothing remotely similar to the type of guidance on environmental issues which features in the case law of the CJEU summarised at paragraph 189 above. There is no obvious environmental issue raised which could be assessed in accordance with the type of strategic assessment envisaged under the SEA Directive, by reference to the criteria set out in Annex I thereto which governs the type of information to be included in the "environmental report". As counsel for the State respondents correctly submitted, there is "nothing concrete" which could be the subject of a meaningful strategic assessment.

193. In light of my finding that the Ministerial Regulations do not meet the conditions prescribed under article 3 of the SEA Directive, it is not, strictly speaking, necessary to consider the separate question of whether the condition under article 2 has been met. This is because my finding in relation to article 3 is sufficient to dispose of this aspect of the proceedings. For the sake of completeness, however, I should observe that the interpretation of the term "required" under article 2 advanced on behalf of the State respondents is difficult to reconcile with the case law of the CJEU. Whereas the State respondents' interpretation appears to coincide with the literal meaning of article 2, the CJEU has adopted a purposive approach to the interpretation of same.

194. This interpretation was first advanced in Case C-567/10, *Inter-Environnement Bruxelles*. Advocate General Kokott had concluded in her Opinion in that case that the word "required" in article 2(a) of the SEA Directive must be construed as meaning that the definition does not include plans and programmes which are provided for by legislative provisions but the drawing up of which is not compulsory.

195. The CJEU in its judgment reached precisely the opposite conclusion. The CJEU held that any plan or programme whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as "required" for the purposes of the SEA Directive.

196. This approach has been confirmed more recently by the CJEU in Case C-671/16, *Inter-Environnement Bruxelles ASBL*.

> "36. Article 2(a) of the SEA Directive defines the 'plans and programmes' covered by that provision as being plans and programmes that satisfy two cumulative conditions, namely (i) they have been prepared and/or adopted by an authority at national, regional or local level or have been prepared by an authority for adoption, through a legislative procedure, by Parliament or Government, and (ii) they are required by legislative, regulatory or administrative provisions.
>
> 37. The Court has interpreted that provision to mean that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of the SEA Directive and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down (judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraph 31).
>
> 38. Excluding from the scope of the SEA Directive those plans and programmes whose adoption is not compulsory would compromise the

practical effect of that directive, having regard to its objective, which consists in providing for a high level of protection of the environment (see, to that effect, judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraphs 28 and 30)."

197. This was so notwithstanding that Advocate General Kokott had suggested, in her Opinion in that case, that the issue should be revisited.

> "41. However, I would note that the case-law of the Court may have in fact extended the scope of the SEA Directive further, as was intended by the legislature and the Member States were able to foresee. In my view, however, this does not follow from the definition of the two terms 'plans and programmes', but from the interpretation of the characteristic set out in Article 2(a), second indent, in accordance with which those plans and programmes must be required by legislative, regulatory or administrative provisions.
>
> 42. As has already been said, the fact that a measure is regulated by national legislative or regulatory provisions which determine the competent authorities for adopting them and the procedure for preparing them should be sufficient. Therefore, a rather rare requirement to adopt the measure in question is not necessary; rather, it suffices if it is made available as a tool. This extends the obligation to carry out an environmental assessment significantly. As I have already stated, this interpretation that is based on the legitimate objective of applying an environmental assessment covering all relevant measures, is contrary to the recognisable intention of the legislature. The Supreme Court of the United Kingdom has therefore strongly criticised this, without, however, making a request for a preliminary ruling to that effect to the Court."
>
> *Emphasis added.

**(4). Alleged interference with judicial independence**

198. The transitional provisions under the Ministerial Regulations purport to allow peat extraction to be carried out—not only pending the determination by the EPA of a licence application—but also pending any *subsequent* judicial review proceedings which seek to challenge a decision on the part of the EPA to refuse a licence.

199. The practical effect of this is that a developer who has been carrying on unauthorised development will be entitled to continue to do so for a period which could, on a conservative estimate, last for several years. I will use the shorthand "***the period of grace***" to refer to this period. The Applicant has already criticised this period of grace as

part of its general complaint that the transitional provisions are inconsistent with the requirements of EU environmental law.

200. The Applicant makes a *separate* complaint that the prolongation of the period of grace during the pendency of an application for judicial review represents an unwarranted interference with judicial independence. It is submitted that the determination of whether the existence of judicial review proceedings should operate as a "stay" on the implementation of an administrative decision, such as a decision to grant or refuse a licence, is a matter exclusively for the courts. It is suggested that the effect of the Ministerial Regulations is that a "stay" on a decision to refuse a licence arises automatically, and that this is an affront to judicial independence.

201. For the reasons set out below, I am satisfied that this attempt to call in aid the principle of judicial independence does not advance the Applicant's case, and, in truth, only serves to muddy the waters.

202. There could be no principled objection, on the grounds of judicial independence, to legislation which provided that a decision of an administrative body would not have binding legal effect until such time as legal proceedings challenging that decision had been heard and determined. Such a provision would ensure that any legal proceedings were not rendered nugatory by dint of the impugned decision having been acted upon pending the determination of those proceedings. This could scarcely be characterised as an attack on judicial independence.

203. In practice, however, legislation is often silent as to what is to happen to administrative decisions made under that legislation pending the determination of legal proceedings. To take a relevant example: the special statutory judicial review procedure governing challenges to planning decisions under the PDA 2000 does not expressly address the question of a stay on the implementation of a planning permission pending the determination of judicial review proceedings. In the absence of any express statutory provision, the High Court has discretion under Order 84 of the Rules of the Superior Courts and as part of its inherent jurisdiction to make such interlocutory orders as it considers appropriate. These could, in principle, include an order restraining the implementation of a planning permission pending the determination of judicial review proceedings. Indeed, the case law of the CJEU indicates that a national court must have jurisdiction to grant interlocutory relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law (Case C-416/00, *Krizan*).

204. The Ministerial Regulations purport to address the legal status, pending the determination of judicial review proceedings, of a decision of the EPA to refuse a licence. The period of grace during which peat extraction can be carried out is extended. It is not entirely accurate for the Applicant to seek to characterise the effect of the Ministerial Regulations as analogous to a stay in judicial review proceedings. It would be very unusual to seek a stay on the *refusal* of a development consent in judicial review proceedings for the

obvious reason that a negative decision does not authorise steps which might otherwise be carried out during the pendency of judicial review proceedings.

205. Whereas there are good grounds for criticising the extension of the period of grace pending the determination of judicial review proceedings, the strength of this criticism stems from the breach of the EU environmental legislation rather than from any interference with judicial independence. The crucial flaw in the amended legislative scheme is that the Ministerial Regulations make no provision for the possibility of the suspension of peat extraction during the period of grace. The fact that the period of grace is to continue pending the determination of judicial review proceedings means that the disapplication of the EU environmental legislation is further prolonged. For the reasons outlined under the previous headings, I have already concluded that this represents a breach of the requirements of EU law, or, in the alternative, represents the making of a significant policy decision which brings the Ministerial Regulations *outside* the scope of the European Communities Act 1972.

**Part 3**

**Form of Order and Conclusion**

**Form of order**

206. For the reasons set out herein, I have concluded that the Ministerial Regulations are invalid. This conclusion is premised on two principal findings as follows. First, the Ministerial Regulations are inconsistent with the requirements of the EIA Directive and the Habitats Directive. Secondly, even if—contrary to the first finding—the Ministerial Regulations could be said to be consistent with the EIA Directive and the Habitats Directive, the use of *secondary* legislation to introduce the legislative amendments required to give effect to the new licensing regime is *ultra vires*. This is because if the EIA Directive and Habitats Directive do, indeed, afford the very broad discretion to Member States contended for on the part of the State Respondents, then the policy choices should have been made by the Oireachtas through the enactment of primary legislation.

207. The case law of the CJEU discussed earlier indicates that a national court has an obligation to disapply national legislation which is in conflict with EU law. Were this court to make an order *disapplying* the Ministerial Regulations, then this would appear to have the effect of restoring the previously compliant legislative regime under the PDA 2000. This is because the Ministerial Regulations entailed a *retrograde* step insofar as the regulation of peat extraction is concerned.

208. As discussed below, however, it is possible that a similar result might be achieved by reliance on the national law principle of *ultra vires.* The conflict between the Ministerial Regulations and the EIA Directive and the Habitats Directive arises principally as a result of their exempting peat extraction from control under the planning legislation with immediate effect, notwithstanding that there will be a lengthy interregnum before the new licensing regime comes into full force and effect. The Ministerial Regulations purport to exempt peat extraction involving an area of more than 30 hectares from the

requirement to obtain planning permission. This is achieved under the second of the two regulations, namely the Planning and Development Act 2000 (Exempted Development) Regulations 2019.

209. These regulations were made pursuant to section 4(4A) of the PDA 2000 which provides as follows.

> "(4A) Notwithstanding subsection (4), the Minister may make regulations prescribing development or any class of development that is—
>
> (a) authorised, or required to be authorised by or under any statute (other than this Act) whether by means of a licence, consent, approval or otherwise, and
>
> (b) as respects which an environmental impact assessment or an appropriate assessment is required,
>
> to be exempted development."

210. As appears, the section empowers the Minister for Housing, Planning and Local Government to exempt development from the planning legislation where the development is "authorised, or required to be authorised by or under any statute" (other than the PDA 2000). Section 4(4A) thus allows for an exemption where there is an *alternative authorisation* procedure in place which will ensure compliance with the EIA Directive and the Habitats Directive. Whereas peat extraction involving an area of more than 30 hectares will, in the fullness of time, be subject to licensing and assessment under the Environmental Protection Agency Act 1992, this will not occur for a period of at least eighteen months in the case of unlicensed activities, and thirty-six months in the case of licensed activities.

211. If this court were to give section 4(4A) an interpretation consistent with or sympathetic to the objectives of the EIA Directive and the Habitats Directive, then the section could be read as meaning that the power to exempt development may not be invoked *until* the alternative authorisation procedure is operative. On this interpretation, the Planning and Development Act 2000 (Exempted Development) Regulations 2019 would have to be set aside on the basis that they were *ultra vires* section 4(4A).

212. Counsel on behalf of the State respondents has pointed out that the Applicant has not pleaded that the Planning and Development Act 2000 (Exempted Development) Regulations 2019 are *ultra vires* section 4(4A) of the PDA 2000. However, counsel did accept—on the authority of the judgment of the Supreme Court in *Callaghan v. An Bord Pleanála (No. 1)* [2017] IESC 60—that it might be open to this court to consider the correct interpretation of the section notwithstanding that no express plea has been raised in this regard.

213. The judgment in *Callaghan* addressed the question of whether it is open to a court to take into account, even on its own motion, provisions of EU law where those provisions might have an impact on the proper interpretation of national measures under consideration.

> "4.4 Where an Irish court is considering the proper interpretation of a statutory measure it may well take into account any constitutional principles which might impact on the proper construction of the legislation concerned. Indeed, it is fair to say that a court might very well be reluctant to disregard such constitutional questions of interpretation even if they were not specifically raised by the parties. A court, and in particular a court of final appeal, is, as a matter of national law, required to give a definitive interpretation of a legislative measure which comes into question in the course of proceedings properly before it. It could not be ruled out, therefore, that a court in such circumstances would be reluctant to give a construction to legislation without having regard to any constitutional issues which might impact on the proper construction of the measure concerned in accordance with *East Donegal* principles. This might well be so where there would be a real risk that the Court would give an incorrect interpretation of the legislation in question if it did not itself raise the constitutional construction issue. It must be recalled that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties.
>
> 4.5 By analogy it seems to me that it is at least arguable that an Irish court, in order to comply with the principle of conforming interpretation, would be required to have regard, even on its own motion, to provisions of Union law where those provisions might have an impact on the proper interpretation of national measures under consideration."

214. The judgment in *Callaghan* is, obviously, not on all fours with the present case. Nevertheless, the statement that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties, appears to me to have a particular resonance.

215. It is at least arguable that the appropriate order for this court to make would be to set aside the second of the Ministerial Regulations on the basis that same are *ultra vires* section 4(4A) of the PDA 2000.

216. The position in respect of the first of the two Ministerial Regulations seems to be more straightforward. These regulations appear to be *ultra vires* section 3 of the European Communities Act 1972.

217. I do not propose to make any final determination on these various issues now, but I will hear counsel in due course on the form of the order which should be made in this case. In particular, the parties will be invited to make submissions as to the precise jurisdictional basis on which the orders setting aside the Ministerial Regulations should be made.

218. I understand from submissions made at the hearing before me earlier in September that there is no suggestion that the Ministerial Regulations should be *severed* in the event of a finding of invalidity. More specifically, it does not seem that the State respondents intend to argue that the court should take a metaphorical blue pencil to the regulations and to strike out only those parts which are found to offend against EU law. Rather, it seems to be accepted that if the Ministerial Regulations are found to be invalid in any respect, then the entire should be set aside. This is, presumably, on the basis that had the respective Ministers known that certain aspects of the proposed regulations would be invalid, they would not necessarily have proceeded to make the regulations in an identical form (save with the offending provisions omitted). See, by analogy, the approach to severability discussed in cases such as *Bord na Móna v. Galway County Council* [1985] I.R. 205.

219. Finally, counsel for the State respondents confirmed at the hearing before me that it is no part of the defence to these proceedings to suggest that either of the exceptions discussed in Case C-411/17, *Inter-Environnement Wallonnie* applies to these proceedings. It will be recalled that this judgment indicates, at paragraphs [177] to [179], that a temporary suspension of the ousting effect of EU law may be allowed where there are overriding considerations relating to the protection of the environment or relating to the security of electricity supply. Even then, the effects of the measure are exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity to be remedied.

**conclusion**

220. The application for judicial review will be granted by reference to the limited grounds identified in the summary set out at the start of this judgment.

221. An order will be made setting aside the Ministerial Regulations in their entirety. I will, however, hear counsel as to the precise form of order and, in particular, as to the exact jurisdictional basis on which same should be made.

Appearances

James Devlin, SC, Oisin Collins and Margaret Heavey for the Applicant instructed by O'Connell Clarke Solicitors.

Niamh Hyland, SC and Suzanne Kingston for the Respondents instructed by the Chief State Solicitor.