THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

[2023] IEHC 620
[Record No. 2022/507JR]

BETWEEN

GR WIND FARMS 1 LIMITED, CNOC WINDFARMS LIMITED, TRA INVESTMENTS LIMITED, BALLYBANE WINDFARMS LIMITED, BEAM WIND LIMITED, MEENAWARD WIND FARM LIMITED, CORDAL WINDFARMS LIMITED, SIGATOKA LIMITED, GLANARUDDERY WINDFARMS LIMITED, GLENCARBRY WINDFARM LIMITED, GORTAHILE WINDFARM LIMITED, KILLALA COMMUNITY WINDFARM DESIGNATED ACTIVITY COMPANY, KILL HILLS WINDFARM LIMITED, KNOCKNACUMMER WIND FARM LIMITED, KNOCKNALOUR WIND FARM LIMITED, SEAHOUND WIND DEVELOPMENTS LIMITED, LISDOWNEY WIND FARM LIMITED, MONAINCHA WIND FARM LIMITED, RONAVER ENERGY LIMITED, TULLYNAMOYLE WIND FARM II LIMITED

PLAINTIFF

AND

THE COMMISSION FOR REGULATION OF UTILITIES

RESPONDENT

AND

EIRGRID PLC

NOTICE PARTY

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2022/501JR]

BETWEEN

ENERGIA GROUP HOLDINGS (ROI) DAC, ENERGIA CUSTOMER SOLUTIONS LIMITED, WIND GENERATION IRELAND LIMITED,

HOLYFORD WINDFARM LIMITED, CORNAVARROW WINDFARM LIMITED AND ESHMORE LIMITED

APPLICANTS

AND

THE COMMISSION FOR REGULATION OF UTILITIES

RESPONDENT

AND

EIRGRID PLC

NOTICE PARTY

JUDGMENT of Mr Justice Mark Sanfey delivered on the 10th day of November 2023.

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Introduction

1. This judgment relates to applications for judicial review by each of the groups of applicants in the titles of the proceedings set out above. I shall say more about the identity of the various participants in due course, but for reasons which will become apparent, I propose to refer to the applicants in the first title above collectively as '**Greencoat'**, and to the applicants in the second title collectively as '**Energia'**.

2. Each of the two groups of applicants was granted leave of the court to initiate their respective proceedings in July 2022**.** Notwithstanding that the Energia proceedings come first in terms of record number, I have listed the Greencoat matter first in the title, simply because Greencoat went first with its submissions in the hearing before me. While the two proceedings have separate pleadings and affidavits,

the two applicants essentially seek the same relief, and indeed, at the hearing before me, counsel for the applicants worked in tandem, dividing up their oral submissions between them.

3. The applicants in each case challenge the lawfulness of a decision made by the respondent ('**the CRU'**) acting through the Single Energy Market Committee ('**the SEMC**') on 22 March 2022 entitled "Decision Paper on Dispatch, Redispatch, and Compensation Pursuant to Regulation (EU) 2019/943" ('**the Decision'**). Each of the applicants seeks an order of *certiorari* quashing the Decision, and an order of mandamus requiring the CRU to "give full effect to Article 13(7) of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity ('**the Regulation'**)". The parties each seek a range of other declaratory reliefs which seek to establish the various deficiencies and errors of law in the Decision for which the applicants contend.

4. The respondent to each of the proceedings, the CRU, filed a statement of opposition in each case. While Greencoat and Energia were critical of the way in which the statement of opposition in the respective cases was pleaded, there is no doubt that the CRU firmly opposed the applications. Each party submitted numerous very lengthy affidavits in support of their respective cases. As the various deponents responded to the averments made in the affidavits from the other side, those deponents frequently acknowledged that it was more appropriate to confine comment on the opponents' position to the submissions of the parties, before proceeding to embark upon what could only be regarded as a lengthy submission in the body of the affidavit.

5. In fairness to the deponents, it was difficult for them to set out their respective positions coherently and accurately without explaining their actions and seeking to

justify them. However, this resulted in the court receiving a large number of very detailed affidavits, each accompanied by several volumes of exhibits and core documents.

6. The parties also submitted the views of expert economists, who proffered successive reports, each responding to the analysis offered by the other. There was some controversy between the parties as to the extent to which such evidence was admissible at all, it being suggested that the reports at times strayed into offering interpretations of the meaning of the Regulation, which all parties agree is solely a matter for the court.

7. Each of the parties also delivered lengthy but very helpful written submissions, accompanied by volumes of applicable legislation, *travaux preparatoires* and relevant case law. The oral submissions of the parties took eight days, much of it spent exploring the complexities and intricacies of the electricity market in the EU: how the parties maintain the regulatory structures set up by the EU are supposed to function, and what that means in practical terms as regards implementing those structures.

8. In order to understand how the Decision came to be implemented by the CRU/SEMC, the rationale for it, and the manner in which the applicants allege that it fails to give effect to the Regulation, it is essential to have a basic appreciation of the way the electricity market works, and in particular how that market is affected by the Regulation and the accompanying "Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity (recast) and amending Directive 2012/27/EU" ('**the Directive'**). In this judgment, I have attempted to give sufficient detail to enable the reader to understand

the issues involved, while trying to avoid an overly-detailed exposition of matters of limited relevance which could only obfuscate the nature of the dispute.

9. Where the electricity market is concerned, one of the difficulties facing the uninitiated is the proliferation of organisations, bodies and concepts to which reference is continually made in the documentation by means of acronyms. Mindful of this difficulty, both sides furnished me at the hearing with a glossary of acronyms and definitions of relevant concepts; the accuracy or lack of same of the definitions led to further divergence between the parties. I have therefore included as appendix A to this judgment a glossary of acronyms only which I hope will assist the reader.

10. As the focus of the applicants' attack on the Decision is its alleged failure to give effect to Article 13(7) of the Regulation, I have quoted that sub-Article in full at para. 65 below. It will however be necessary to consider Article 13 in its entirety; rather than quote its lengthy provisions in full in the judgment, I have attached the full article to this judgment as appendix B.

11. In this judgment, after introducing the parties, I shall say something about the legal framework relevant to the market for electricity in the EU generally, and the circumstances which led to the introduction of the Directive and the Regulation in 2019. It will then be necessary to consider the text of Article 13(7) of the Regulation; this in turn will require an explanation of the various technical terms and concepts which are referenced in the sub-Article. The judgment will then go on to consider the respective arguments of the parties as to the extent to which the Decision does or does not implement the Regulation in accordance with its terms.

The parties

12. The first named applicant, GR Windfarms 1 Limited ('**GRW**') is a company incorporated in the State. It is a holding company which holds, *inter alia*, the entire

issued share capital of the second to twentieth applicants ('**the GRW group entities'**). The applicants directly or indirectly own renewable energy assets in Ireland, France, Spain and Sweden including 25 renewable energy generation assets in Ireland with a combined capacity of just under 700MW.

13. In the Energia proceedings, the first named applicant, Energia Group Holdings (ROI) DAC is a holding company within the Energia Group with subsidiaries in Ireland and in Northern Ireland, including all of Energia's wind generation assets.

14. In his grounding affidavit of 14 June 2022, Peter Baillie, Managing Director of Energia Renewables, avers that the Decision affects all of the operational windfarms within the Energia Group, as well as all companies in the group with renewable projects in the development. However, rather than join all of the affected companies, the applicants have been chosen as a representative group of windfarms within the Energia Group affected by the Decision. Thus, the second named applicant, Energia Customer Solutions Limited, participates in the single electricity market ('**SEM'**) as intermediary for renewable generators and as such is a direct recipient of market revenues and renewable energy feed-in tariff ('**REFIT'**) payments in the Republic of Ireland. The third named applicant, Wind Generation Ireland Limited is a renewable generator in the Republic of Ireland and an indirect recipient of support scheme payments both through a "REFIT supported power purchase agreement with the supplier ECSL [the second applicant]" …. The fourth named applicant, Holyford Windfarm Limited is a *de minimis* generator – a term which I will explain in due course – and is also an indirect recipient of REFIT payments. The fifth named applicant, Cornavarrow Windfarm Limited is a generator in Northern Ireland that participates in the SEM. The sixth named applicant, Eshmore Limited is a *de minimis* generator in Northern Ireland which sells electricity directly to a licensed supplier in

Northern Ireland. Both the fifth and sixth named applicants are recipients of renewables obligation certificates which they sell to generate financial supports.

15. The CRU is the Commission for regulation of utilities and is the energy and water regulator in Ireland. It was established pursuant to s.8 of the Electricity Regulation Act 1999 ('**the ERA'**) as the Commission for Energy Regulation and was renamed pursuant to s.4 of the Energy Act 2016.

16. The SEM committee is provided for in s.8A of the ERA which provides that it is a committee of the respondent, and that any decision as to the exercise of a relevant function of the CRU which arises in relation to a SEM matter shall be taken by the SEMC on behalf of the respondent. It is common case between the parties that the Decision in the present matter is a decision of the SEMC and thus attributable to the CRU.

17. Eirgrid plc ('**Eirgrid'**) is the notice party in each of the proceedings. It is the transmission system operator ('**the TSO'**) in the State pursuant to a licence issued by the respondent in accordance with s.14(1)(e) of the ERA. It is also the single energy market operator ('**the SEMO'**) pursuant to a licence issued by the respondent, a role which it carries out jointly with the System Operator for Northern Ireland Limited ('**SONI'**) which is the TSO in Northern Ireland. It is also the nominated electricity market operator ('**the NEMO'**) in the State, having been designated as such on 8 July 2019 by the respondent.

The legal framework

18. In his grounding affidavit in the Energia proceedings, Mr Baillie addresses the development of energy policy in the EU. In particular, at para. 13 of his affidavit, he outlines a series of "energy packages" adopted by the EU from 1996 to 2021, the ultimate objective of which he asserts is "to build a competitive, flexible,

economically efficient and non-discriminatory EU electricity market with market-based supply prices". He lays particular emphasis on the "fourth energy package" adopted in 2019, which "comprised eight new or recast Directives, Regulations and Decisions designed to fundamentally transform Europe's energy system, moving away from fossil fuels towards cleaner energy and, more specifically, to deliver on the EU's Paris Agreement commitments for reducing greenhouse gas emissions" [para. 13.4]. The fourth energy package included the Directive and the Regulation.

19. Mr John Melvin, Director of Security of Supply and Wholesale of the CRU, swore the main affidavits in both proceedings on behalf of the respondent. In his first affidavit in the Energia proceedings of 17 November 2022, he dealt at length, in paras. 28 to 47, with the "Relevant Regulatory Architecture", and in particular the requirements of the Directive for national regulatory authorities to "play an expert and independent decision-making role in the application of the Regulation", citing recital 80 of the Directive particularly in this regard. He avers at para. 36 that the ERA "…which, together with associated legislation, has transposed [the Directive], confers upon the CRU (and, when taking decisions on its behalf, the SENC), broad, expert and independent decision-making authority in relation to matters such as those in issue in the present proceedings".

<u>The consultation process</u>

20. At para. 48 of his first affidavit in the Energia proceedings, Mr Melvin acknowledges that the Regulation came into force on 1 January 2020, and states that

> "…the SEMC conducted a detailed consultation process on various aspects of the implementation of the Regulation. This included the following:
>
> - On 27 April 2020, the SEMC published SEM-20-028 *'implementation of Regulation 2019/943 in relation to Dispatch and Redispatch'*;

- the SEMC received and considered responses to SEM-20-028;
- on 23 April 2021, the SEMC published SEM-21-026 *'Consultation on Dispatch, Redispatch and Compensation pursuant to Regulation EU 2019/943'*;
- on 23 April 2021, the SEMC also published SEM-21-027 *'Proposed Decision on treatment of New Renewable Units in the SEM'*;
- on 26 May 2021, the CRU received a letter from Wind Energy Ireland raising concerns in relation to SEM-21-026 and SEM-21-027;
- on 3 June 2021, the UR ('**Utilities Regulator'**), [a reference to the Northern Ireland regulator] received a letter from RenewableNI raising concerns in relation to SEM-21-026 and SEM-21-027;
- on 28 June 2021, the SEMC extended the deadline for responses to the Consultation on Dispatch, Redispatch and Compensation pursuant to Regulation EU 2019/943 (SEM-21-026) and Proposed Decision on treatment of new renewable units in the SEM (SEM-21-027);
- the SEMC received and considered responses to SEM-21-026 and SEM-21-027;
- on 25 June 2021, the CRU and UR sent a letter to Wind Energy Ireland and RenewableNI in response to concerns raised in relation to SEM-21-026 and SEM-21-027 by Wind Energy Ireland in letter dated 26 May 2021 and by RenewableNI in letter dated 3 June ('**SEM-22-056 response**') and
- on 22 March 2022, the SEMC published the Decision (SEM-22-009)."

The single electricity market

21. Before embarking upon a consideration of the Regulation and Article 13(7) in particular, it is necessary to consider briefly how the single electricity market (SEM) operates. The SEM is a wholesale electricity market for the island of Ireland, *i.e.*, it is operated on an all-island basis. As we have seen, the SEM operates on a statutory basis as set out in the ERA, and is intended to operate in a manner consistent not only with national legislation, but relevant EU legislation, and in particular the Directive and the Regulation.

22. It is necessary to say something about the notice party's role in the SEM, which, as we have seen, requires it to act as TSO, SEMO and NEMO, with SONI playing the equivalent roles in Northern Ireland.

23. As TSO, the notice party, Eirgrid, is responsible for operating the electricity transmission system in the State, including the dispatch and redispatch of electricity generation.

24. In its capacity as SEMO, Eirgrid is responsible for the administration and operation of the financial pricing and settlement aspects of the balancing market. Provision for these functions is found in the trading and settlement code ('**the TSC'**) which has been adopted by the SEM committee and is administered by the SEMO.

25. In its capacity as NEMO, Eirgrid is responsible for the administration of the day ahead market and the intra-day market, referred to collectively as the 'ex-ante markets'. This role is performed jointly with SONI through a contractual joint venture called SEMOpx. The rules of the market govern access to the ex-ante markets, and settlement in the course of these markets is carried out *via* Pan-European financial clearing arrangements known as a clearing house.

26. The CRU and the Northern Ireland Authority for Utility Regulation ('**NIAUR**') are the relevant regulatory authorities in respect of electricity in the State

and Northern Ireland respectively, and the SEM is jointly regulated by the CRU and NIAUR through the SEM committee which is a sub-committee of both the CRU and NIAUR.

Relevant concepts generally

27. Before embarking upon a consideration of the regulation generally or Article 13 in particular, it is necessary to become acquainted with some of the concepts fundamental to an understanding of the issues in these proceedings.

28. The following paragraphs attempt to set out what is meant by the technical terms which may be found throughout the Regulation and the Directive and the pleadings and submissions of the parties.

29. In attempting to convey the meaning of these terms, the court has to steer a course between the need to condense the lengthy and complex explanations given by all parties in the affidavits and submissions to a manageably concise and comprehensible level, and the dangers of selectivity and over-simplification. While it may be therefore that the treatment of some of these terms is somewhat cursory, the reader can rest assured that this is a function of the need for concision rather than ignorance or omission of the complexity or nuances of the terms involved.

Dispatch

30. Eirgrid, as TSO, has responsibility for operating the electricity transmission system in the State, with SONI having the equivalent role for Northern Ireland. As such, Eirgrid must ensure that the system of supply and demand is balanced, and that there is enough power in the grid to meet the demand. One of the ways this is done is by a process of dispatching energy generators and demand response facilities. In simple terms, Eirgrid can instruct generators to produce more power in order to meet

demand required, or can issue an instruction to “demand site facilities” or “demand response facilities” to reduce their demand.

31. Dispatch is the “scheduling and dispatch of units to meet the energy requirements of the market” (from the Decision). As counsel for Greencoat put it, “…at its simplest dispatch is really just an instruction, if you dispatch a generator, you issue an instruction to it to generate. If you dispatch a demand response facility you issue an instruction to it to reduce its demand” [day 1, p.22, lines 10 to 14].

32. Dispatching is operated through a “central dispatching model”. This is defined in Article 2(29) of the Regulation to mean “…a scheduling and dispatching model where the generation schedules and consumption schedules as well as dispatching of power-generating facilities and demand facilities, in relation to dispatchable facilities, are determined by a transmission system operator with an integrated scheduling process”. The respondent characterises this as “a system where no generator or demand facility should generate or reduce their demand, unless instructed by the TSO. In a central dispatch system, there is a presumption that you do nothing, unless told otherwise. This is distinguishable from a self-dispatch model, common in most EU jurisdictions, whereby you tell the TSO what you intend to do, and the presumption is you do it unless told otherwise” [glossary supplied by respondent].

33. The instruction issued to a power generating facility to generate or to a demand facility to reduce demand is known as a “dispatch instruction”. A “dispatchable unit” is a unit that can be instructed to run at any time by the TSO. Dispatchable units have stored energy, such as a battery or a pumped hydro, or alternatively have a fuel source. A non-dispatchable unit is a unit that can only generate when its energy source is available, such as a wind or solar generator.

34. The TSO must constantly assess the demand on the system and ensure that there is enough supply to meet that demand, and this is primarily done through dispatching. However, Article 12 of the Regulation also requires the dispatching of generators to be market-based. This means that, in principle, the TSO should dispatch the cheapest suppliers in preference to more expensive suppliers. However, priority has to be given to certain generators so their power is taken first. After this, market principles apply and the cheapest generators are then given priority.

Priority dispatch

35. "Priority dispatch" is defined in Article 2(20) of the Regulation to mean: "With regard to the self-dispatch model, the dispatch of power plants on the basis of criteria which are different from the economic order of bids and, with regard to the central dispatch model, the dispatch of power plants on the basis of criteria which are different from the economic order of bids and from network constraints, giving priority to the dispatch of particular generation technologies".

36. Article 12(6) of the Regulation makes specific provision for priority dispatch as follows:

> "6. Without prejudice to contracts concluded before 4 July 2019, power-generating facilities that use renewable energy sources or high-efficiency cogeneration and were commissioned before 4 July 2019 and, when commissioned were subject to priority dispatch under Article 15(5) of Directive 2012/27/EU or Article 16(2) of Directive 2009/28/EC of the European Parliament and of the Council shall continue to benefit from priority dispatch. Priority dispatch shall no longer apply to such power-generating facilities…".

37. Because of the benefit of priority dispatch, renewable energy generators do not have to trade their electricity on the ex-ante markets. Their electricity is taken as a matter of priority, and they are therefore not affected by the economic order of the bids. Priority dispatch generators do choose on occasion to trade on the ex-ante markets if they perceive it to be in their economic interest, but do not have to do so. However, one of the features of the Decision is that the SEMC intends to alter this approach. In his first affidavit in the Greencoat proceedings, Mr Melvin refers to Article 13(3) of the Regulation as requiring that non-market-redispatch may only be used where there is no market-based alternative available and all available market-based resources have been used, and states that "…[t]his creates a significant difference in the propositions for those with priority dispatch and those without. New units will always be turned down (redispatched) before units that have priority dispatch when applying constraints…[i]n order to implement this requirement, all new units need to be fully integrated into the market and into scheduling and dispatch systems…put simply, the TSOs will have to substantially redesign core systems to facilitate market participation of new units…" [paras. 57-58].

The three markets

38. While the number of renewable sources that supply the electricity market has increased greatly in recent years, it does not appear to be the case that 100% of the electricity supplied on the grid comes from renewable sources. The main renewable source generators are dependent to some degree on the vagaries of weather: if the wind does not blow, or the sun does not shine, wind or solar energy suppliers may not be able to provide their maximum capability.

39. In such cases, the shortfall between what renewable sources can generate and what is required to meet system demand is usually met by fossil fuel generators,

which are not dependent on the vagaries of the weather. Such generators bid into the market at a price at which they are willing to supply electricity, and the TSO then dispatches according to the economic order of the bids. The bids however must be considered in the context of the markets in which they are made.

The ex-ante markets

40. In general terms, the day ahead market ('**DAM**') is – as the respondent puts it in the glossary it offered to the court – "the primary market for trade of electricity across the EU. It runs every day at 11am for the following day which starts at 11pm/12am (CET). It is the main reference market for the settlement of renewable support schemes and financial contracts". The intra-day market ('**IDM**') "… opens at approximately the time that the results of the DAM are published, to allow traders to refine their position throughout the day. The Intraday market comprises the intraday auctions and continuous trading. The IDM remains open until one hour before real-time".

41. The IDM and the DAM are known as the "ex-ante markets" as they involve forecasting what an individual generator will have available by way of power to deliver into the market, or on the demand side, forecasting what the generator's demand will be. The ex-ante markets are operated by SEMOpx, *i.e.*, single electricity market operator power exchange. SEMOpx matches bids and offers in the market and operates as a counterparty to all of the trades that take place on the market.

Balancing market

42. The balancing market ('**BM'**) allows the TSO to adjust the position of market participants so that the transmission system is balanced, with supply matching demand. The BM runs up to the point of dispatch, and also determines the settlement

price in relation to the TSO's balancing actions. Rules of the BM are set out in the TSC.

Redispatch

43. Redispatching is defined in Article 2(26) of the Regulation to mean "…a measure, including curtailment, that is activated by one or more transmission system operators or distribution system operators by altering the generation, load pattern, or both, in order to change physical flows in the electricity system and relieve a physical congestion or otherwise ensure system security". The respondent refers to the description of redispatch in SEM-22-009 as follows:

> *"…Redispatching the SEM relates to deviations from the market schedule for generation for both local network and broader system reasons, including TSO-instructed changes in generation due to localised network issues (constraints) and reduction in non-synchronous generation due to other system-wide reasons such as levels of System Non-Synchronous Penetration (Curtailment)*".

44. Redispatch must be differentiated from the adjustments made in the markets which result in dispatch instructions directed towards equalising supply and demand. Redispatch occurs when there is a "physical limitation" in the system which requires instructions from the TSO to address its effect. "Downward redispatching" occurs where a generator which is scheduled to produce electricity is told to produce less. "Upwards dispatching" can occur where a generator which is not due to produce electricity is instructed to produce, or is instructed to produce more than it originally intended.

45. The physical limitations are classified as "constraints" and "curtailment". A constraint is a limitation on the amount of electricity that can be transmitted over the

system due to localised network reasons. The example given by counsel for Greencoat is helpful: if it is particularly windy in an area where there is a large number of windfarms, it may be that the local network is unable to accommodate the amount of power produced. In such circumstances, the generators in the area may be redispatched, *i.e.*, required by the TSO to reduce their output.

46. The other physical limitation is curtailment. This is a limitation on the amount of electricity that can be transmitted to the system due to a network-wide issue. Curtailment may occur due to the SNSP – system non-synchronous penetration – being exceeded. SNSP is a measure of non-synchronous generation on the transmission system at a point in time. Non-synchronous generation relates to generation which cannot by its nature be produced at a steady rate. The classic example of this is wind and solar energy: the amount of power generated from these sources may fluctuate by the minute. If the SNSP is exceeded with the result that more non-synchronous generation than the system can safely accommodate is present, redispatch may be necessary to curtail renewable energy generators across the system to bring the SNSP back within limits. The necessity for curtailment is therefore a system-based limitation, rather than one relating to local circumstances.

47. All redispatch in Ireland takes place on a central dispatch basis, and is also done on a non-market basis. The participants in the market do not therefore determine the price of redispatch through market bids. As we shall see, Article 13 permits non-market based redispatching to take place only in limited circumstances, and in particular where no market-based alternative is available and/or all available market-based resources have been used: see Article 13(3) in this regard. Article 13(6) lays down principles which apply where non-market based downward redispatching is

used, and Article 13(7) deals with the compensation to be paid where non-market based redispatching is necessary.

Grid connection and firm access

48. In order for a generator to export electricity into the grid, a generator must have a grid connection agreement ('**GCA**'). That involves an agreement with Eirgrid if the connection is to a transmission network; the vast majority of renewable energy generators are connected to the transmission network. There is also the possibility of an agreement with ESB Networks DAC in respect of a connection to the distribution network. Such an agreement is relatively rare, however, and we are concerned for present purposes only with a GCA with the TSO.

49. The GCA will indicate whether a generator has "firm access" or not. Where a generator has firm access, in general terms the generator's power can be accommodated by the system and transported across the grid to end consumers under all reasonable network conditions. Firm access depends on the strength of the local grid, the plans to reinforce the grid, the extent to which it requires reinforcement and the location of demand. The availability of compensation for redispatch under Article 13(7) depends on whether a generator who is redispatched has firm access or not.

50. An important part of the applicants' cases is that the concept of firm access constitutes what is referred to as a "locational signal". The availability of firm access to the grid indicates to developers of windfarms where they should be developing the windfarms. If a windfarm were developed in an area which did not have firm access, compensation under Article 13(7) would not be available so that the financial risk of downward redispatch would be borne by the developer.

51. A generator will have a "firm access quantity" which is recognition of firm access up to a particular ceiling or threshold. Compensation for redispatch is capped at the level of firm access quantity.

Financial support schemes

52. There have been various schemes put in place over the years by the state to support and encourage the development of renewable generation. The first of these were the REFIT schemes: renewable energy feed in-tariff ('**REFIT1, REFIT2 and REFIT3**'). These schemes started in 2006 and provide financial support in relation to renewable energy projects for a period of fifteen years. The schemes operate by setting a minimum floor price for the electricity generated by renewable generators. If a market price is below the floor price in the applicable REFIT scheme, the generator gets paid REFIT support payments to bring them up to the floor price.

53. There are also RESS schemes (Renewable Energy Support Schemes), RESS1 and RESS2. The RESS schemes do not have a floor price, but use the concept of "contracts for difference".

54. In respect of the REFIT and RESS Schemes, in each case the generators who avail of support under these schemes must enter into a power purchase agreement ('**PPA**') with an electricity supplier licenced by the respondent. Under such an agreement, the generator sells all of the electricity it produces to a third party which will invariably be a licensed electricity supplier who will then sell the electricity into the SEM. Where a PPA has been concluded between the generator and the licensed supplier, that supplier is generally appointed as the generator's intermediary, with any monies paid through the SEM to the intermediary and not the generator itself.

55. As we shall see, the applicants each contend that the financial supports which would be received by way of compensation pursuant to Article 13(7) are "baked in" to

the formula for compensation in that article; the Decision carves out financial support schemes as an element of compensation, a position which the applicants characterise as *ultra vires* and unlawful.

Relevant terms of the Regulation

56. The Regulation forms part of a package of legislation adopted in June 2019 and known as the "Clean Energy for all Europeans" package. The package includes the Directive and the Regulation; the electricity elements of the clean energy package were transposed into Irish law by the ERA 1999, and by way of statutory instruments.

57. The Regulation contains extensive recitals which set out context and the rationale for its enactment. In particular, recital no. 4 states as follows:

> "This Regulation establishes rules to ensure the functioning of the internal market for electricity and includes requirements related to the development of renewable forms of energy and environmental policy, in particular specific rules for certain types of renewable power–generating facilities, concerning balancing responsibility, dispatch and redispatching, as well as a threshold for CO2 emissions of new generation capacity where such capacity is subject to temporary measures to ensure the necessary level of resource adequacy, namely, capacity mechanisms."

58. As set out in Article 1, the Regulation aims to:

> "(a) set the basis for an efficient achievement of the objectives of the Energy Union and in particular the climate and energy framework for 2030 by enabling market signals to be delivered for increased efficiency, higher share of renewable energy sources, security of supply, flexibility, sustainability, decarbonisation and innovation;

(b) set fundamental principles for well-functioning, integrated electricity markets, which allow all resource providers and electricity customers non-discriminatory market access, empower consumers, ensure competitiveness on the global market as well as demand response, energy storage and energy efficiency, and facilitate aggregation of distributed demand and supply, and enable market and sectoral integration and market-based remuneration of electricity generated from renewable sources;

(c) set fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market for electricity, taking into account the particular characteristics of national and regional markets, including the establishment of a compensation mechanism for cross-border flows of electricity, the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems;

(d) facilitate the emergence of a well-functioning and transparent wholesale market, contributing to a high level of security of electricity supply, and provide for mechanisms to harmonise the rules for cross-border exchanges in electricity."

59. Article 3 of the Regulation sets out seventeen principles which must be observed by "Member States, regulatory authorities, transmission system operators, distribution system operators, market operators and delegated operators [in the operation of the electricity market]". While I do not propose to set out those principles here, a cursory inspection of them makes it clear that the Regulation intends that much of the operation of the electricity market is to be conducted according to "market rules" which, *inter alia*, : "shall encourage free price formation and shall avoid actions

which prevent price formation on the basis of demand and supply…"; "shall facilitate the development of more flexible generation, sustainable low carbon generation, and more flexible demand; "shall enable the decarbonisation of the electricity system and thus the economy, including by enabling the integration of electricity from renewable energy sources and by providing incentives for energy efficiency"; and "shall deliver appropriate investment incentives for generation, in particular for long-term investments in a decarbonised and sustainable electricity system, energy storage, energy efficiency and demand response to meet market needs, and shall facilitate fair competition thus ensuring security of supply". Article 3 further provides that, in particular, "market rules shall enable the efficient dispatch storage and demand response.

60. Article 12 of the Regulation sets out principles in relation to the dispatch of generation and demand response, providing in Article 12(1) that "The dispatching of power-generating facilities and demand response shall be non-discriminatory, transparent and, unless otherwise provided under paras. 2 to 6, market based". As we have seen, Article 12(6) quoted above provides for priority dispatch.

61. The full text of Article 13 is set out at Appendix B to this judgment. The Article sets out the principles governing "redispatching", and provides at Article 13(1) that the dispatching of generation and demand response "shall be based on objective, transparent and non-discriminatory criteria. It shall be open to all generation technologies, all energy storage and all demand response, including those located in other Member States unless technically not feasible".

62. Article 13(2) provides that "The resources that are re-dispatched shall be selected from among generating facilities, energy storage or demand response using market-based mechanisms and shall be financially compensated…". Article 13(3)

provides that non-market-based redispatching "may only be used" in certain limited circumstances specified in that sub-article. In its written submissions, Greencoat emphasises that "…Market-based redispatching is the default which is only to be deviated from where these specific requirements of Article 13(3) are met" [para. 26]. Article 13(4) sets out certain reporting requirements to the regulatory authorities which the TSO and DSO must observe in relation to, *inter alia*, the level of development and effectiveness of market-based redispatching mechanisms for power generating, energy storage and demand response facilities and other information relevant to the ongoing operation of redispatching, including measures taken to reduce the need for downward redispatching of renewable energy sources. The regulatory authorities are obliged in turn to submit the report of the TSO and DSO to the Agency for the Cooperation of Energy Regulators (**ACER**), and to publish a summary of the data, "together with recommendations for improvement where necessary".

63. Article 13(5) sets out certain obligations on TSOs and DSOs:

> "5. Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria established by the regulatory authorities, transmission system operators and distribution system operators shall:
>
> > (a) guarantee the capability of transmission networks and distribution networks to transmit electricity produced from renewable energy sources or high-efficiency cogeneration with minimum possible redispatching, which shall not prevent network planning from taking into account limited redispatching where the transmission system operator or distribution system operator is able to demonstrate in a transparent way that doing so is more economically efficient and does

not exceed 5% of the annual generated electricity in installations which use renewable energy sources and which are directly connected to their respective grid, unless otherwise provided by a Member State in which electricity from power-generating facilities using renewable energy sources or high-efficiency cogeneration represents more than 50% of the annual gross final consumption of electricity;

(b) take appropriate grid-related and market-related operational measures in order to minimise the downward redispatching of electricity produced from renewable energy sources or from high-efficiency cogeneration;

(c) ensure that their networks are sufficiently flexible so that they are able to manage them."

64. Article 13(6) sets out a number of principles which apply where non-market based downward re-dispatch is used. The first of these principles is that "power-generating facilities using renewable energy sources shall only be subject to downward redispatching if no other alternative exists or if other solutions would result in significantly disproportionate costs or severe risks to network security".

65. Article 13(7) warrants full reproduction here and is as follows: -

"7. Where non-market based redispatching is used, it shall be subject to financial compensation by the system operator requesting the redispatching to the operator of the redispatched generation, energy storage or demand response facility except in the case of producers that have accepted a connection agreement under which there is no guarantee of firm delivery of energy. Such financial compensation shall be at least equal to the higher of the

following elements or a combination of both if applying only the higher would lead to an unjustifiably low or an unjustifiably high compensation:

> (a) additional operating cost caused by the redispatching, such as additional fuel costs in the case of upward redispatching, or backup heat provision in the case of downward redispatching of power-generating facilities using high-efficiency cogeneration;
>
> (b) net revenues from the sale of electricity on the day-ahead market that the power-generating, energy storage or demand response facility would have generated without the redispatching request; where financial support is granted to power-generating, energy storage or demand response facilities based on the electricity volume generated or consumed, financial support that would have been received without the redispatching request shall be deemed to be part of the net revenues."

66. Article 64 of the Regulation deals with derogations from its terms. Article 64(1) sets out the articles in respect of which Member States may apply for derogations; Article 13 is not among them. Article 64(2) states that Cyprus will be entitled to a derogation from a number of articles, including Article 13, under certain circumstances. Other than in this limited circumstance, there is no possibility under the terms of the Regulation for a derogation from its terms for any Member State. Article 71 of the Regulation provides that the terms of the Regulation "shall apply from 1 January 2020".

The Decision

67. The Decision – SEM-22-009 – issued on 22 March 2022. It consists of forty-three pages, and commences with a helpful "executive summary", the first part of which merits reproduction:

> "This paper outlines the feedback received to SEM-21-026 and the SEM Committee's response and decisions in the below areas along with providing an update on SEM-21-027 in relation to the treatment of new renewable units in the SEM.
>
> The SEM Committee has given careful consideration to the feedback received, and engaged extensively with the TSOs in the preparation of this decision. As part of the engagement with the TSOs, it became clear that full implementation of the proposals in SEM-21-027 would take several years and impact on a number of key TSO systems. In light of this, the SEM committee has had to consider the implications of Article 12 and 13 in the context of an initial solution, during which TSO dispatch systems would remain broadly as they are today, and an enduring solution, at which point TSO systems would fully reflect the vision set out in Regulation (EU) 2019/943. The decisions summarised here, and set out below, represent the first step in the implementation of the requirements of Regulation (EU) 2019/943, and the project to implement its requirements is likely to continue for a number of years and require detailed engagement, in particular, between TSOs and market participants, on the implementation of market-based re-dispatch in the SEM".

68. Both applicants make the point that the approach set out in this opening passage from the Decision and the terms of the Decision generally suggest that the Decision itself acknowledges that the Decision, by its terms, defers giving full effect to Article 13(7) of the Regulation and, as Greencoat puts it at para. 38 of its written submissions, "…the Decision proceeds on the premise that it is open to the SEMC/CRU to adopt a phased implementation of the Regulation over a number of

years. As such, it is fundamentally flawed. The Regulation, which is directly applicable, was required to be complied with in full from 1 January 2020".

69. The respondent addresses the terms of the Decision at paras. 6 to 18 of its statement of opposition in the Greencoat matter, and in the same terms at paras. 5 to 17 of its statement of opposition in the Energia matter. At paras. 13 to 16 of the former statement of opposition, the respondent states as follows: -

> 13. "In the Decision, the SEMC set out its view that in order to implement the requirements of Article 13(7), there was a need to separate compensation mechanism in terms of costs associated with lost revenues in the market and revenues associated with foregone government support associated with different renewable support schemes in the State and in Northern Ireland.
>
> 14. The SEMC decided that all units would initially receive compensation in the SEM for non-market based re-dispatch, (in relation to both constraints and curtailment), where firm, at the better of their complex bid/offer price or imbalance settlement price up to the level of their firm access quantity as is the case for constraints today (with wind and solar units essentially retaining their ex-ante revenue, as such volumes are settled at a deemed decremental price of zero).
>
> 15. As regards the taking into account of foregoing financial support, the SEMC decided that in order to reflect the jurisdictional nature of the support schemes present across the SEM, the Decision in relation to the financial compensation related to the incentive schemes would be made jurisdictionally.
>
> 16. It was further determined in the Decision that where there is a difference between market revenue compensation and a renewable units foregone support payment where non-market re-dispatch has occurred, in order to prevent any

potential distortions of competition within the SEM resulting from divergent jurisdictional approaches, the following principles should be applied:

(a) For renewable units commissioned after 4 July 2019, compensation based on the higher of a unit's ex-ante revenues or foregone support should not be considered 'unjustifiably high', unless there is good cause (in the context of applying the assumption set out below) to find otherwise.

(b) For renewable units commissioned prior to 4 July 2019, compensation based on the higher of a unit's ex-ante revenues or foregone support should be considered 'unjustifiably high' unless there is good cause (in the context of applying the assumption set out below) to find otherwise".

70. At para. 18 of the statement of opposition in the Greencoat matter, the respondent states that "…[t]hese aspects of the Decision, which appear to be the focus of the Applicants' complaints, constitute a lawful application of the requirements of Article 13(7) in the particular context of the SEM and are fully consistent with the direct applicability of the Regulation".

71. The written submissions of Greencoat draw attention to a number of aspects of the Decision which it contends demonstrate the non-compliance of the Decision with the requirements of the Regulation. It refers to p.3 of the Decision, on which the SEMC states that "…In the context of the current and expected next two years' high prices, the SEM committee has decided to implement and compensate any payments for curtailment associated with this decision, beginning in tariff year 2024/25". The Decision therefore provides that, for curtailments in the period from 1 January 2020 until the tariff year 2024/25, no compensation will be paid until the latter date.

72. Greencoat also draws attention to pp 26-27 of the Decision, in which the SEMC states that "…All units will initially receive compensation in the SEM for non-market based redispatch (in relation to both constraints and curtailment), where firm, … [f]ollowing implementation of enduring solutions and completion of the future market design, the measures introduced through this Decision for compensation associated with curtailment for priority dispatch units will be phased out…". Greencoat contends that the Decision indicates therefore that compensation for redispatching arising from curtailment will be phased out notwithstanding that it will continue to occur on a non-market basis.

73. Greencoat also makes complaint about the limitation of compensation to generators with ex-ante positions. It contends that an approach whereby renewable generators will only be compensated from 1 January 2020 where such generators had a position in the ex-ante markets may exclude any priority dispatch generators that elected not to trade in the ex-ante markets, in particular *de minimis* generators (*i.e.,* generating units of less than 10MW). At p.12 of the Decision, the SEMC states that "…[t]he SEM committee have [sic] concluded that generation [sic] below the *de minimis* threshold have a choice to participate in the market on a voluntary basis, to avail of re-dispatch compensation or retain existing *de minimis* benefits". Greencoat alleges that such a provision is discriminatory; Article 13(7) provides that all generators are to receive compensation in the event of being re-dispatched.

74. Greencoat is also particularly critical of what it sees as the "splitting of the compensation calculation method in two", *i.e.,* two aspects of lost revenue which generators suffer when dispatched downwards, being lost revenues from the sale of electricity, and foregone financial support, which Greencoat maintains is incompatible with the terms of Article 13(7), which it contends includes foregone financial support

as a "baked-in" element of compensation for re-dispatch. The submissions are also critical of the distinction in treatment between generators based on their date of commissioning, for which it is contended there is no justification in the wording of Article 13(7).

75. Greencoat is critical of the statement on p.26 of the Decision that "…all units will initially receive compensation in the SEM for non-market based re-dispatch (in relation to both constraints and curtailment) ….". It contends that this means that the current method of compensation will continue, so that monies paid by the SEMO, including compensation for re-dispatch, will be paid to the licenced supplier and not to the generator itself. It is suggested that, in circumstances where generators have entered into PPAs, the beneficiary of the compensation will be the licensed supplier or intermediary, rather than the generator.

76. The criticisms of the Decision summarised briefly above are to be found at paras. 37 to 56 of the written submissions of Greencoat. Energia makes similar complaints in its submissions, and may for the purpose of this judgment be deemed to have impugned the Decision on the same bases.

The reliefs sought

77. At para. 7 of the statement of grounds in the Greencoat proceedings, the applicants sought the following reliefs:

> (i) An Order of Certiorari quashing the Decision made by the Respondent acting through the Single Energy Market Committee (the '**SEM committee**') on 22 March 2022 entitled Decision Paper on Dispatch, ReDispatch and Compensation Pursuant to Regulation (EU) 2019/943 (SEM-22-009) the '**Decision**';

(ii) An Order of Mandamus requiring the Respondent to give effect to Article 13(7) of Regulation (EU) 2019/943 of the European Parliament and of the Counsel of 5 June 2019 on the internal market for electricity (the '**Regulation**');

(iii) A Declaration that, in accordance with Article 13(7) of the Regulation, financial compensation for non-market-based redispatching must be paid by the Notice Party acting as the transmission system operator ('**TSO**') licensed by the Respondent pursuant to section 14(1)(e) of the Electricity Regulation Act (the '**ERA**') to the operators of the electricity generation facility in question;

(iv) A declaration that, in accordance with Article 13(7) of the Regulation, financial compensation can only be paid on the basis of a combination of the additional operating costs caused by the redispatching and the net revenues from the sale of electricity on the day-ahead market (with financial support deemed to be part of the net revenues) that the power-generating facility would have generated without the redispatching request if applying only the higher of the two would lead to an unjustifiably high compensation to that power-generating facility in respect of the redispatching that has occurred;

(v) a declaration that in considering the Regulation which has direct effect, the respondent may not have regard to policy considerations, including policy costs and its duties including under the ERA;

(vi) A declaration that, in accordance with Article 13(7) of the Regulation, a single determination must be made by a single decision-maker in respect of the financial compensation to be paid and cannot be separated into separate

determinations in respect of "*market revenues*" and "*foregone financial support*" [italics in original];

(vii) A declaration that compensation is required to be paid pursuant to Article 13(7) of the Regulation from 1 January 2020;

(viii) A declaration that participation in ex-ante electricity markets in the single electricity market (the '**SEM**') is not a requirement in order to receive compensation pursuant to Article 13(7) of the Regulation;

(ix) A Declaration that *de minimis* generators which are not required to participate in the SEM are entitled to compensation pursuant to Article 13(7) of the Regulation including in circumstances where they do not participate;

(x) A declaration that, in order to give proper effect to Article 13(7) of the Regulation, the treatment of compensation pursuant to the Respondent's Arrangements for the Calculation of the Public Service Obligation Levy post I-SEM Implementation (CRU/20/13) must be amended so that it no longer:

> (a) provides for compensation in respect of non-market-based redispatching to be treated as revenue of the licensed supplier rather than of the operator of the generating unit; and
>
> (b) reduces the amount of REFIT support due in a respect [sic] of a given generating unit for dispatched energy by the amount of any compensation paid for non-market-based redispatching thus rendering such compensation nugatory;

(xi) A Declaration that by failing to make a decision on firm access the respondent has failed to comply with Article 13(5) of the Regulation;

(xii) A declaration that any removal of compensation for non-market-based redispatching in case of curtailment (whether from 2026 or otherwise) would be in breach of Article 13(7) of the Regulation;

(xiii) A Declaration that the Decision is in breach of the Regulation and/or EU law and invalid in that it purports to delegate part of the implementation of Article 13(7) of the Regulation to the Governments of Ireland and Northern Ireland and/or to the respective regulators in each jurisdiction in breach of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (the '**Electricity Market Directive'**);

(xiv) A declaration that the Decision is invalid in that it is in breach of Article 15.2.1 of the Constitution in purporting to implement the Regulation in a manner which is not consistent with and goes beyond the principles and policies set out in the Regulation by way of administrative decision;

(xv) Such further or other declarations as may be appropriate;

(xvi) Further or other relief;

(xvii) costs.

78. The reliefs sought by Greencoat are more prescriptive than those sought by Energia, and give a slightly clearer indication of the basis upon which the declaratory reliefs in particular are sought. There is however no material difference between the reliefs sought by Energia and those sought by Greencoat, or as to the bases upon which each set of reliefs is sought. Indeed, during the hearing of the matter, I asked the parties to furnish me with a list of issues which they considered it would be necessary for the court to decide. Greencoat and Energia, having shared the burden of

making submissions during the hearing, furnished a joint list of issues. The CRU also furnished a list of issues, and I shall refer to these lists in more detail below.

The parties' positions on direct effect/direct applicability

79. Article 288 of the Treaty on the Functioning of the EU (the '**TFEU**') provides that "[A] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States". While this statement would appear to be straightforward, much of the argument before the court concerned the issues of whether or not, or the extent to which, the Regulation was of direct effect or directly applicable.

80. The parties were broadly in agreement that, in order to have direct effect, a measure must be clear and precise, unconditional and unqualified, and requiring or admitting of no further implementing measure on the part of any Union or national authority; in this regard, see the extracts from Lenaerts & Van Nuffel, EU Constitutional Law (Oxford 2021, p.651) and Edwards and Lane on European Union Law (2013, p.295) quoted at paras. 69 and 39 respectively of Greencoat's and the CRU's written submissions.

81. Each of the applicants asserts that the Regulation has direct effect. However, both applicants side-step the issue of direct effect and rely on what they contend is the obligation to give full effect to the Regulation as a directly applicable measure of EU law. As Energia puts it at paras. 44 to 45 of its written submissions:

> "44…It is submitted that Article 13(7) is sufficiently clear and precise to have direct effect, and it is clearly relevant to the situation of the Applicants… [45] In any event, this is largely beside the point. Article 13(7) is contained in a regulation, which is directly applicable and binding in its entirety on the CRU. This is not a case in which it is necessary to determine whether Article 13(7) is

capable of being relied upon and enforced by the applicants before the national courts. Rather, the Applicants contend that the CRU, in purporting to adopt measures of application to give effect to Article 13 of the Regulation, has failed to give effect to Article 13(7) and has adopted a Decision which is incompatible with EU law."

82. Likewise, in its statement of grounds, Greencoat, under the heading "the respondent is required to give effect to the Regulation and has no *vires* to decide not to give effect to Article 13 of the Regulation in full", expresses its opinion as follows:

"129. In accordance with Article 288 TFEU, the Regulation has direct effect as a matter of EU law. Accordingly, it creates legal obligations and entitlements from its entry into force and/or its date of application.

130. The respondent, acting through the SEM committee, is under a duty to give full effect to the provisions of the Regulation in the SEM, including, if necessary, by disapplying any conflicting provisions of national law and the respondent cannot decide not to give full effect to the Regulation on the basis of any provisions of the ERA. The Respondent is not entitled and has no power or discretion to modify or delay the application of Articles 12 or 13 or decide to apply the Regulation in part only. As an emanation of the State, the role and obligation of the Respondent is to give effect to the Regulation in full and ensure that it discharges its functions in a manner that is consistent with the Regulation rather than purporting to make decisions which fail to implement the Regulation in full.

131. The Decision does not give effect to Articles 12 and 13 of the Regulation and is contrary to EU law and invalid."

83. Counsel for Greencoat, Declan McGrath SC, expressed the applicants' net position in his oral submissions to the court as follows:

> "…As you will have seen from our submissions, Judge, we take the position that the Regulation is directly effective but we also say that the court doesn't have to decide that…because that would only actually be relevant if my clients were bringing an action against Eirgrid claiming the compensation that they say is due to them under Article 13(7), in that way you would be relying on the direct effect of Article 13(7) to ground that claim for compensation. So it isn't necessary for the court to deal with that and we just have to look at the issue of direct applicability". [Day 6, p.172, line 24 to p.173, line 7].

84. Energia, at para. 58 of its statement of grounds, contended that certain identified matters set out in the Decision "do not implement Article 13(7), notwithstanding that the Regulation is binding in its entirety, directly applicable in all of the Member States, and entered into force on 1 January 2020". The paragraph goes on to list at length the "fundamental" respects in which it is contended that "the Decision departs…from the requirements of Article 13(7) of the electricity market regulation…".

85. In addressing the concept and requirements of direct applicability of EU law, Mr McGrath in his oral submissions referred to a number of reported decisions: case 34/73 *Fratelli Variola,* case 50/76 *Amsterdam Bulbs*, case C-316/10 *Danske Svineproducenter,* case C-539/10 P *Stichting Al-Aqsa*, C-541/16 *Commission v Denmark*, C-13/17 *Federation des Enterprises de la Beauté* and *North East Pylon Pressure Campaign v An Bord Pleanála* [2017] IEHC 338 [Barrett J].

86. Counsel went on to submit that the following principles could be distilled from the cases which he had addressed:

"(i) All regulations are directly applicable and form part of domestic law without the necessity for any implementing measure by operation of Article 288 TFEU.

(ii) Member States have a duty to ensure the full and complete implementation of a regulation.

(iii) Any national rule which is inconsistent with the Regulation is unlawful and must be set aside by the national court.

(iv) If the Regulation requires or permits the adoption of legislative or administrative measure of application to facilitate the implementation of the Regulation, then these may be adopted.

(v) Measures of application must come within the parameters set by the Regulation and cannot be inconsistent with it.

(vi) In adopting such measures of application, the Member State cannot obstruct the direct applicability of the Regulation or conceal the EU law nature of the applicable rules.

(vii) Where discretion is afforded by a regulation to Member States, the national body should specify that it is exercising such a discretion."

87. Essentially, each of the applicants contends that the Decision constitutes a wholesale departure from these principles for the reasons which I shall summarise below.

88. The respondent accepts that the Regulation is directly applicable and is part of the law of the State. It does not however accept that the Regulation has direct effect; as it states in its written submissions:

"43. The Applicants appear to argue that Article 13(7) has direct effect. However, it is clearly not an article which has direct effect, in particular

because of the *unjustifiably high* qualification that applies to compensation and the fact that where the awarding of the higher of (a) or (b) in Article 13(7) would be unjustifiably high, there is to be some calculation to determine the compensation to be awarded. This is not a provision that is clear, precise and unconditional so that it could be applied by a national court.

44. If the Respondent is correct about this, what is the implication of Article 13(7) not having direct effect? It is that the provision cannot itself be enforced directly before this Court (see *e.g.,* case C-403/98 *Azienda Agricola Monte Arcosu SRL v Regione Autonoma Della Sardegna* ECLI:EU:C:2001:6). Therefore, the Applicants are left to argue that the implementing measures in this case (*i.e.*, the Decision) are outside the scope of the discretion afforded to Ireland or obstruct the direct applicability of the Regulation. That is not the case, as discussed further below. Of course, if Ireland had failed to apply the Regulation, the European Commission could have opened an infringement procedure against Ireland pursuant to Article 258 of the Treaty on the Functioning of the European Union. However, no such procedure has been opened and no infringement proceedings have been brought".

89. By the time the respondent had, after the hearing and at my request, submitted a "list of issues" which it considered ought to be addressed in this judgment, it appeared to be adopting a more extreme position, which was expressed as follows: -

"**Issue 1 - Direct Effect**

(1) Does Article 13(7) of the Regulation have direct effect? (In answering that question, the court should consider whether Article 13(7) is sufficiently clear, precise and unconditional so that it could be applied by a national court).

(2) If no, can Article 13(7) be relied on by this Court so as to disapply the Decision?

(3) Again, if question (1) is answered in the negative, are the applicants entitled to any relief on the basis of arguments to the effect that the respondent has failed to apply or implement Article 13(7) or failed adequately to do so (or like arguments).

The Respondent says the Applicants are not entitled to any such relief and have pointed out that any action is for the European Commission, which can take infringement proceedings. If the court agrees that owing to Regulation 13(7) not having direct effect, the Applicants should not obtain any relief based on arguments about the alleged non-application or non-implementation of Article 13(7), the remaining issues in the case that are based on Article 13(7) become redundant."

90. Essentially, the respondent contends for the stark proposition that, if the court is of the view that the Regulation does not have direct effect, any infirmity in the manner in which it has been interpreted or implemented in the Decision cannot be invoked by the applicants, who would not be entitled to any reliefs, thereby rendering the remaining issues in the case "redundant".

The experts' evidence

91. The applicants and the respondent both commissioned reports from expert economists in relation to matters relevant to the interpretation of the Regulation. Mr Dan Roberts of Frontier Economics is an economist specialising in the energy sector, and was commissioned by the applicants jointly to provide an expert opinion outlining the economic and policy objectives underpinning the clean energy package and the Regulation, and assessing from an economic perspective the extent to which the

SEMC's Decision meets those objectives. He produced an expert report on 20 February 2023 in this regard.

92. By way of reply, the respondent engaged Mr George Anstey, who is a managing director in the "energy practice" of NERA Economic Consulting, to produce a report "to analyse Mr Roberts's report in detail and present my own, independent view on the economic issues in Mr Roberts's report. In particular, I have been instructed to present my independent view on the analysis provided by Mr Roberts and to explain the economic rationale of any disagreements I may have" [para. 1.1.9].

93. Both initial reports are extremely extensive. Mr Roberts replied to Mr Anstey's report by way of a further report of 29 May 2023; Mr Anstey in turn prepared a second report on 19 June 2023 in response to Mr Roberts's reply. Mr Roberts then proffered a final report replying to Mr Anstey's second report on 26 June 2023. All of the reports were verified by affidavit in the normal way; however, neither of the economists was called to give oral evidence at the hearing.

94. Counsel for both sides referred extensively in their submissions to the economists' reports in support of their respective interpretations of the economic rationale(s) behind the Regulation. The extent to which such interpretations were matters which could validly be considered by the court was an issue of some controversy between the parties, and counsel for the respondent in particular reminded the court on more than one occasion that, while the evidence of the experts was helpful in understanding the way in which the electricity market worked and the economic theories which may have informed the terms of the Regulation, the question of the proper interpretation of those terms was a legal one, and solely a matter for the court.

95. While the reports of both experts were admirably clear and understandable by a person not well versed in economics, they are lengthy and refer in considerable detail to complex issues. What follows therefore is a brief summary of the main themes only of each of the experts, although all of the submissions of the parties in relation to their evidence have been considered by the court.

Mr Roberts's evidence

96. In section 3 of his report, Mr Roberts addressed the Regulation, citing Recital no. 4 and Article 1 which I have quoted at paras. 57 and 58 above. He concludes that it is clear that the Regulation:

> "(a) emphasises the use of competitive markets in general and
>
> (b) views one of the uses of the markets to be supporting the delivery of outcomes consistent with the energy transition [to renewable sources of electricity] …"
>
> [para 3.9].

97. Mr Roberts concludes that Article 13(1)-(3) "suggests a market-based approach to redispatching as the default, with non-market based redispatching being implemented only where a market-based approach is either not possible or would not result in economically efficient outcomes (*e.g.* because of the exercise of market power)." [Paragraph 3.17]. Having analysed Article 13(4)-(6), he asserts that these provisions emphasise that "redispatching down renewable sources (which may in turn imply a greater use of fossil-fuelled generation to meet demand) is discouraged" [para. 3.21]. He emphasises the "negative consequences" from an economic perspective of redispatch, in particular "the higher cost of meeting demand and the likelihood of increased carbon emissions" [para. 3.25]. He concludes accordingly that there is an economic rationale to reducing the level of dispatch, and that Article 13

seeks to ensure that system operators are taking steps to reduce downward dispatching, and placing an obligation on them to maintain a network capable of supporting the energy transition in this regard [para. 3.28].

98. Mr Roberts sets out what he contends is the economic rationale behind prescribing market-based redispatching as the default mechanism, which is that it ensures that the risk associated with network limitations is allocated to the TSO, which is best placed to manage the risk, and tends to ensure that decisions related to redispatch and network development are efficient: see paras. 3.28 to 3.45 in this regard.

99. In addressing the principles for compensation under non-market redispatch, Mr Roberts states that "…In my view, the economic rationale underpinning Article 13(7) is to ensure that the compensation outcomes of non-market based redispatch emulate those associated with a competitive market-based approach" [3.48]. He demonstrates how this will occur in "simple cases" where a "conventional unsupported generator" on redispatch will be compensated either under element (a) or element (b) on redispatch.

100. Mr Roberts then considers "more complex cases" [para. 3.50] in which compensation resulting from the higher of element (a) or element (b) might be "unjustifiably high" or "unjustifiably low" relevant to a market-based benchmark, and concludes that "…the further flexibility provided by Article 13(7), including allowing for a "combination" of both elements, provides for the emulation of a market-based benchmark" [para. 3.50(b)]. Mr Roberts then sets out an example of a generator which may incur cost for which it will not be compensated if only offered the higher of additional operating cost or net revenues; in order to ensure that the generator is

indifferent to redispatch, a combination of element (a) and element (b) by summing them is necessary: see the example at paras. 3.52 to 3.55.

101. Likewise, at paras. 3.56 to 3.62, Mr Roberts gives an example of an asset being able to earn additional revenue as a result of being redispatched down, with the result that the higher of element (a) or element (b) results in an "unjustifiably high" level of compensation.

102. Mr Roberts expresses his conclusion as follows:

> "3.69 Therefore, I conclude that:
>
> (a) the inclusion in Article 13(7) of the potential to deviate from simply applying the higher of the two elements cited is, from an economic perspective, required to ensure that non-market based redispatch emulates the outcomes which would emerge from the (default) market-based approach; and
>
> (b) the relevant benchmarks against which the implementation of Article 13(7) should be assessed, from an economic perspective, are the outcomes that would be achieved if a market-based approach to redispatch was implemented (in terms of volumes, prices and incentives)."

103. Section 4 of Mr Roberts's first report analyses the Decision and criticises many of its provisions. In particular, he is critical of "the decision not to include all net revenue in redispatch compensation" and concludes as follows:

> "(a) The Decision deviates from the economic logic underpinning the Regulation, in that it provides for arrangements that will deliver outcomes inconsistent with the outcomes which would be expected in a competitive market-based approach:
>
> (i) it only includes market revenues within the scope of compensation;

(ii) it sets out principles for the compensation of financial support revenues which differentiate between generators based on commissioning date;

(b) the Decision will therefore result in arrangements which do not result in the benefits from market-based outcomes which I set out in section 3, and which in particular risk:

(i) impacting customers negatively through higher prices for electricity or higher prices to secure given level of investment;

(ii) procurement of lower levels of renewable capacity (and so slower decarbonisation); and

(iii) investment in inefficient levels of network capacity or procurement of inefficient volumes of technical systems services;

(c) beyond this, the reasoning behind the principles for the compensation of financial support set out in the Decision is, from an economic perspective, flawed in that it:

(i) references legislative history in a way which is misplaced in the context of the Decision itself and the wider Irish context;

(ii) is based on a broad interpretation of the basis for judging compensation as 'unjustifiably high' which is not underpinned by the economic rationale of Article 13; and

(iii) is based on allegedly market specific aspects of SEM which are not relevant from an economic viewpoint, and where evidence supports strong similarities in important respects between the SEM and other EU jurisdictions".

[Paragraph 4.72]

104. Mr Roberts also concludes that "the limitation on eligibility for compensation to (a) day ahead market prices…", and "those with an ex-ante market position" will "result in outcomes which are not consistent with those which would result from a market-based approach…". [See s.4.73 *et seq*].

Mr Anstey's evidence

105. Mr Anstey's first report is a lengthy response to Mr Roberts's first report. At para. (ii) of his executive summary, Mr Anstey states as follows:

> "In his expert report Mr Roberts advances *an* economic rationale (which he subsequently refers to as 'the' economic rationale) for the choice of the Regulation to promote markets based on the assumption that markets are efficient, *i.e.,* they maximise total welfare in the system (which consists of the combination of consumer or producer welfare or 'surplus'). He points to efficiency benefits he perceives market-based redispatch to have in the SEM. He characterises the Regulation as mandating the use of markets and where non-market-based mechanisms are used to compensate units as if a competitive market were operating". [Emphasis in original]

106. While Mr Anstey agrees with Mr Roberts that "basic economic theory" supports the use of markets in general, he concludes, after a lengthy commentary on Mr Roberts's report, that:

> "Mr Roberts's 'economic rationale' is not the only reasonable economic interpretation of the Regulation. In particular, an alternative economic interpretation could be expressed as:
>
> > A. the Regulation puts forward market-based mechanisms as the default option for redispatch;

B. the Regulation does so because market-based mechanisms generally promote consumer interests over the long-term; and

C. in circumstances where NRAs [National Regulatory Authorities] introduce non-market-based mechanisms, NRAs may set compensation which departs from that [which] a market would provide where market-level compensation would result in an unjustifiable balance of consumer and producer interests".

107. Mr Anstey then very fairly makes the following point:

"92. I am not acting as a legal expert in these proceedings and indeed to do so would be outside of my expertise. It may have been neither of the above economic rationales that motivated the design of the Regulation and broader policy considerations may have been relevant."

108. Mr Anstey goes on to observe that "Mr Roberts's assumptions about the efficiency of markets even in distorted settings and his interpretation of the Regulation materially affect the conclusions of his report", in particular affecting the "repeated assertions" that the Decision:

"…deviated from the economic rationale behind the Regulation in at least two ways:

A. he characterises the SEMC decision as economically unjustified because in his view it does not promote efficiency;

B. he interprets 'unjustifiable' compensation and 'discrimination' through the lens of what a market would deliver, rather than balancing consumer and producer interests. This balancing is always an act of compromise and must account for the physical realities of the grid (for the ultimate benefit of consumers)."

109. In the executive summary, Mr Anstey describes Mr Roberts's analysis of the economic consequences of the SEMC decision as "incomplete" in a number of respects:

- "…[t]he existence of constraints and need for curtailment imposes material costs on Irish consumers. The TSOs recover cost associated with managing constraints and curtailments directly from consumers in [the] form of the imperfections charge. Introducing market-based approaches, especially in a manner that results in windfall gains for existing generators may not be in consumers short-term or long-term interest; …
- …market-based approaches can result in *less* efficient outcomes than non-market-based approaches in circumstances where markets are distorted…[t]hose distortions may in principle be wide, including market power, asymmetry of information or the presence of externalities (such as carbon emissions). Whatever the other market failures that [are] present in the SEM, the financial support mechanisms for renewable generators present on the island of Ireland are themselves distortionary: [p]riority units, *i.e.*, renewable generators which connected before 04 July 2019, in receipt of financial support have distorted incentives to generate. Those incentives exceed the social value of their generation. Excessive incentives to generate can lead market-based approaches to result in less efficient dispatch than non-market-based mechanisms; …
- …Mr Roberts argues that the TSO is best placed to manage constraint risk but ignores the dynamic effects that providing compensation for

providing financial support may have. If plants are indifferent between being redispatched or not, then they face a weaker incentive to locate in areas of the network where their energy is more likely to be used to serve demand. Plants locating in more congested areas might cause excessive levels of network investment as opposed to an efficient use of the existing network capacity…

- …the TSOs in Ireland and Northern Ireland already have incentives for expanding the grid and the incremental impact of compensating financial support on investment efficiency for the TSOs may be low (or even negative) …" [Emphasis in original]

110. Mr Anstey is critical of Mr Roberts's view as to how the "unjustifiably high/low" criterion should operate, and his view that the use of the combination of additional operating costs and lost revenue should only apply to narrow "complex cases". Mr Anstey expresses his view as follows:

> "In my experience, regulators are not only concerned [with] delivering a market outcome but also the impact of rent transfers between consumers and producers. In the SEM context, full compensation of priority dispatch units would create windfall gains for those redispatched plants, because they invested under alternative arrangements for which compensation for foregone financial support was not available. Those windfall gains consist in a transfer of welfare from consumers to producers. It is unsurprising therefore that the SEMC decision considers the distributional effects of the Decision, given the SEMC's mandate to protect long-term consumer interests and given the (likely) scant impacts on economic efficiency of the Decision. Those distributional considerations may be particular to Ireland and between the

jurisdictions on the island of Ireland and may motivate a different approach in Ireland to other EU Member States and between the jurisdictions on the island." [Pages (v)–(vi) of executive summary.]

111. As the purpose of this section of the judgment is only to give a general sense of the approaches taken by the respective economists in their evidence, I do not propose to tax the patience of the reader by summarising their three further reports; suffice to say that Mr Rogers and Mr Anstey each refined their arguments in response to the other while maintaining their respective positions. Where necessary, I shall refer to any relevant points made in those reports below when addressing the submissions of the parties.

Submissions by Greencoat on specific aspects of the Regulation

112. As I have indicated above, counsel for Greencoat and Energia divided the submissions to the court between them, treating each as joint submissions. Mr McGrath, having opened the matter and given a helpful exposition of the relevant issues and concepts, dealt with the issue of direct applicability as I have outlined above, and then went on to deal with five discrete respects in which the applicants allege that the Decision has failed to implement the Regulation or comply with it. Brian Kennedy SC, instructed on behalf of Energia, then made submissions on behalf of the applicants in relation to a number of issues, most notably the interpretation of the "unjustifiably low/high" criterion in Article 13(7) which, as is particularly clear from the experts' reports, is at the heart of the differences between the parties.

113. I propose to summarise briefly the submissions of Mr McGrath in relation to the five "discrete issues" before doing likewise for Mr Kennedy's submissions. I shall then address in detail the submissions made by Michael Collins SC and Ciaran Lewis SC to the court on behalf of the CRU.

(i) Deferral of compensation payments until 2024

114. Notwithstanding that the Regulation came into effect on 1 January 2020, the Decision provides "…[i]n the context of the current and expected next two years high prices, the SEM committee has decided to implement and compensate any payments for curtailment associated with this decision, beginning in tariff year 2024/2025" [Page 3 of Decision]. At p.28 of the Decision, the SEMC sets out its approach to the process, entailing a compilation of information "on the level of curtailment and constraints from firm market positions of each unit for each market time unit across the applicable time period" which could "then be compared against relevant DAM prices and expected revenues based on each unit's market position. This should lead to some payments to firms generated with ex-ante positions in the case of curtailment, but should not lead to any additional costs in the case of constrained generators".

115. The applicants submit that this is "a deliberate and conscious breach of European law. Compensation is due from 1st January 2020 and it's been postponed for four and three quarter years" [day 2, p.57, lines 20 to 23]. The applicants cite the Decision in *Commission v Italy* [1971] ECR 101 to illustrate the proposition that to defer a payment clearly due on foot of a European regulation is a clear breach of European law.

116. Counsel submitted that the thrust of Article 13 is to reduce the amount of redispatching, given that downward redispatching generally results in renewable sources of energy such as wind and solar energy being replaced by fossil fuel generation. It is imposing an obligation on national authorities to pay compensation to generators who are redispatched downwards, and this provides an incentive to TSOs to minimise such redispatch, an objective which cannot be achieved if compensation is not actually paid.

(ii) Phasing out of compensation for redispatch due to curtailment.

117. Counsel for Greencoat refers to the definition of "redispatching" at Article 2(26) of the Regulation:

> "A measure, including curtailment, that is activated by one or more transmission system operators or distribution system operators by altering the generation, load partner, or both, in order to change physical flows in the electricity system and relieve a physical congestion or otherwise ensure system security".

118. It is submitted on behalf of the applicants that it is clear from this definition that redispatch includes downward redispatching due to curtailment, and that Article 13(7) clearly envisages compensation being paid for redispatch due to constraint or curtailment. The Decision however not only suggests that compensation for redispatch due to curtailment will only be payable from 1 October 2024 - although the respondent accepts that it is due from 1 January 2020 – but that such compensation will subsequently be phased out notwithstanding that curtailment will continue to occur on a non-market basis for some time.

119. It is acknowledged at p.26 of the Decision that compensation is to be paid for non-market based redispatch, and that this is to extend to curtailments as well as constraints, the costs to be recovered by means of an "imperfections" charge. Greencoat raised various queries on the implications and correct interpretation of the Decision by letters of 21 April 2022 and 13 May 2022 to the CRU and the utility regulator for Northern Ireland; in response to a request for clarification as to the position regarding compensation for constraints and curtailments, the SEMC in its letter to Greencoat of 27 May 2022 stated as follows:

> "Yes – the SEM Committee has decided, that as matters presently stand, it is appropriate to treat all redispatch applied to both priority dispatch and non-priority dispatch units, in relation to constraints and curtailment in the SEM, as non-market based redispatch.
>
> All units will initially receive compensation in the SEM for non-market based redispatch (in relation to both constraints and curtailments), where firm, with wind and solar units essentially retaining their ex-ante revenue, as such volumes are settled at a deemed decremental price of zero.
>
> The measures introduced through this decision for compensation associated with curtailment for priority dispatch units *will be phased out*, based on the expected change in the value of Priority Dispatch at such a point in time." [Emphasis added].

120. Counsel for Greencoat drew attention to a significant clarification by the SEMC as to its general approach to redispatch set out in its letter to Greencoat of 27 May 2022:

> "The Regulation requires an introduction of market-based solutions for redispatch, referred to in places in the Decision as market-based redispatch. The enduring solution is for the TSO systems to reflect these requirements insofar that new renewable generators should be able to submit bids and offers for energy balancing and redispatch. Due to the significant system changes required, this will require extensive engagement with industry. Following this engagement, a final proposal setting out the modalities of the implementation of market solutions for redispatch from the TSOs will then be subject to SEMC approval. The Regulatory Authorities will continue to engage with the TSOs and interested stake holders in relation to this project.

> It should be noted however that the implementation of market solutions for redispatch does not change the SEM Committee's position that given the inability of units freely to submit bids and offers for constraints or curtailment, redispatch in the SEM (both applied to priority dispatch and non-priority dispatch units) has features associated with non-market based redispatch and therefore the provisions of Article 13(7) apply in all cases. As stated in the Decision, as matters presently stand, it is appropriate to treat all redispatch applied to both priority dispatch and non-priority dispatch units, in relation to constraints and curtailment in the SEM as non-market based redispatch".

121. It was submitted on behalf of Greencoat that it appears that, as part of the "enduring solution", the SEM is going to move in the direction of a market-based solution, but that redispatch will have "features associated with non-market based redispatch" so that Article 13(7) would continue to be applicable to the issue of compensation. Notwithstanding that, the excerpt quoted at para. 119 above suggests that compensation for curtailment, which is an integral part of redispatch, would be phased out. Greencoat maintains that this is a clear breach of the Regulation; Article 13(7) requires that compensation be paid for both constraints and curtailments.

(iii) Payment of compensation by the TSO to the generator

122. The Decision provides at p.26 that "…all units will initially receive compensation in the SEM for non-market based redispatch (in relation to both constraints and curtailment), …". This suggests that compensation will be paid by means of the SEM; as the SEM currently operates, monies paid through the SEM by the SEMO, including compensation for redispatch, is paid to the licensed supplier and not the operator of the generator itself. Thus, where generators have entered into

PPAs, it is submitted that the beneficiary of that compensation is the licensed supplier who typically acts as an intermediary – not the generator.

123. The applicants submit that Article 13(7) clearly provides that, where non-market based redispatching is used, the financial compensation to be paid "by the system operator requesting the redispatching" is to be paid "to the operator of the redispatched generation". In short, the compensation is to be paid directly to the generator rather than to the intermediary.

124. Counsel for Greencoat referred in detail to the report of Mr Roberts, and in particular his dominant themes: the Regulation's emphasis on market-based mechanisms, and what he contends is the onus implicit in Article 13 on system operators to reduce downward dispatching and to develop network capable of transmitting energy generated from renewable sources with minimal need for redispatch. Central to those themes is the contention that the TSO, being better placed to manage the risk of redispatch, should bear the risk of the obligation to pay compensation: see para. 3.31 of the first Roberts report in particular.

125. Counsel for Greencoat also framed this argument in terms of "common sense" [day 2, pp. 77 to 78]: if the TSO must pay compensation for redispatch out of its own budget, this creates an incentive for the TSO to invest in upgrading the network with the view to minimising the need for redispatch. As counsel put it, the TSO "…can make the decisions in terms of relieving the technical difficulties that lead to constraint and…curtailment" … [day 2, p.78, lines 18 to 22].

126. The criticisms by Greencoat are, therefore, that the TSO does not make the compensation payment pursuant to Article 13(7), and that the payment is not made to the generator of the electricity, as under the REFIT schemes the generator must enter into a PPA with the licensed supplier: see para. 54 above. The applicants contend that,

when a generator is redispatched downwards, and a payment is made in respect of electricity which the generator does not have to deliver as a result, that payment goes to the supplier/intermediary who has registered that electricity on the market. This, the applicants say, is in breach of Article 13(7), which clearly states that the compensation should be paid "to the operator of the redispatched generation, energy storage or demand response facility…".

127. Greencoat references para. 90 of Mr Melvin's first affidavit in the Greencoat proceedings in this regard, in which he avers as follows:

> "The Applicant argues that the SEM committee has erred by not clarifying that revenues associated with compensation under the Regulation should be received by the owner of the generation asset that has been redispatched. This is not a matter for the SEMC to decide on to the extent it relates to foregone support, but an administrative matter, best resolved through the jurisdictional arrangements to be established in due course. It should be noted that GR's approach, if followed, would lead to enormous disruption in the electricity market due to the need to potentially reopen and renegotiate existing PPAs. I understand that both GR and Energia entities are contracted with each other through a PPA, whereby Energia provides trading and intermediary services to units owned by Greencoat. I wholly reject the suggestion that the SEMC has not implemented the Regulation by not addressing the issue of who might request and ultimately receive any additional compensation that might accrue. This issue is entirely a matter for the contract, or PPA, between the generator and the intermediary supply company".

128. Counsel for Greencoat characterises this position as "patently wrong", relying on the terms of Article 13(7), which it is contended are clear and unequivocal in requiring payment of compensation to the generators of the electricity.

(iv) Limitation of compensation to generators with ex-ante positions in the SEM

129. Greencoat draws attention to the following passage at p.26 of the Decision (already partially quoted at para. 72 above):

> "All units will initially receive compensation in the SEM for non-market based redispatch (in relation to both constraints and curtailment), where firm, at the better of their complex bid/offer price or imbalance settlement price up to the level of their Firm Access Quantity as is the case for constraints today (with wind and solar units essentially retaining their ex-ante revenue, as such volumes are settled at a deemed decremental price of zero)."

130. It is submitted by Greencoat that the compensation mechanism set out in the Decision is therefore predicated on a generator having participated in the ex-ante markets; in order to be paid "the better of their complex bid/offer price…", generators would have to trade on the ex-ante markets. It is submitted that there is no requirement imposed by Article 13(7) that a generator has to have traded on the ex-ante markets in order to get compensation. Counsel submitted that "…the only qualifying condition that you have to meet under 13(7) is you have firm access. Once you have got firm access and you're downward dispatched then you are entitled to compensation. That is it. You don't have to have firm access and have traded on the ex-ante markets" [day 2, p.91, line 29 to p.92, line 6].

131. As we have seen, renewable energy generators commissioned prior to 4 July 2019 who have priority access are unlikely to trade their energy, given their priority. Greencoat contends that such generators would be effectively excluded from

compensation if dispatched downwards, as the compensation is predicated on them having a market position.

132. Counsel noted that Article 13(7)(b) refers to "…net revenues from the sale of electricity on the day-ahead market that the power generating energy storage or demand response facility would have generated without the redispatching request". He contended that it was suggested by the CRU that reference to the net revenue from the sale on the day-ahead market meant that the generator must be a participant in the day-ahead market, but that this was not correct; reference to the day-ahead market simply provided a reference point for the value or quantum of the compensation rather than constituting a requirement to participate in the day-ahead market.

133. Counsel emphasised the premise of Article 13(7), *i.e.*, that it relates to compensation for redispatch on a non-market basis, and submitted that there could be no assumption that generators were participating in the market given this premise. It was also submitted that, to oppose a requirement of participation in the market was to undermine the priority dispatch status of the generators. The requirement of participation in the market in order to receive compensation would undermine the status of having priority dispatch, pursuant to which it is generally not necessary to participate in the market.

134. It is submitted that the requirement of market participation has a particular effect on *de minimis* generators. At p.12 of the Decision, it is stated that "…[t]he SEM committee have concluded that generation below the *de minimis* threshold have a choice [sic] to participate in the market on a voluntary basis, to avail of redispatch compensation or retain existing *de minimis* benefits". *De minimis* generators have a choice whether or not to participate in the market; the point being made by the

applicants is that Article 13(7) requires compensation for redispatch to be paid to all generators, and envisages no exception for *de minimis* generators.

(v) Exclusion of financial supports

135. As we can see from Article 13(7), compensation is envisaged on the basis of the higher of additional operating cost caused by the redispatching, or net revenues from the sale of electricity that would have been generated without the redispatching request. In the case of the vast majority of renewable generators – wind and solar – the appropriate measure will be under Article 13(7)(b), *i.e.*, net revenues. This is because, with wind and solar energy in particular, the ongoing operating costs are close to zero.

136. Article 13(7) (b) provides that "…where financial support is granted to power-generating, energy storage or demand response facilities based on the electricity volume generated or consumed, financial support that would have been received without the redispatching request shall be deemed to be part of the net revenues". The support schemes supplement revenues received by a generator; for instance, the REFIT support schemes operate on the basis of a guaranteed floor price, so that, if that price is higher than the market price per megawatt, the difference between the two prices is paid by way of support. The applicants contend that Article 13(7) makes it clear that the financial supports are "baked in" to the compensation, *i.e.*, that they are an integral part of the compensation, included due to the necessity to "make whole" the generator and to make it indifferent to whether or not it is redispatched in a given case, which the applicants say is the fundamental purpose of the compensation provisions in Article 13(7).

137. However, the SEMC states as follows at pp. 25-26 of the Decision:

"The SEM committee is of the view that in order to implement the requirements of Article 13(7), there is a need to separate compensation mechanisms in terms of costs associated with lost revenues in the market and revenues associated with foregone government support associated with the jurisdictional renewable support schemes. Considerations for this approach include:

(a) the compatibility of compensation mechanisms with existing and future renewable support schemes;

(b) to the allocation of the costs associated with renewable support appropriately to the relevant jurisdiction (*i.e.*, Ireland and Northern Ireland), and;

(c) the differences in each jurisdictional support scheme."

138. At p.27 of the Decision, the SEMC notes that:

"(1) Ireland and Northern Ireland have different renewable support schemes in operation. The design of these schemes are considerably different and would demand a specific mechanism to calculate the potential compensation due.

(2) Given the role of the respective departments of government in Ireland and Northern Ireland in setting Government-Backed incentives and design [sic] such schemes, the decision over any compensation mechanism that would arise from loss of Government backed incentives needs to be implemented jurisdictionally and in coordination with the respective Departments of Government".

139. The applicants argue that the Decision effectively splits the compensation envisaged by Article 13(7) in two, with compensation for the foregone financial supports being a matter for negotiation between the two governments. Counsel

pointed out that the compensation due to generators could not in fact be calculated "because the governments have been sent off to work it out". [Day 2, p.108, lines 26 to 28].

140. Counsel referred to Mr Melvin's averment in his first affidavit in the Greencoat proceedings at para. 42:

> "In this way, electricity consumers of the two different jurisdictions provide supports to new and existing renewable generation in their own jurisdiction only. This is an important factor as I understand that the Applicants contend that the CRU cannot have regard to jurisdictional requirements. It is the CRU's view that as a result of the above payment mechanism, a unilateral decision by the SEMC could result in consumers in Northern Ireland paying for state compensation schemes in the State. Indeed, if the Applicants' position was to be followed that there should be only one mechanism for payment through the market in some unspecified way which would lead to costs being incurred through the SEM, in particular for Northern Irish consumers to support Irish government-backed renewables contacts and *vice versa."*

141. Counsel for Greencoat submitted that these averments were "simply not a justification at all from departing from the requirement of the Regulation". It was submitted that this aspect of the Decision had "positively obstructed the application of Article 13(7)". The financial support, it was submitted, is an integral part of the calculation of the net revenues [day 2, p.110, lines 15 to 24]. Indeed, the point was made that, unless the correct compensation figure could be calculated – which could only be done if the compensation for foregone financial supports could be quantified – it would not be possible to say whether compensation was "unjustifiably high" or "unjustifiably low" as required by Article 13(7).

142. Counsel referred to para. 85 of Mr Melvin's first affidavit in the Greencoat proceedings, in which he outlined the SEMC's approach as set out in the Decision, and averred that:

> "…this approach is consistent with Article 13(7) and applies that article in a way that accounts for the specific context of the SEM. The jurisdictional approach reflects the fact that Ireland and Northern Ireland have different incentive schemes in operation; each would require specific settlement mechanisms to calculate the compensation due; the schemes in each jurisdiction are Government backed; and the need for correct allocation of jurisdictional costs. The compensation in respect of lost support will be payable by the TSO to whose network the generator subject to redispatch is connected. Furthermore, this approach means that the question of compensation for foregone support is addressed *vis-à-vis* each unit/generator individually".

143. Counsel for Greencoat submits that the difficulties stem from the fact that the SEMC were "trying to rework an existing system and to adapt it and extend it to the new paradigm of the Regulation where it just doesn't work at all…if they had set up a compensation mechanism outside of the SEM, all of these difficulties would have been avoided…" [day 2, pp. 112 to 113]. Counsel submitted that "…what has happened here is that a basic decision to try and maintain the *status quo* to change it as little as possible has led to this compounding effect whereby there has been multiple breaches of Article 13(7) and the Decision just completely fails to implement the Regulation" [day 2, p.114, lines, 21 to 26].

<u>Energia submissions</u>

144. Counsel for Energia, Brian Kennedy SC, effectively adopted the submissions made by Mr McGrath on behalf of Greencoat, and concentrated his submissions on other aspects of the applicants' cases. A particular focus of his submissions was the issue of the meaning and significance of the requirement in Article 13(7) to adjust compensation if it were "unjustifiably low" or "unjustifiably high".

145. Counsel noted that suppliers of wind and solar energy such as both applicants are, in practical terms, only ever going to be redispatched downwards; they all have priority dispatch, and bid at a price based on their anticipated maximum operational capacity. As additional operating costs due to redispatching are minimal, the compensation payable for redispatch downwards will always relate to the net revenues foregone, *i.e.,* as defined particularly in Article 13(7)(b).

"Unjustifiably low/high"

146. However, the financial compensation is required by Article 13(7) to "be at least equal to the higher of the following elements or a combination of both if applying only the higher would lead to an unjustifiably low or an unjustifiably high compensation…". This of course begs the question as to what is meant by "unjustifiably low/high", and how a calculation of compensation would satisfy these criteria.

147. The overarching principle which both applicants say governs the calculation is that Article 13(7) is intended to bring about a situation in which a generator which is redispatched downwards is compensated in a manner which ensures that it is put in the same position financially as if it had not been redispatched, *i.e.,* that a generator should be "economically indifferent to redispatch", and "made whole" by the compensation. The applicants contend that, in order for such compensation to operate

in this way, it must include revenues which would have been received from financial support schemes, and that Article 13(7) makes it clear that this is what should occur.

Examples

148. Examples of what the applicants consider to be appropriate measures of "unjustifiably low" or "unjustifiably high" compensation are set out by Mr Roberts at paras. 3.52 to 3.55 and paras. 3.56 to 3.62 respectively of his first report. Mr Kennedy helpfully summarised these examples in simple terms: see day 3, p.21, line 18 to p.25, line 6. It should be said that Mr Anstey does not accept that the examples, particularly that relating to the "unjustifiably high" criterion, are compliant with the terms of the Regulation: see paras. 169 to 184 of his first report in this regard.

149. An example of unjustifiably low compensation offered by the applicants relates to a scenario involving a "high efficiency co-generation plant" ('**HECGP**'). Such a plant might produce electricity, but also produce heat in the course of that process, which it would sell separately. To use Mr Roberts's example, if the price which would have been received in the DAM was €60 per MW, and the cost of producing such a unit was €50 per MW, redispatch downward may result in a revenue loss of €10 per unit. However, if the heat generated by the process could have been sold for €20 per MW, the generator may have to spend €20 per unit to ensure the supply under contract of heat to its customer. The generator will therefore have suffered a loss of revenue of €10 per MW, and incurred a cost of €20 per MW; the higher of (a) additional operating cost or (b) net revenue would be €20 per MW. The applicants contend that to be paid (b) only would result in "unjustifiably low" compensation, in that the generator would not be compensated for its total loss of €30 per MW. It is submitted that Article 13(7) provides for such a situation by allowing "a

combination of both" (a) and (b) – in the example, €20 plus €10 - to compensate for the actual loss to the generator.

150. The example of "unjustifiably high" compensation offered by the applicants concerns electricity supplied by a battery. In this scenario, it is assumed that there are two peak periods; in the first period, revenue of €80 per MW is obtainable and in the second, €70 per MW is obtainable. The cost of generation is €50 per MW. For the purpose of the example, the generator cannot operate in both periods. If the generator is dispatched down completely during the first period, it loses €30 per MW in revenue per unit. However, the battery can now be used in the second period – which would not have been possible if the generator had not been redispatched – so the loss of revenue is in fact only €10, *i.e.,* €80 minus €70. If the generator is paid the higher of (a) or (b), it would receive €30 per MW; but this would be "unjustifiably high", given that, in the circumstances, the loss would in fact only be €10 per unit.

151. Mr Roberts comments in his first report on this example as follows:

> "3.62 To achieve the market benchmark under this example, Article 13(7) affords the flexibility to combine elements (a) and (b). However, unlike the first case, this combination does not simply involve adding the two elements. The compensation would need to be based on combining a proportion of element (b) and element (a). The ability of the TSO to select an appropriate proportion of each element ensures it can emulate the market-based benchmark".

152. In the course of his submissions, Mr Kennedy stressed that circumstances where the higher of (a) or (b) does not give an appropriate level of compensation "are going to be very rare, it seems to us…" [day 3, pp. 53 to 54].

The SEMC's perspective on "unjustifiably low/high"

153. Counsel for Energia referred to the text of the Decision dealing with the SEMC's interpretation of the "unjustifiably high" test at p.22 *et seq*. The SEMC referred to the European Commission Proposal on which the Regulation was based and the accompanying impact assessment to that proposal. It concluded as follows:

> "In the view of the SEM committee, it is evident in light of this legislative history that a key purpose of the 'unjustifiably high' test contained in Article 13(7) is to allow an appropriate balance to be struck between the increase in policy costs resulting from compensation for the redispatch of renewable generation (having regard to such matters as the extent to which such costs are integrated into renewable subsidy schemes) and the increase of financing costs associated with such a generation due to higher market risk. The need for a balanced solution is a key consideration for the SEM committee in reaching the Decisions set out in this paper."

154. The SEMC goes on to set out its "decisions in relation to compensation", addressing in particular what it considers to be the "need to separate compensation mechanisms in terms of costs associated with lost revenues in the market and revenues associated with foregone government support" (pp. 25 to 26), and setting out the principles governing compensation based on whether the renewable units were commissioned prior to or after 4 July 2019: see the SEMC's own summary of its position in the statement of opposition in the Greencoat matter quoted at para. 69 above.

155. Mr Kennedy dealt at some length with the extensive treatment by Mr Roberts, particularly in his first report, of the approach of the SEMC to the "unjustifiably low/high" criterion in Article 13(7) and in the various reports from Mr Anstey and Mr Roberts which followed. A similar approach was adopted in relation to the treatment

by the respective economists of the separate but related issue of the differing treatment of generators based on their date of commission. I shall return to the evidence in my discussion of the issues later in this judgment. An issue arose between the parties as to the admissibility of the expert evidence – particularly, that of Mr Roberts – and submissions were made in this regard: see para 94 above. To the extent that the respective arguments of the parties require to be considered, they are addressed below.

The principles of non-discrimination/equal treatment

156. Counsel for Energia submitted that the different treatment of priority dispatchers based on the date of commissioning of their generators infringed against the principle of non-discrimination which the applicants contend applies to the electricity market. In Article 1 of the Regulation, quoted at para. 58 above, one of the stated aims of the Regulation is to "…set fundamental principles for well-functioning, integrated electricity markets, which allow all resource providers and electricity customers non-discriminatory market access…". Among the principles set out in Article 3 of the Regulation is Article (3)(q), which states that "…market participants shall have a right to obtain access to the transmission networks and distribution networks on objective, transparent, and non-discriminatory terms". Article 13 itself requires at sub-Article 1 that redispatching must be based on "objective, transparent and non-discriminatory criteria".

157. Counsel submitted that the Regulation intended for a general principle of "equal treatment" which requires persons in the same situation to be treated in the same way, and which it was contended was a general principle of Union law. Counsel accordingly submitted that differing treatment of generators that benefit from priority

was inconsistent with these principles, unless the difference in treatment could be objectively justified.

Bidding code of practice ("BCoP")

158. Commercial bids and offers are formed and priced for certain actions in the balancing market according to a code of practice known as the "bidding code of practice" or "BCoP". The BCoP is due to be replaced by the "balancing market principles code of practice" or "BMPCoP".

159. In a letter of 27 May 2022 to Wind Energy Ireland, the CRU appears to suggest that the BCoP and the BMPCoP will continue to apply in their current form even after market based redispatch has been implemented in the SEM. The applicants complain that this position is not clearly identified in the Decision itself; they contend that no reasoning is provided in respect of this position, and that it is in any event incompatible with marked based pricing.

160. It is submitted by the applicants that, in the case of renewable generators, BCoP prevents them from incorporating their true opportunity costs of generating by requiring them to exclude certain matters such as foregone financial supports such as REFIT or RESS supports, CPPA revenues *etc.* It is contended that BMPCoP provides for revisions to "eligible cost" items where required, although the letter of 27 May 2022 appears to rule out any such revisions. The applicants contend that this also means that generators would not be permitted to bid at a price that reflects the true opportunity cost of redispatch, and therefore would not represent a market-based dispatch regime. This is notwithstanding that the stated intention of the CRU is to implement a system of market-based redispatch which is subject to bidding controls.

Corporate power purchase agreements

161. Corporate power purchase agreements ('CPPAs') are arrangements whereby a generator (typically a renewable generator) agrees to sell its electricity to a business at a fixed price. As Mr Roberts put it at para. 4.76 of his first report:

> "…companies may wish to purchase electricity from renewable sources. They may do so by concluding a Corporate Power Purchase Agreement (CPPA) with a renewable generator, in which they agree to purchase electricity at an agreed price which may be higher or lower than expected market prices. In the SEM, CPPAs typically take the form of Contracts for Difference (CFDs) under which generators will make a payment to a corporate purchaser or receive a payment from a corporate purchaser depending on whether the price agreed in the CPPA is above or below a market reference price (typically the day-ahead price). The revenues which a generator with a CPPA receives for their electricity are unlikely to be equal to the day-ahead price."

162. In his first affidavit in the Energia proceedings, Mr Melvin on behalf of the CRU avers as follows:

> "90. As regards the foregone financial support that can be taken into account, I note at para. 58(v)(c) of the Statement of Grounds, the Applicants appear to suggest that privately negotiated [CPPAs] should be considered a form of 'financial support' under Article 13(7). This would suggest that a PPA entered into by a fully merchant facility (*i.e.*, one developed without a government support contract) would be compensated, which is not the intent of the Regulation.
>
> 91. The policy across the EU is that CPPAs are encouraged to avoid the need for State backing of projects. The CRU considers support as State support. CPPA policy is designed to remove the need for State support. The CRU is at

> a loss as to how CPPAs and/or their operation could be in any way covered by the Decision.
>
> …93. CCPAs are not transparent to Regulatory Authorities and it is the CRU's view that they are not included in the scope of Article 13(7). Put simply, the CRU is a stranger to third party commercial contracts where it has no oversight or privity of contract. In this context, it is also relevant to note that the Regulation is part of a broader legislative package including Directive 2018/2001 on renewable electricity which draws a clear distinction between a "support scheme" and a "renewable power purchase agreement".

163. While the issue is traversed in the affidavits, the essential point made by the applicants is that there is no practical difference between a generator supported by RESS – which also operates on a CFD basis – and a generator with a CPPA. As Mr Peter Bailie avers at para. 55 of his second affidavit on behalf of Energia

> "…if difference payments CPPA revenue is not taken into account in calculating 'net revenues from the sale of electricity' then the compensation would be unjustifiably low or unjustifiably high (depending on whether the difference payment was positive or negative) as it would not reflect opportunity cost, which is what generators would bid to be redispatched if it was market based. In this case, the TSO would be bound to use a combination of limbs (a) and (b) to ensure that the generator is compensated at its opportunity cost".

164. As with the issue in relation to foregone financial supports, the applicants maintain that Article 13(7) requires inclusion of all net revenues which have been foregone in the case of redispatch, and that there is in essence no difference between a payment under a CPPA and a payment under RESS.

165. In any event, the applicants make the point that this issue is simply not addressed in the Decision itself, and that the respondent is not entitled to rely on explanations after the fact to justify positions which it wishes to adopt.

The Decision is in breach of Article 15.2.1 of the Constitution

166. The applicants contend that the role of the CRU is limited to giving effect to Article 13(7) of the Regulation by way of administrative decision, and that the CRU has no power to alter the principles or policies set out in the Regulation, which have clearly been determined by the EU legislature in enacting the Regulation.

167. The CRU's interpretation of its mandate is set out by Mr Melvin at paras. 33 to 37 of his first affidavit of 17 November 2022 in the Energia proceedings. He refers to the Directive and the various obligations on regulatory authorities to ensure compliance in the market with their obligations under the Directive, and at para. 36 avers as follows:

> "The 1999 Act, which, together with associated legislation, has transposed the Electricity Market Directive, confers upon the CRU (and, when taking decisions on its behalf, the SEMC) broad, expert and independent decision-making authority in relation to matters such as those in issue in the present proceedings".

168. However, the applicants contend that this alleged broad decision-making power does not extend to administrative decisions the purpose of which is to give effect to the terms of the Regulation. They argue that, if there were such a power, it would be in breach of Article 15.2.1 of the Constitution, which provides that:

> "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".

169. In this regard, the applicants rely on the decisions of the Supreme Court in *Meagher v Minister for Agriculture* [1994] 1 IR 329 and *Maher v Minister for Agriculture* [2001] 2 IR 139; in its written submissions, Energia, after analysing the two decisions, expresses its net position as follows:

> "It is clear from ***Meagher*** and ***Maher*** that, where the implementation of EU law is effected by secondary legislation or an administrative act, as here, this will be *ultra vires* and in breach with Article 15.2.1 of the Constitution if the secondary legislation or administrative decision goes further than simply implementing details of principles or policies to be found in the Regulation". [para. 109] [Emphasis in original]

170. In essence, the applicants argue that the respondents' role in giving effect to Article 13(7) does not extend to exercising policy functions or making decisions in that regard; but that if it could be said to have such a function or power, such policies can only be enacted in accordance with Article 15.2.1, and cannot be effected by administrative regulation.

Irrelevant considerations

171. It follows from the position adopted by the applicants that, in exercising the "broad, expert and independent decision-making authority" to which Mr Melvin referred, the CRU has, according to the applicants, had regard to a range of irrelevant considerations, which are set out at para. 91 of Energia's written submissions as follows:

> "(i) The balance of risk between consumers and generators and the objective of consumer protection.
>
> (ii) The utility of curtailed electricity.

(iii) The limited funding available to invest in programmes to reduce the overall level of curtailment and facilitate higher levels of renewables on the system.

(iv) The specific characteristics of the SEM, in relation to system wide curtailment that are not reflected in other Member States.

(v) The relatively high level of instantaneous renewable penetration (SNSP) in Ireland and Northern Ireland.

(vi) Whether giving effect to Article 13(7) would represent an additional cost and risk to consumers based on the level of support provided to renewable generators and the day-ahead market price over time.

(vii) The differences between the jurisdictional renewable energy support schemes.

(viii) The interaction of Article 13 of the Regulation with the electricity balancing guidelines network code (EGBL).

(ix) The overall costs of providing compensation for curtailment of firm generators up to the level provided for in Article 13(7).

(x) The current high prices of electricity which underpinned the Decision to delay collection to tariff year 2024/5.

(xi) Whether generators are priority dispatch or not.

(xii) The 'absolute nature' of priority dispatch applied in the SEM.

(xiii) A consultation response submitted by an industry body in relation to a different version of the Regulation." [Attribution footnotes omitted].

Statement of opposition/duty to give reasons

172. Energia in particular makes sustained complaint about the statement of opposition in its proceedings. It refers in particular to O.84, r.22(5) of the Rules of the Superior Courts, which provides as follows:

> "It shall not be sufficient for a respondent in his statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (except damages, where claimed)."

173. Energia contends that there has been wholesale breach of this sub-rule, which Mr Baillie on behalf of Energia avers at para. 7 of his second affidavit of 20 February 2023 "…has made it impossible for the applicants to understand fully the grounds on which the respondent opposes each of its grounds and/or the extent to which the facts and particulars pleaded by the applicants in support of those grounds are disputed. The applicants will object to any attempt by the respondents to advance any case which is not pleaded in the statement of opposition at the hearing of this action".

174. Counsel made reference to the decision of Eagar J in *Bergin v Child and Family Agency* [2017] IEHC 50 as a case in which the court struck out a statement of opposition on the basis of non-compliance with O.84, r.22(5). Counsel stated that Energia was not seeking such relief in the present case, but submitted that any attempt by the respondent to advance reasons or justifications not advanced in the statement of opposition would be resisted.

175. In addition to an alleged failure to set out its grounds of opposition, the applicants both contend that the respondents failed to give adequate reasons for the

matters set out in the Decision: see Greencoat written submissions paras. 100-108, and Energia submissions paras. 112-121 in this regard. The applicants assert that the duty to give reasons is to be found in Article 296 TFEU which imposes a duty to give reasons in respect of all legal acts, including implementing acts, and Article 41 of the Charter of Fundamental Rights of the European Union ('the **Charter'**), which provides for a right to good administration, and expressly provides for "the obligation of the administration to give reasons for its decision".

176. The applicants placed particular emphasis on the decision of the Supreme Court in *Connelly v An Bord Pleanála* [2018] IESC 31 in this regard. At para. 6.15 of his judgment, Clarke J, having reviewed other Supreme Court authorities on the duty to give reasons, stated as follows:

> "…it seems to me that it is possible to identify two separate but clearly related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the Decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review".

177. Among a number of cases cited by counsel for Energia was the Decision of Hyland J in *Jackson Way Properties Limited v The Information Commissioner* [2020] IEHC 73. This case concerned a statutory appeal under the Freedom of Information

Act 2014 brought by the applicants in relation to a decision of the Information Commissioner made on 23 January 2019 whereby the Commissioner upheld the decision of Dun Laoghaire Rathdown County Council to refuse the first named applicant's request to access certain records. The applicant appealed the decision to the High Court.

178. In the course of the appeal, the appellants sought the exclusion of certain paragraphs of an affidavit proffered by the respondents on the basis "that a deponent may not seek to supplement an administrative decision or provide evidence of intention in relation to that decision by way of affidavit evidence" [para. 29]. At para. 32 of the judgment, the court set out a paragraph of an affidavit which offered an interpretation of part of the decision. At paragraph 33 of the judgment, Hyland J stated as follows:

> "In my view, this paragraph seeks to supplement or vary the Decision by explaining what certain passages in the Decision meant, to what extent they were material to the Decision and their impact on the Decision as a whole. This seems to me an impermissible attempt to add to the Decision in the way criticised in [State Crowley v the Irish Land Commission & Ors. [1951] IR 250]. The Decision must stand or fall on its own terms and should not require to, or be permitted to, [be] read in conjunction with a later explanation...".

179. At paras. 34-35 of her decision, Hyland J indicated that the court would disregard a further paragraph of the same affidavit "as it seeks to supplement reasoning in the Decision insofar as reasonableness is concerned".

180. In the present case, the court asked counsel for Energia whether the contended failure to give adequate reasons or giving of rationales in the affidavit which should have been given in the Decision itself were sufficient of themselves to justify the

relief of *certiorari* sought. Counsel answered emphatically in the affirmative. Of the eight matters set out at paras. 114-121 in Energia's written submissions, counsel relied particularly on the eighth of these grounds at para. 121:

> **Eighth** The CRU has sought impermissibly to expand or elaborate on the reasoning in the Decision in the affidavits and expert evidence delivered on its behalf in these proceedings. This is not permissible (*State (Crowley) v the Irish Land Commission* [1951] IR 250, *Jackson Way Properties v The Information Commissioner* [2020] IEHC 73; *Utmost Paneurope DAC v Financial Services and Pensions Ombudsman* [2020] IEHC 539, para. 80)." [Attribution footnote to the first sentence of this quote is omitted for reasons of brevity).

Correspondence on the meaning of the Decision

181. By way of supplement to the submissions of Mr Kennedy on the issue of adequacy of reasons, Mr McGrath briefly referred to the correspondence between the stakeholders immediately subsequent to the issue of the Decision in March 2022. This comprised communications, not just from each of the applicants, but also from the representative bodies Wind Energy Ireland and RenewableNI. By letter of 8 April 2022, the latter bodies wrote a joint letter which sought clarification of "several immediate queries" in advance of the "RESS 2 auction window", and expressing the view that "…in the absence of receiving a sufficient response to these questions… we believe that bidders…will be required to make assumptions that could be wildly different and could potentially lead to damaging outcomes for themselves and for the end consumer". A further joint letter of 20 April 2022 from those bodies raised several specific queries on various aspects of the Decision.

182. Energia also wrote by letter of 20 April 2022 to the CRU and NIAUR in which it identified "a number of serious concerns" in respect of which it anticipated corresponding "in due course", but identifying "one matter of particular priority in respect of which we expect a clarification from the SEM committee as a matter of urgency. This is the determination of the compensation to which generators are entitled under Article 13(7) of the Regulation…".

183. The letter contended that the Decision "does not make a final decision in relation to the entitlement of generators to compensation under Article 13(7) of the Regulation" … and went on to comment as follows:

> "…it is impossible to understand the significance of a determination that the application of Article 13(7) may result in an unjustifiably low or an unjustifiably high compensation, without knowing what compensation a generator is entitled to in the case of such a finding. This fundamental lack of clarity gives rise to very significant concerns on the part of market participants because it places them in an invidious position in which they cannot make any meaningful assessment of the implications of the Decision Paper for their business, including their current operations and future investment plans.
>
> We therefore respectfully request that the SEM Committee confirm that none of the views, opinions, principles or decisions expressed in the Decision Paper in relation to the determination of compensation under Article 13(7) constitute decisions of the SEM committee until such time as a final decision is made on all outstanding matters pertaining to Article 13(7), at which time market participants can evaluate a single decision on the proper implementation of Article 13(7)…".

184. By letter of 21 April 2022, Greencoat wrote to the CRU and NIAUR jointly in similar terms. It pointed out that:

> "The Decision Paper does not make a final decision in relation to the entitlement of generators to compensation under Article 13(7) of the Regulation…. It is impossible to determine from the Decision Paper precisely what parts of the Decision Paper are intended to be decisions and, to the extent that decisions have been made, what the implications of those decisions are in the absence of other decisions. The Decision Paper appears to contain a mix of observations (which may or may not be decisions) and decisions on subsidiary elements of the compensation mechanism which cannot be contextualised given the absence of an overall decision on Article 13(7). There are also a multitude of matters that remain to be decided, but without which it is impossible to understand or interpret the implications of the decisions that appear to have been made."

185. The CRU and NIAUR responded by letter of 29 April 2022 to the letter of 8 April 2022 from Wind Energy Ireland Limited and RenewableNI, the parties having had an engagement on 25 April 2022. The letter enclosed an appendix setting out detailed responses to various queries raised. By letter of 13 May 2022, Greencoat wrote to the CRU/NIAUR setting out the further queries which it had indicated in its previous letter of 21 April 2022 that it would be raising. By subsequent letters from the SEMC to Energia and Greencoat, the SEMC expressed the hope that the detailed response letters to Wind Energy Ireland/RenewableNI "has provided clarity on the SEM committee decisions in this area".

186. By letter of 27 May 2022 to Greencoat, the SEMC referred to the letters to Wind Energy Ireland/RenewableNI as providing "some initial clarity" on the SEM

committee decisions, and included a response to various queries raised by Greencoat in its letters of 21 April and 13 May 2022. The letter also confirmed "that the text boxes which appear in the Decision paper are used to draw attention to key elements of the relevant decisions, but do not limit the scope of those decisions".

187. Counsel expressed some bemusement at a situation in which the "participants in a process had to raise questions like this to understand what was the outcome of the process, not even understanding what the Decision was, never mind getting into what the reasons were for the Decision" [day 4, p.94, lines 20-25]. It was submitted that there was "…a fundamental confusion about what has actually been decided in the Decision paper" [day 4, p.96, lines 19-20]… "the SEM committee were not taking the position that clarity was not required…it was necessary to have the whole series of post-decision clarifications because the reasoning in the Decision itself was so poor…" [day 4, p.98, lines 18-25]. Counsel submitted, in response to a direct question from the court, that the correspondence could not be taken into account as giving reasons for the Decision as it came into existence after the Decision was delivered [day 4, p.100, lines 7-15].

Submissions of the respondent generally

188. In its written submissions, the respondent contends at the outset that "…the Decision is not contrary to the Regulation, nor does it give rise to any of the other breaches alleged by the Applicants. The Decision is consistent with Article 13(7) and the Regulation more generally" [para. 4]. As para. 8 of the written submissions puts it "…as regards the taking into account of foregone financial support, the SEMC decided that in order to reflect the jurisdictional nature of the support schemes present across the SEM, the Decision in relation to the financial compensation related to the

incentive schemes would be made jurisdictionally. Therefore, individual decisions on this aspect are to be taken in the future at the jurisdictional level" [para. 8].

189. The respondent also acknowledges the differentiation for compensation purposes between renewable units commissioned before and after 4 July 2019. It was suggested that "this approach…allows for further engagement with the respective departments of government in both market jurisdictions" [para 10]. At para. 13, the respondent's position is summarised as follows:

> "…The Decision strikes an appropriate balance between the interests of generators, consumers and other stakeholders, the aim of de-carbonisation and the fact that in an electricity market covering two jurisdictions, the ultimate decision as to levels of compensation for specific units should be taken at the jurisdictional level by the Irish and Northern Irish regulatory authorities respectively, albeit in light of the broader principles set out in the Decision. The precise approach at the jurisdictional level and, in particular, the question of when units benefitting from priority dispatch may be able to establish *good cause* as to why they should be compensated up to the level of foregone support, is a matter to be addressed further and ultimately a decision to be made on a unit-by-unit basis by the regulators in each jurisdiction" [emphasis in original].

190. Michael Collins SC, on behalf of the respondent, made detailed and very helpful submissions to the court to set out comprehensively the respondent's position, with Ciaran Lewis SC dealing with certain specific legal issues which I shall address below. Mr Collins emphasised that the "fundamental issue of the interpretation of Article 13(7)" which was "ultimately a question of law…a question of construction of certain words in Article 13(7)" was a task to be conducted in accordance with the

principles of interpretation of European legislation which would involve having regard, not just to the Regulation itself, but its "parent directive and the whole process that led up to it and the overall context" [day 4, p.107, line 22 to p.108, line 3].

191. In this regard, Mr Collins spent a substantial amount of time dealing with the respondent's own "guide" to the SEM and the more detailed "industry guide" produced by Eirgrid, with a view to demonstrating how the SEM works in practice. Counsel also brought the court through the Commission proposals for the Directive and its impact assessment. Counsel then addressed the Directive and the Regulation itself, and the debate reflected in the two consultation papers which led to the Decision.

192. In considering the respondent's submissions on Article 13(7), there is no doubting the centrality of the "unjustifiably low/high" criteria. As the respondent remarked at para. 50 of its written submissions:

> "Had the reference to *unjustifiably high* (and *low*) compensation not been included, Article 13(7) would have been quite different and potentially a provision with direct effect".

193. The respondents contend that:

> "56. The gist of the Applicants' argument is that Article 13(7) must be interpreted in a narrow way, with a goal of ensuring that a generator is entirely indifferent to whether it is redispatched or not. But narrow interpretation is not support by the wording or context. Had such a narrow approach been intended, it would have been expressed… [61] In light then of its wording, context and objectives, Article 13(7) and, specifically, the unjustifiably high compensation proviso, is a relatively broad provision that affords Member States discretion as to how it is applied".

The timeliness of implementation

194. The applicants complain that the respondent, in not providing for a definitive system of compensation by 01 January 2020 and in particular leaving the issues surrounding the matter of financial support to be decided by the respective governments and deferring compensation for curtailment to October 2024, has failed to implement the Regulation which the respondents accept is directly applicable.

195. The respondent does not accept that it has failed to implement the Regulation. Its position is that it is "in the middle of the process of implementing Article 13(7)" [day 4, p.158, lines 1 to 3]. Counsel referred to the complexity of the Regulations, and the fact that the respondent was "undoubtedly actively implementing them…undoubtedly engaging in consultation and responding meaningfully to the consultation, changing its mind as appropriate…unless the time it has taken to go through that process can be seen to be so outrageous as to again be beyond the regulator's jurisdiction, that they have gone completely beyond the boundaries of their proper jurisdiction, no legal criticism can be made to found any order against the CRU simply because we are where we are at the moment in 2023 and still progressing with the process of completing the compensation process" [day 4, pp. 147 to 148].

196. The respondent argues that the fact that Article 13(7) has not been implemented in full is a matter within its scope of discretion, and as such is not amenable to judicial review. The respondent also relies on the point made in its list of issues as set out at para. 89 above, *i.e.,* that an alleged failure to act on the part of the regulator is a matter for the Commission, which can take infringement proceedings, and that no relief should be available to the applicants.

Unjustifiably low/high: the respondent's perspective

197. Counsel referred to the applicants' position in relation to the interpretation of Article 13(7), describing it as follows:

> "The interpretation that my friends proffer of that is that the resulting compensation to the generator must be such as to one hundred percent compensate the generator for any income stream of any sort that it has lost as a result of the redispatching. And that's frequently expressed in the papers by saying that the generator would be indifferent as to whether or not he is redispatched. So it is an absolute requirement in the sense that therefore the regulator, according to them, has no discretion in the matter at all, it just has to give one hundred percent compensation for everything that is lost, no matter what the nature of what is lost" [day 5, p.46, lines 16 to 27].

198. Counsel described this approach as "simply wrong". Counsel made reference to the fact that, given that, for wind and solar operators such as the applicants, the measure of loss would always be according to Article 13(7)(b) – because such producers have no additional cost due to redispatch – if the principle were that the generator should always be indifferent to redispatch, such a generator would always get one hundred percent of its lost revenues. It is submitted that Article 13(7), in providing that such lost revenues may be "unjustifiably high", clearly by its own terms suggests that "making whole" the operator may be "unjustifiable". It is contended that, if the intention of the Regulation had been that the operator should be no better or worse off as a consequence of redispatch, it could simply have said that; counsel submitted that "…in fact it says entirely the opposite. Because it incorporates into the assessment of the compensation the overarching principle that the Regulator has to make a judgment as to whether the revenues…give an unjustifiably high level of compensation…" [day 5, p.52, lines 6 to 11].

199. Counsel accepted that the financial supports are part of the financial net revenues set out in Article 13(7)(b). However, it was submitted that the respondent was entitled to look at whether the combination of market revenue and government subsidies produced a level of compensation that was unjustifiable.

200. In this regard, the Decision has differentiated between renewable units commissioned before and after 4 July 2019. In effect, there is a presumption in the case of units commissioned after 4 July 2019 that the lost financial support revenue will not cause the compensation to be "unjustifiably high", with the opposite presumption applying to units commissioned prior to that date. The pre-4 July 2019 generators have the benefit of priority dispatch; essentially, the Decision provides that, given this advantage, they will be required to show the Regulator "good cause" why, in those circumstances, the combination of lost revenue and financial support should not be considered "unjustifiably high", particularly in circumstances where those generators made their decision to invest at a time when they had no expectation of receiving compensation for lost financial supports.

Documents providing context for the Decision

201. Mr Collins dealt at some length with certain documents and papers which gave context to the Decision. He referred in particular to the SEM consultation paper of 27 April 2020 on the implementation of the Regulation in relation to dispatch and redispatch (SEMC-20-028). The paper canvassed a large number of issues which counsel contended demonstrated the complexity of designing a system of compensation for redispatch which gave appropriate effect to the Regulation. Debate occurred around two matters in particular: the issue of constraint and curtailment, and whether they should be regarded as market-based redispatch or non-market-based redispatch, and what counsel contended was "the need to create signals and incentives

for people who are considering investing in renewable generators and try to incentivise people to locate in areas where the grid has the capability of accepting large amounts of electricity from generators and accessing the system…" [day 5, p.60, lines 2 to 7].

202. It was submitted that it is clear from the overview in the consultation paper that there were very many ways in which compensation could be handled, and that a level of judgment and discretion was required in the design of the system, and that to regard Article 13 as a self-executing measure that required no discretion as regards implementation to be exercised was incorrect. It was contended that the applicants' case was that no weight should be given by the SEMC to factors such as cost, the intricacies of incorporating financial supports, the interests of consumers *etc*, and counsel submitted that "no responsible regulator could possibly take that view and that could not possibly be the proper interpretation of Article 13(7)…" [day 5, p.87, lines 28 to p.88, line 11].

203. Counsel referred to the responses from each of the applicants of 22 June 2020 which, it was suggested, acknowledged that there were very complicated issues which required to be addressed in the implementation of the Regulation, and also the Commission proposal of 30 November 2016, COM (2016) 861 and impact statement which highlighted "…the type of considerations that are fundamental to underpin the Directive and the Regulation, the policy imperatives that they are trying to achieve through the Regulation, which must be taken account of by the Regulators…it is clear that the [unjustifiably high] test was adopted…for reasons to do precisely with these type of multifaceted factors that have to be considered by regulators when they are trying to design the system and design systems of compensation and everything else.

Within, of course, the parameters of whatever is laid down by the Regulation". [day 5 page 112 line 20 to page 113 line 13]

204. Counsel also referred to the SEMC consultation paper of 23 April 2021 (SEM-21-026), its "proposed decision" (SEMC-21-027) of that date, and the responses of Greencoat and Energia, both by letters of 9 July 2021. The CRU at that time was still minded to approach the question of compensation on a general basis, rather than generator-by-generator, and was still against allowing compensation for lost financial revenues for electricity that was never produced (*i.e.,* in downward redispatch). Counsel summarised the respondents' view of the approach to be taken by the court as to the manner in which the SEMC exercised its discretion as follows:

> "…You are only concerned with a very high level question of whether the mechanism that they have adopted is compatible with the Regulation and is part and parcel of the way in which they are implementing the Regulation or whether it is obstructing the implementation of the Regulation. And you only even get into what I might call the classic judicial review type situation where it is the case that all of these factors were patently irrelevant considerations that should never be considered in the design of a market structure. But they are obviously relevant considerations to be considered in the design of a market structure because the whole objective of the Directive and the Regulation and the energy union is all about creating these incentives and sending the appropriate price signals to investors, to suppliers, to generators and so forth and all with a view to, ultimately, the benefit of consumers. These are all relevant factors that are appropriately considered in deciding the design of a system". [Day 5, p.117, line 26 to p.118, line 16].

Generators pre-and post-4 July 2019

205. In relation to the alleged discrimination between generators prior to and post 4 July 2019, it was submitted that the SEMC's task was to set up a mechanism by which compensation could be assessed, and that factors taken into account by the Regulator were ones which it was entitled to consider. The pre-4 July 2019 generators benefit from priority dispatch; the generators commissioned after this date do not. The former generators made their investment decisions at a time when they had no expectation of receiving such financial supports as part of their compensation. Counsel also referred to the necessity to incentivise new investors who will not have priority dispatch but will have the benefit of a presumption in their favour that the receipt of financial supports will not render their compensation "unjustifiably high".

206. As the Decision itself expresses it at p.24:

> "In the view of the SEM committee, it is evident in light of this legislative history that a key purpose of the "unjustifiably high" test contained in Article 13(7) is to allow an appropriate balance to be struck between the increase in policy costs resulting from compensation for the redispatch of renewable generation (having regard to such matters as the extent to which such costs are integrated into renewable subsidy schemes) and the increase of financing costs associated with such generation due to higher market risk. The need for a balanced solution is a key consideration for the SEM committee in reaching the Decisions set out in this paper".

207. The respondent submits that the "indifferent to redispatch" test for which the applicants advocate "…would render the unjustifiably high test almost entirely meaningless, because it could hardly ever operate except conceivably in very remote and unusual circumstances…" [day 5, p.159, lines 7 to 19]. The respondent points out that the initial Commission proposal for the Regulation did not provide for

compensation up to the level of foregone support, but in fact allowed for only ninety percent of the net revenue together with lost financial support; while this provision was removed in favour of an "unjustifiably low/high" test in the Regulation, the applicants argue that it shows that the Commission did not at that time intend that full compensation to the level of foregone support should be automatically available.

Supports a matter for the two governments

208. Counsel submitted that it was important that the design of the mechanism for the collection of foregone government supports would be consistent with the forms of schemes the governments were operating. This was referred to as a "political necessity" given the nature of the SEM as an all-island electricity market; in the aftermath of Brexit, Article 9 of The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ L 29/7 (the "**Northern Irish Protocol**") retained the application of EU law to the electricity market. Counsel described this as "one of the very important and…sensitive exceptions to the Brexit decision in the United Kingdom…decisions have to be made taking into account those sensitivities" [day 5, p.140, lines 13 to 28].

209. Counsel summarised the net position of the respondent that the SEMC's decision in relation to financial compensation related to the incentive schemes would be made jurisdictionally as follows:

> "So in circumstances where there are quite different schemes in the two jurisdictions, where even within each jurisdiction there are different schemes in operation, where it is clearly undesirable that the taxpayers of one jurisdiction could subsidise the generators of another, I would respectfully say there can simply be no objection as a matter of the *vires* of the regulators to a

jurisdictional approach which they have taken to disentangle and to distinguish the elements that go up to make a total compensation package at the end of the day and to enable a final decision to be arrived at by the relevant authority as to the level of compensation to be given in accordance with Article 13(7)" [day 5, p.165, lines 10 to 23].

Phasing out of compensation for curtailment

210. The applicants complain that the particular measures for compensation associated with curtailment for priority dispatch units will be phased out: see para. 72 above. The respondent contends that this simply relates to the fact that more market-based solutions will be adopted in the future, in accordance with the preference in the Regulation for such a course. The respondent considers this a function of future market design, as the need for distortions in the market caused by subsidies and priority dispatch gradually disappears with the increase in renewable generators to a point where market principles can determine supply and price to the benefit of consumers.

211. Counsel submitted that there is no basis on which the court can be requested to interfere in relation to matters which may occur in the future in the context of the market design of an "enduring solution" based on market principles.

Submissions on the experts' evidence

212. Both Mr. Kennedy on behalf of Energia and Mr. Collins on behalf of the CRU spent a considerable amount of time making submissions in relation to the contents of the various reports of the experts. Mr. Kennedy's submissions to the court in this regard may be found at Day 3 pages 39 to 126; Mr. Collins' submissions are at Day 5 page 171 to Day 6 page 89. I have given the general gist of the arguments of both experts which emerge from their respective first reports at para. 105 to 111 above.

Both Mr. McGrath and Mr. Kennedy in turn referred in the course of their replies to the submissions of Mr. Collins in relation to the experts' reports.

213. Rather than summarise the various submissions, I propose to refer to them, to the extent that I consider them relevant, in the discussion and analysis of the issues set out below. However, it is appropriate to consider briefly the extent to which the evidence of the experts may be taken into account by the court.

214. Both experts offer an economic analysis of the factors which they consider form the basis for the system of compensation set out in Article 13(7). The contention is made by the respondent that Mr. Roberts strays from his analysis by offering an interpretation of what Article 13(7) means – a legal matter which is solely for the court. This was refuted by Mr. Kennedy in his submissions: see Day 3 pages 132 to 143 in particular. Counsel referred to the Decision of Heslin J. in *Re Custom House Capital Ltd (in liquidation)* [2021] IEHC 842: in that case, an economist retained by one of the parties furnished an opinion as to whether certain worked examples and valuation methodologies were "inconsistent with the economic and financial principles underlying the provisions and purpose of the [Investor Compensation Act, 1998]".

215. The economist – Dr. da Silva – referred to the issues which he was asked to address, which were "the very issues which this court is asked to determine and these can be said to be or to involve questions of law" [Heslin J., para. 100]. Dr. da Silva stated that "I do not attempt to opine on the correct interpretation of any legislation, which is a matter of law". The Investor Compensation Company DAC ["**ICCL**"] objected to Dr. da Silva's evidence, contending that his report was "of no probative value … an opinion based on an economic and financial perspective is not relevant to the meaning and effective law of the relevant section…" [para. 103 of judgment].

216. Heslin J., in addressing Dr. da Silva's report in the context of this objection, stated as follows:

> "226. From para. 1.28 [of the expert's report] onwards, Dr. da Silva makes clear what his instructions were and he sets out what are, in effect, the six questions which this Court has been called upon to answer. These are undoubtedly questions of law but it does not appear to me that there is anything inappropriate about Dr. da Silva (a) referring to the questions; (b) making clear what his instructions are as regards those questions; and, (c) providing his expert opinion as regards the consequences of the interpretation contended for by the ICCL in the context of those question [sic] which the court is asked to answer. It is also perfectly clear from para. 1.29 that Dr. da Silva is not attempting to opine on the correct interpretation of any legislation and that he properly accepts that the question of interpretation is a legal issue and one for the court alone. I do not accept that it is fair to criticise Dr. da Silva for providing his views with regard to the objectives of the Directive and whether the consequences of what is contended for on behalf of the ICCL would accord with those objectives. I do not accept that the mere fact Dr. da Silva makes clear that for the purposes of his report, he is instructed to assume that the interpretation contended for by the ICCL is incorrect, means that this Court can or should disregard the expert views proffered by Dr. da Silva which do not constitute opinions on the correct interpretation of legislation…"

217. In the present case, both experts set out their qualifications and the ambit of their instructions. They each offer an economic analysis of the electricity market generally, and of policy issues which they consider inform both the regulation and the

Decision. They acknowledge that these are not intended to offer legal interpretation of either measures.

218. However, the respondent takes exception to the reports of Mr. Roberts; while it accepts that he acknowledges at para. 3.23 of his first report that the interpretation of Article 13 is a legal matter on which he does not opine, it is contended that, in providing the particular view of what he says is 'the economic rationale' for Article 13, he "inappropriately advocates for one particular interpretation of Article 13, even if he couches this as being *economic* interpretation …" [para. 47 written submissions: emphasis in original]. The respondent submits that the meaning of Article 13(7) "is a legal question for the court … it is not open to the court to receive expert evidence of any matter of the law of the State, whether of Irish or EU law…" [para. 48 of the respondent's written submissions].

219. It will be perhaps painfully obvious to the reader of this judgment that the regulation of the electricity market gives rise to difficult issues involving complex economic concepts and policies. This court has found the reports of Mr. Roberts and Mr. Anstey to be of enormous assistance in elucidating such matters, providing an understanding of how the market works, and what the competing economic interests are which inform the respective approaches of the applicant and the respondent. Mr. Roberts has an unequivocal view of the dominant economic rationale which he contends underlies Article 13(7), and has expressed that view eloquently and at length. Mr. Anstey has equally eloquently taken issue with Mr. Roberts' opinion, and in particular stresses the view that the applicant is entitled and indeed obliged to take into account a number of different economic factors in giving effect to an appropriate methodology for the compensation required by Article 13(7). I do not think however that the fact that Mr. Roberts's view, if accepted by the court, would lead inexorably

to the interpretation of Article 13(7) for which the applicants contend should mean that he should not be entitled to express that view.

220. I accept that the approach of Heslin J. in *Custom House Capital* is appropriate also in the present case. No application has been made to this court to disallow Mr. Roberts's evidence. There is no dispute between the parties as to the legal position; the interpretation of the Regulation is entirely a matter for the court, and the views of the experts, while helpful, will not be considered by this court as indicative, much less determinative, of the legal meaning of the Regulation.

221. Mr. Collins summarised the dispute from the respective economic perspectives of the parties in his submissions to the court. Though lengthy, this passage captures the essence of the dispute from the respondent's point of view:

> "Ultimately I think the dispute between the economists, insofar as it is relevant to the interpretation of the Regulation, is a dispute as to whether the regulators are mandated by the Regulation to make the generators whole when they are redispatched, in the sense of giving them compensation right down to the last cent of exactly what they would have received if they had not been redispatched and, therefore, making them indifferent to redispatch; that you are supposed to combine A and B in such a way as to bring about that result even though you consider it is unjustifiably high. Because, remember, you only get into the business of combining A and B where you have to come to the conclusion that it is unjustifiably high. Combining A and B is the remedy for unjustifiably high, it is not the means by which you work out it is unjustifiably high."
>
> So you either take that very narrow interpretation or else you say, actually there is a range of factors that are properly and could properly be considered

by a regulator in deciding what is unjustifiably high. And they are things like … the desirability of incentivising new investors to locate in less constrained areas; there is the desirability in designing a system so that the amount of compensation paid by consumers is minimised; the desirability of designing a system so that you don't transfer benefits or surplus from consumers to generators without some reason to do so such as some increase in efficiency or something of that sort; the significance of priority dispatch for the existing generators and the value of that priority dispatch which is, as I say, not just something casual or a policy whim but is built into the whole structure, starting with the Directive, the Regulations, the legislation and the statutory instruments and the SEM committee decisions that I outlined [to the court] this morning in that balancing market statement; the potentially distorting effects of permitting compensation to be paid in respect of entirely private contractual arrangements to remunerate generators for what they get where the State entities and the regulators have no control at all over what those private contractual arrangements might be…

… it is actually a discretionary business that the regulators are in, discretionary in the sense that they have to make an evaluation of a range of factors whatever those factors may be; or does it just seem indifferent to the outcome, indifference to redispatching? That is really a part of the issue that [the court has] to decide…

… so when you ally all of that to the fact that [what] the Decision actually does is to say that all of these compensation decisions are going to be made on a case by case, by a generator by generator basis at some point in the future, that anybody can make the arguments that they want to make as to the level of

compensation that they are going to receive, that the new – since 4th July, 2019 – generators have a presumption that they are going to get the compensation for the foregone financial supports; where the people with the prior benefit of the priority dispatch, they have a greater burden in that argument, undoubtedly, insofar as the presumption is there. But that is all it is, it is a greater burden of argument. They are still entitled to show good reasons why they are in fact entitled to it; how could it possibly be said that a decision of that very limited nature could be said to be inconsistent with the Regulation, or actually obstructing the Regulation in some shape or form?" [Day 6 pages 86 to 88]

222. Mr. McGrath addressed this submission in his reply. In addressing Mr Collins' "range of factors that are properly and could properly be considered by a regulator in deciding what is unjustifiably high", he stated as follows:

"… that is a pretty broad menu of things that you can look at. Any policy objectives of any description, as long as it relates to the electricity market, can be taken into account in deciding whether the compensation is unjustifiably high or not. In practical terms, there are no constraints to what you can look at…there are no limits, there are no parameters to what can be considered … and I do ask the question: is that consistent with the text and the scheme of Article 13(7) or is there a logic to what is happening here where you are trying to minimise redispatching, you are especially trying to minimise redispatching renewable energy resources, you are insisting that there be market-based solutions. If there cannot be a market-based solution, then you have to pay compensation, with the compensation designed to achieve the result you would have if there was a market-based solution. And it is only if you would

> be overcompensated that you take the compensation away or you reduce the compensation because it would be unjustifiably high. That, in my respectful submission, is sensible, it is logical, it follows the scheme and text of the Article. Whereas, as I say, Mr. Collins's view of this is not tethered in any way to the language of Article 13 or, indeed, to any provision…." [Day 7 pages 103 to 104].

Legal issues raised by the respondent

(1) Direct effect/direct applicability

223. Mr Lewis in his submissions for the respondent addressed the issues of direct effect and direct applicability. He reiterated the respondent's position that Article 13(7) could not be deemed to be of direct effect; having referred to certain text books on EU law, he submitted that the measure could only be of direct effect where it is (1) clear and precise; (2) creates an unconditional and unqualified obligation; and (3) requires or admits of no further implementing measure on the part of any union or national authority. It was submitted that "you cannot have a provision that is said to have direct effect but at the same time requires some implementing measure" [day 6, p.121, lines 23 to 26], and that Article 13(7) clearly required an implementing measure.

224. Counsel did accept that Member States might adopt national implementing regulations in respect of an EU regulation even where the latter measure did not expressly authorise such a course. Counsel referred in particular to the Decision of the CJEU in *Commission v Denmark* (Case C-541/16). At para. 29 of its judgment, the CJEU states as follows:

> "It is by referring to the relevant provisions of the regulation concerned, interpreted in the light of its objectives, that it may be determined whether

they prohibit, require or allow Member States to adopt certain implementing measures and, particularly in the latter case, whether the measure concerned comes within the scope of the discretion that each Member State is recognised as having…".

225. In that case, the court held that the term "cabotage operations", which was not defined in Regulation (EC No. 1072/2009), had resulted in differing interpretations in a number of Member States, which showed the "lack of clarity and precision [of the Regulation] regarding the definition of cabotage operations" [para. 42], so that "…it must be held that, even though Article 2(6) and Article 8 of the Regulation No. 1072/2009 do not expressly provide for the adoption of national implementing measures, they are unclear as regards the definition of cabotage operation, so that the Member States must be granted discretion to adopt such measures". [Paragraph 44].

226. Mr Lewis contended that some of the authorities relied upon by the applicants in their analysis of the direct effect/direct applicability issue – see in particular paras. 85 and 86 above – were not on point. It was submitted that the Decision in *Leonesio v Ministry for Agriculture and Forestry of the Italian Republic* (Case 93/71), a case relied upon particularly by Energia, was a case clearly involving an EU regulation which had direct effect, so that the Member State could not rely on arguments based on legislative provisions or administrative practice to withhold payment to the applicant in that case; it was suggested that the present case is different, as implementing measures are clearly required to give effect to the Decision. It was submitted that, in the present case, it was clear from Article 13(7) that a discretion had been granted as to the implementation of the Regulation, but that there was "no guidance whatsoever in terms of the Article itself as to how the discretion is to be exercised…" [day 6, p.134, lines 13 to 16].

(2) The obligation to give reasons

227. Mr Lewis dealt at some length with the Decision of the Supreme Court in *Connelly v An Bord Pleanála* [2021] 2 IR 752 in relation to the obligation to give reasons for an administrative act. He referred *inter alia* to the passage quoted at para. 176 above regarding the requirements for reasons. Indeed, it appears that all parties accept that there is an obligation to give reasons; counsel submitted that the two consultation papers, the correspondence between the CRU and Wind Energy Ireland, the Decision itself and the post-decision correspondence with the applicants provided the reasons why the SEMC reached its decision. It was submitted that it was clear from the *Connelly* decision that "where you have a process which involves full engagement with a party, you are not limited to looking at the Decision to try to find out what the reasons are…it is a full consultation process…" [day 6, p.149 to p.150].

228. Counsel did not accept the applicants' proposition that the respondent was not entitled to rely on correspondence after the Decision to supply reasons for the Decision itself. Counsel did accept, in answer to the court, that there could at least be no reasons proffered after judicial review proceedings in respect of the Decision commenced. Counsel suggested that it would be "absurd" if, where correspondence subsequent to the Decision "fleshed out" the reasons so that they were "sufficient for [the applicants] to understand or to take a view that they think they have good grounds to challenge the Decision", that … "no reliance could be placed on those communicated reasons". Counsel accepted that such reasons could not be a "post-facto rationalisation", but submitted that this was not what had occurred in the present case [see day 6, p.157].

229. Counsel submitted that, in any event, a deficiency in reasons did not necessarily result in the Decision being struck down, and cited the decision of

McDonald J in *Sanofi Aventis Ireland Limited v Health Service Executive* [2018] IEHC 566, in which the court exercised its discretion not to strike down a decision by the HSE on a procurement award despite a failure to provide reasons in relation to certain parts of the decision, as an example of the court not considering striking down a decision to be appropriate or proportionate on that ground alone. It was submitted that the court had a "wide discretion" in this regard to fashion an order appropriate to the circumstances of the case.

(3) Pleadings

230. Counsel conducted an analysis of the response of the CRU in its statement of opposition to the statement of grounds of Energia, there being no significant difference in its approach to the Greencoat proceedings. Counsel made the point that there was very little factual dispute between the parties, and thus no necessity to answer the pleas of the applicants by setting out a range of exculpatory facts. It was submitted that it was very clear that the applicants set out a number of ways in which it was alleged that the Decision was defective; the basic defence in relation to each of these points was that the CRU had acted correctly and in accordance with the terms of the Regulation, and that this position was manifest from the statement of opposition in each case.

(4) Article 15.2 of the Constitution

231. Similarly, counsel submitted that the Decision was either consistent with the Regulation as a matter of law, or it was not; it did not follow that the respondent had impermissibly purported to make law. As counsel put it "…the question is resolved fundamentally by who has interpreted Article 13(7) correctly…" [day 6, p.166, lines 9 to 27].

232. Counsel referred in particular to the decision of the Supreme Court in *Maher v Minister for Agriculture and Rural Development* [2001] 2 IR 139. In that case, Fennelly J, in discussing the "principles and policies" test, remarked at p.247 that the test "provides the basis for deciding whether a given legislative act abdicates the exclusive authority of the Oireachtas. It is intrinsic to the test, and is important to the present case, that the named executor of delegated authority has power and discretion to make decisions within the four walls of the governing statute…".

233. Counsel also referred to the judgment of O'Donnell J (as he then was) in *O'Sullivan v Sea Fisheries Protection Authority* [2017] 3 IR 751. That case involved a challenge to the validity of certain regulations ('**the 2014 Regulations**') introduced by the Minister for Agriculture, Food and the Marine pursuant to Counsel Regulation EC/1005/2008, which established a system of Europe-wide sanctions to combat illegal, unreported and unregulated fishing. It was contended by the applicant that a points system established under the 2014 Regulations was not permitted under European law, and in particular *inter alia* that the "principles and policies" test required such a system to be introduced by primary legislation.

234. In dealing with this point, O'Donnell J – in a passage which, while lengthy, is of some significance in the present context – stated as follows:

> "39. The principles and policies test, while regularly invoked, has remained somewhat elusive. Indeed it is a difficult test to apply in the present context. At one level the European Regulations are replete with policy. As the respondents point out the European Regulations contain 127 recitals alone, giving, cumulatively, a very clear view of the overall thrust of the provisions and the principles and policies embodied in them. On the other hand, the European Regulations very deliberately leave to the Member State the choice

of method for establishing a system for the allocation of points to the licence. That means that the domestic authorities must make choices. At one level at least, those choices can be said to involve some policy considerations, since presumably the choice is made on the basis that a particular provision is considered more effective, convenient, compatible or simply better. Certainly the outcome is not dictated or even guided by the European Regulations. Instead what those Regulations show clearly is that the policy of the Regulations is that, in this area at least, the issue is one for the domestic authorities. The plaintiffs point out that there are in theory a significant range of point allocating processes that could have been adopted and similarly a range of procedures which could have been established. Once the process is effective and dissuasive and the procedures are fair, the domestic authorities are, in this respect at least, at large. This it is said contravenes the principles and policies test, or, more precisely, means that the issue for determination by the domestic authorities is one which can only be achieved by primary legislation.

40. 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 … [2016] 3 IR 1, 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."

235. Counsel submitted that it was "fanciful to suggest that [the CRU] has assumed to itself some kind of legislative role that infringes Article 15.2. The simple question is how do you construe Article 13(7) and is the Decision within or without it" [day 6, p.171, lines 20 to 27].

236. It is however instructive to note the conclusion to which O'Donnell J came in the *O'Sullivan* matter:

> "44. A useful comparison may be drawn with the decision in Maher v Minister for Agriculture [2001] 2 IR 139. There the decisions to be made by the Member State had undeniable significance for individuals concerned (and indeed the dairy industry more generally) but as Keane CJ put it, the choice of policy in the field available to the Minister had been reduced almost to vanishing point, and as Fennelly J put it, the Minister was acting as the delegate of the Community. In other words the area of delegation was small and constrained. In the same way the area of policy left to the Member State here is also severely reduced. A choice does not imply a capacity to determine policy. The matters dealt with in the 2014 Regulations were incidental, supplemental and consequential to the provisions of the European Regulations. Accordingly, I do not consider that in principle the establishment of procedures under the 2014 Regulations contravened Article 15.2.1, and I would allow the appeal in that respect."

Reply by the applicants

237. In reply to Mr Collins and Mr Lewis, substantial submissions were made by Mr McGrath on behalf of the applicants, with significant input also from Mr

Kennedy: see days 7 and 8 of the transcript of the hearing. In the interests of concision, I do not propose to summarise those submissions; however, I have taken them fully into consideration – along with further brief interventions from both counsel for the respondent – and shall refer to them as appropriate in the analysis that follows.

Discussion and analysis

The implications of direct applicability

238. As will be clear from this judgment, much of the submissions of the parties centred around the issue of the direct applicability of the Regulation. The applicants contend that the Regulation is in fact of direct effect; the respondent asserts robustly that this is not the case. The applicants however do not rely on their proposition that the Regulation has direct effect: see the quote from Mr McGrath's submissions at para. 83 above in this regard. Both parties agree that the Regulation is directly applicable, and has had the force of law in this jurisdiction since 01 January 2020. What that means in practical terms is the issue at the heart of the present dispute.

239. At para. 86 above, the principles extracted by the applicants from their analysis of the cases are set out. These principles were not the subject of particular dispute between the parties, although both sides place a different emphasis on the ways in which they should be interpreted.

240. The respondent says that, notwithstanding that the will of the EU legislature regarding compensation is expressed in a regulation, it cannot and does not have direct effect because it cannot be said to be "clear and precise, unconditional and unqualified, and requiring or admitting of no further implementing measure on the part of any union or national authority…": see para. 80 above. The respondent goes so far as to suggest in its issue paper that, where the compensation provision does not

have direct effect, the applicants cannot be entitled to relief on the basis of arguments that the respondent has failed to apply or implement Article 13(7): see paras. 89 to 90 above.

241. The applicants contend that it is not necessary to determine whether or not Article 13(7) is of direct effect; all parties agree that the Regulation is directly applicable, and the applicants contend that the purported implementation of it by the Decision is inconsistent with the Regulation and *ultra vires*.

242. As we have seen, the respondent accepts in its written submissions that, had the "unjustifiably low/high" criteria not been included, Article 13(7) "would have been quite different and potentially a provision with direct effect" [see para. 192 above]. The inclusion of this benchmark of unjustifiably low/high might suggest that, in assessing compensation, some criteria not specified in the Regulation would have to be applied to the assessment of compensation in order to determine whether, in a given case, that compensation would be "unjustifiably low" or "unjustifiably high". As we have seen, the applicants say that the position is straightforward: compensation will be unjustifiably high or low if it does not render to the generator the revenues which it would have received if redispatch had not occurred, so that the generator would be "indifferent to redispatch". The respondents on the other hand are of the view that the assessment of whether or not compensation is "unjustifiable" requires an assessment according to a range of policy criteria, and entitles the regulator to implement the Regulation by measures which it sees as providing, according to these criteria, for compensation which is not unjustifiably low or high.

243. This is the heart of the dispute between the parties. The applicants could have relied upon the argument that the Regulation is of direct effect, that implementing measures were not mandated by the Regulation either expressly or implicitly, and

that, in failing to give effect to the Regulation by reference to what Mr Collins has called "the indifference principle", the respondent had acted in breach of rights which vest in the applicants which they are entitled to invoke in the national court. The applicants in fact take a different tack; they contend that the implementation of the Decision is inconsistent with the Regulation, is incompatible with EU law, and offends against its direct applicability.

244. The first part of "issue one" raised by the respondent in its joint issue paper – requested by the court during the hearing, but furnished after the hearing had concluded – raised the question of whether Article 13(7) of the Regulation has direct effect. It seems to me that, given the thrust of the applicants' argument at the hearing, it is not necessary to decide this issue. The applicants explicitly submit that it is not necessary to decide whether or not the Regulation is of direct effect; the respondent squarely contends that the Regulation cannot be said to be of direct effect. In reality, the battleground between the parties from the applicants' perspective is the issue of whether or not the Decision is inconsistent with the Regulation and fails to implement or give effect to it.

245. Before we get to that issue however, the court must consider the contention of the respondent in issue number one of its issue paper, as set out at para. 89 above. Are the applicants entitled to any relief at all if they are not relying on the proposition – from which they do not resile, it must be said – that the Regulation has direct effect? Or is it the case that only the Commission can act by way of infringement proceedings in circumstances where a Member State has failed to implement a regulation in accordance with its terms?

246. Paragraph 44 of the written submissions of the respondent, as quoted at para. 88 above, contends that, if the Regulation is not of direct effect, "…the applicants are

left to argue that the implementing measures in this case (*i.e.*, the Decision) are outside the scope of the discretion afforded to Ireland or obstruct the direct applicability of the Regulation". The submissions go on to deal with the issue of whether the Decision is compatible with Article 13(7): see paras. 62 to 69 in particular. It is squarely asserted at para. 63 that "…[N]othing in the Decision obstructs the direct applicability of Article 13(7)".

247. Also, in a passage quoted at para. 204 above, Mr Collins in his oral submissions stated that the court was "…only concerned with the very high level question of whether the mechanism that [the respondent has] adopted is compatible with the Regulation and is part and parcel of the way in which [the respondent is] implementing the Regulation or whether it is obstructing the implementation of the Regulation…". Significantly, the respondent submits at para. 36 of its written submissions that "…[T]he core dispute is… whether the Decision obstructs the Regulation's direct applicability, goes beyond what the Regulations allows or goes beyond the scope of the Member State's discretion".

248. These submissions are in accordance with what I took to be the respondent's net position at the hearing: that the Regulation did not have direct effect, and that, as set out at para. 4 of the written submissions as quoted at para. 188 above, "…the Decision is consistent with Article 13(7) and the Regulation more generally". I did not understand the respondent be arguing in the terms set out at "issue one – direct effect" in the "list of issues" quoted at para. 89 above, *i.e.,* that if Article 13(7) did not have direct effect, the applicants were not entitled to any relief on the basis of arguments to the effect that the respondent has failed to apply or implement Article 13(7) adequately or at all.

249. Mr McGrath, at the outset of his reply, referred to a number of passages from Laenarts & Van Nuffell, *European Union Law* (1st edn, Oxford University Press 2021) in which the author refers to Article 4(3) of the TFEU which "…requires Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union and to facilitate the achievement of the Union's tasks (2nd and 3rd subparagraphs) and at the same time to refrain from any measure which could jeopardise the attainment of the Union's objectives (3rd subparagraph)…". [day 7, page 24, lines 11 to 19].

250. Counsel went on to refer to the concepts referred to by Laenarts et. al. which are incumbent on Member States, such as the "principle of sincere cooperation" and the "duty of care" to implement provisions of EU law. As Laenart et. al. comments "…Member States are under a general duty of care in implementing Union law. They have to take all appropriate measures to guarantee the full scope and effect of Union law…". In particular, Laenarts states that

> "…In accordance with the principle of sincere cooperation, the national courts are entrusted with securing the legal protection that citizens derive from the direct effect of provisions of Union law. *The courts must also ensure that provisions of Union law not endowed with direct effect are given effet utile.* This can be done by interpreting national law as far as possible in conformity with Union law (a duty which rests on all governmental bodies)". [Laenart et. al, pp. 111 – 112, emphasis added].

251. Accordingly, counsel submitted that "…even if Article 13(7) is not directly effective, this Court is under a duty to ensure its *effet utile*…" [day 7, p.27, lines 20 to 22]. Counsel referred to Article 291 TFEU, subparagraph 1 of which provides that

"…Member States shall adopt all measures of national law necessary to implement legally binding Union acts…".

252. To the extent that the respondent considered that an implementing act such as the Decision was necessary, it was obliged to enact implementing measures which were consistent with the Regulation. As the ECJ commented in *Eridania-Zuccherfici v. Minister for Agriculture and Forestry* (Case 230/78) [1979] 3 ECR 2749:

> "34. The fact that a regulation is directly applicable does not prevent the provisions of that regulation from empowering a Community institution or a Member State to take implementing measures. In the latter case the detailed rules for the exercise of that power are governed by the public law of the Member State in question; however, the direct applicability of the measure empowering the Member State to take the national measures in question will mean that the national courts may ascertain whether such national measures are in accordance with the content of the Community regulation".

253. The approach of Member States when adopting national rules to implement EU regulations was set out with admirable clarity by Fennelly J in *Maher v Minister for Agriculture* [2001] 2 IR 139, 250-251 as follows:

> "Firstly, in the absence of common rules, or where Community law authorises such action, Member States may adopt their own national rules. Secondly, by virtue, inter alia, of Article 10EC (formerly Article 5 of the Treaty), Member States must ensure the implementation of Community regulations and take no action to undermine them. Thirdly, in doing so, they are implementing community law, with the result that general principles of community law, notably the principle of equal treatment but also the fundamental rights protected in the community legal order must be respected. Fourthly,

community law is indifferent as to the national method of implementation (subject to the principle of effectiveness as explained in the passage from *Dominikanerinnen-Kloster Altenhohenau v Hauptzolland Rosenheim* (Case C-285/93 [1995] ECR-4069), as well as the principle of equivalence, i.e., that rights under community law are treated no less favourably than those granted by national law). For present purposes, that indifference relates to the choice between legislation and regulation.

In summary, Member States, acting within the framework of community regulations, exercise powers or discretions which are conferred on them for the furtherance of the objectives of the scheme in question. Community law does not require any particular form of implementation. That is a matter for the legal system of the Member State concerned, except that the implementation must not have the effect of impeding the effectiveness of community law".

254. It is true, as the respondent points out, that it is open to the European Commission to take infringement proceedings in the event that a Member State defaults in the requisite implementation of a community measure. However, it seems to me that the applicants, who are directly affected by the implementation by the respondent of the Regulation, are entitled to raise issues by way of judicial review in relation to an implementation which they contend is not compatible with the State's obligations under the Regulation. Indeed, I do not understand the respondent to argue otherwise; its argument is that, where the Regulation is not of direct effect, the applicants are not entitled to any relief based on an alleged defective implementation of the Regulation.

255. It seems to me that such an argument is inconsistent with the basis upon which the respondent has defended the current proceedings; in any event, if the respondents are entitled, in the case of a directly applicable regulation, to argue that the implementation of that regulation by the respondent is incompatible with EU law, they must be entitled to appropriate relief in the event that they persuade the court that they are correct. It would be absurd if the applicants were to establish that national measures were incompatible with EU law, and yet not be entitled to a remedy from the national court whose clear duty is to vindicate and compel compliance with EU laws.

256. The applicants accept that remedies such as compensation which can only be invoked in respect of a measure which has direct effect are not appropriate in the present case. However, the court's obligations to ensure that provisions of EU law are given *effet utile* in national measures and that such measures "must not have the effect of impeding the effectiveness of community law" must mean that, if the applicants succeed in establishing that the Decision is incompatible with EU law, they are entitled to an effective remedy which vindicates the EU law in question, notwithstanding that they do not rely on the Regulation as having direct effect.

The textual interpretation of Article 13(7)

257. In order to assess whether the Decision is consistent with the requirements of Article 13(7) of the Regulation, it is necessary to decide, in as far as possible, what was intended by the EU legislature in enacting it, and ultimately what it means. The method of interpretation was summarised by Mr Collins in his submissions and quoted at para. 190 above. As he pointed out, regard must be had to the legislative antecedents of the Regulation, and the general context leading up to its enactment.

258. In this regard, the parties furnished four volumes of *travaux preparatoires* in relation to the various proposals for a regulation on the internal market for electricity, including most notably:

- the Commission proposal of 30 November 2016;
- the impact assessment of 30 November 2016 which accompanied the Commission proposal;
- the Council proposal (recast) of 24 February 2017; and
- the Council Presidency's revised proposal of 15 September 2017.

259. In truth, these documents are very limited in terms of narrative as to the reasons for amendments in the various iterations to what ultimately became Article 13(7) of the Regulation. It is helpful and relevant however to see how the text of the compensation provision for non-market redispatch evolved over the various proposals. The reader may at this point care to have available the text of Article 13(7) set out at para. 65 above or in appendix B to this judgment for the purpose of comparison with the various proposals.

260. The initial formulation regarding compensation in the case of non-market redispatching by the Commission in its proposal of 30 November 2016 was as follows:

> "Article 12
>
> …6. Where non-market based curtailment or redispatching is used, it shall be subject to financial compensation by the system operator requesting the curtailment or redispatching to the owner of the curtailed or redispatched generation, or demand facility. Financial compensation shall at least be equal to the highest of the following elements:

(a) additional operating cost caused by the curtailment or redispatching, such as additional fuel costs in the case of upward redispatching, or backup heat provision in case of downward redispatching or curtailment of generating installations using high-efficiency cogeneration;

(b) 90% of the net revenues from the sale of electricity on the day-ahead market that the generating or demand facility would have generated without the curtailment or redispatching request. Where financial support is granted to generating or demand facilities based on the electricity volume generated or consumed, lost financial support shall be deemed part of the net revenues."

261. This formulation at Article 12(6) was reproduced unchanged in the recast Council proposal of 24 February 2017. However, the proposal-article was amended significantly in the Council Presidency's revised proposal of 15 September, 2017, which set out the amendments to the previous iteration:

"~~[(c) self generated electricity from generating installations using renewable energy sources or high efficiency cogeneration which is not fed into the transmission or distribution network shall not be curtailed unless no other solution would resolve network security issues;]~~

(d) downward dispatching ~~[or curtailment]~~ under letters a ~~[to]~~ **and b** ~~[c]~~ shall be duly and transparently justified. The justification shall be included in the report under paragraph 3.

6. Where non-marked based ~~[curtailment or]~~ redispatching is used, it shall be subject to financial compensation by the system operator requesting the ~~[curtailment or]~~ redispatching to the ~~[owner]~~ **operator** of the ~~[curtailment or]~~ redispatched generation or demand facility

except in the case of generators accepting non-firm connections.

Financial compensation shall at least be equal to the highest of the following elements:

(a) additional operating cost caused by the ~~[curtailment or]~~ redispatching, such as additional fuel costs in case of upward redispatching, or backup heat provision in case of downward redispatching or curtailment of ~~[generating installations]~~ **power generating facility** using high-efficiency cogeneration;

~~[90% of the n~~] **N**et revenues from the sale of electricity on the day-ahead market that the generating or demand facility would have generated without the ~~[curtailment or]~~ redispatching request. Where financial support is granted to generating or demand facilities based on the electricity volume generated or consumed, lost financial support shall be deemed part of the net revenues."

262. Unfortunately, the Council Presidency does not set out in its revised proposal the reason for the changes, commenting that the amendments were made "in light of the discussions in the Energy Working Party and the written comments received … the text includes revisions in line with the opinion of the consultative working party of legal services…".

263. The changes in the text of the Council Presidency's proposal appear to have comprised some tidying-up of the language; the express reference to curtailment was omitted so that the Article referred to "redispatching" generally. The concept of firm access being a pre-requisite of compensation was introduced. The "operator" was specified as the recipient of the compensation, rather than the "owner". Crucially, the requirement that, where revenues were the appropriate measure of compensation

rather than cost, compensation would only be 90% of net revenues from the sale of electricity which would have been generated, was dropped.

264. The respondent places particular emphasis on the fact that the Commission proposal and recast proposal both envisaged that only 90% of revenues would be discharged as compensation; see paras. 57 to 58 of the respondent's written submissions. It is submitted that "…[O]bviously, that 90% limitation in (B) was removed in the final version of the Regulation, but what was added was the "unjustifiably high" test. That must similarly be seen as a mechanism providing that full compensation to the level of foregone support is not made automatically available" [para. 58].

265. Comparison between Article 12(6) of the Council Presidency's proposal of 15 September, 2017 and Article 13(7) of the Regulation itself shows a further tightening-up of the phraseology, and the introduction of the concept that the compensation should be "at least equal" to the higher of elements (a) or (b) as set out in the text "or a combination of both if applying only the higher would lead to an unjustifiably low or an unjustifiably high compensation…".

266. The progression of the various drafts to the ultimate wording of the Regulation shows that para. 58 of the respondent's submissions as quoted above at para. 264, to the extent that it might suggest that the 90% limitation in the Commission and recast proposals was directly replaced by the "unjustifiably low/high" criterion, is incorrect. The intervening Council Presidency's proposal of 15 September 2017, quoted at para. 261 above, removed the 90% limitation and did not appear to place any further limitation on net revenues, so that, if this draft had not been amended in the final wording, compensation for lost revenues would have been "at least … equal to … net

revenues from the sale of electricity on the day-ahead market that the generating or demand facility would have generated without the re-dispatching request".

267. So the question remains: what was intended by the introduction, for the first time, in the wording of the Regulation of the "unjustifiably low/high" test? Was it to allow the system operator to deal with outlier instances in which the compensation required to be adjusted to ensure that the operator is "made whole" (as the applicants contend), or was it to allow the regulator to have regard to a wider range of matters in order to satisfy perceived policy imperatives (as the respondent contends)?

268. To answer this question, the court must scrutinise the wording of Article 13 itself; see paras. 56 to 66 above. Certain overarching principles relevant for present purposes can be inferred from Article 13:

> "(i) Resources to be redispatched are to be selected 'using market-based mechanisms' and 'shall be financially compensated'. [Article 13(2)];
>
> (ii) Non-market based redispatching may only be used where no market-based alternative is available [Article 13(3)(a)];
>
> (iii) TSOs and DSOs must 'guarantee the capability of transmission networks and distribution networks to transmit electricity produced from the renewable energy sources or high-efficiency cogeneration with minimal possible redispatching …' [Article 13 (5)(a)], and 'take appropriate grid-related and market-related operational measures in order to minimise the downward redispatching of electricity produced from renewable energy sources …' [Article 13 (5)(b)];
>
> (iv) Where non-market based redispatching is used, power-generating facilities using renewable energy sources "shall only be subject to downward redispatching if no other alternative exists…". [Article 13(6)]

269. There can be no doubt that Article 13 places the onus on the TSO/DSO to configure the transmission and distribution systems so as to minimise as far as possible any redispatching, and where non-market based redispatching must occur, that facilities using renewable sources only be redispatched "if no other alternative exists…". Any such redispatching must be "duly and transparently justified" [Article 13(6)(d)]. It is against this backdrop that Article 13(7) provides for the payment of compensation in respect of non-market based redispatching.

270. Article 13(7) makes it clear that, in the case of non-market based redispatching, compensation must be paid "by the system operator" … "to the operator of the redispatched generation…". The sub-article does not suggest that there is any exception to this requirement to pay compensation, other than to producers who do not have firm access (in this regard, see paras. 48 to 51 above). The Regulation thus adopts the initiative introduced in the Council Presidency's recast proposal of firm access as a prerequisite for the payment of compensation. There is no further refinement in Article 13(7) of the categories of generator which may be entitled to compensation, whether by way of size or participation in the markets, or otherwise.

271. As regards the compensation payable on the basis of "net revenues" set out in Article 13(7)(b), the formula set out is straightforward. The "sale of electricity on the day-ahead market" gives rise to one clear price which is readily ascertainable. Leaving aside the separate issue of whether "financial support" is capable of including support from sources other than state agencies, such support "shall be deemed to be part of the net revenues". On its face, this would appear to mean that, if a REFIT or RESS payment is lost due to redispatching, it must be included in the compensation.

272. The compensation is to be, in the first instance, "at least equal to" the higher of (a) or (b). In the case of wind energy generators such as the applicants, the applicable

formula is always (b). If the wording were to stop there, the calculation of compensation would be absolutely straightforward and, as we have seen, the respondent accepts that the provision would probably be of direct effect.

273. However, the Regulation has refined the relatively simple and straightforward Council Presidency's revised proposal quoted at para. 261 above by incorporating two concepts: retaining the requirement of firm access, and introducing the "unjustifiably low/high" qualification. The former criterion does not appear to present a difficulty of interpretation: if a generator is to be eligible for compensation, the *quid pro quo* is that it must have firm access whereby its power can be accommodated by the system and transported across the grid to end consumers under all reasonable network conditions. Operators looking to locate generators in the future know that firm access must be obtained if compensation for redispatching is to be available, and thus have an incentive to locate where the infrastructure can best accommodate the provision of its power.

274. As regards the "unjustifiably low/high" criterion, the respondent contends that this criterion involves a value judgment as whether the higher of (a) or (b) is unjustifiable, and that this allows the regulator to consider a range of factors in the context of the markets generally such as those to which Mr. Collins referred in his oral submissions: see para. 221 above.

275. The introduction of this phrase prompted the respondent to consider that it should implement a range of measures to accommodate what it considered to be important policy interests and, indeed, to do so in such a manner that its current position, almost four years after the Regulation came into force, is that it is still in the course of implementing the Regulation and working towards an "enduring solution" involving a market-based mechanism.

276. Does the introduction of this "unjustifiably low/high" criterion into the Regulation warrant and support the approach taken by the respondent? On a pure textual interpretation, it is difficult to see how it could. The Commission proposal at Article 12(6) was unequivocal as to the necessity for compensation in respect of non-market based redispatch, the only significant difference to the Regulation being the limitation of net revenues to 90%. This limitation was dropped completely in the Council Presidency's revised proposal, from which one may fairly assume that the thinking at that time was that full compensation should be payable. This position was modified in the Regulation by the formulation "… such financial compensation shall be at least equal to the higher of [(a) or (b)] or a combination of both if applying only the higher would lead to an unjustifiably low or an unjustifiably high compensation …".

277. This sentence follows immediately after a sentence which establishes the imperative of compensation and the necessity for firm access. It is addressed towards the calculation of the compensation ("… at least equal to the higher of the following elements or a combination of both…"). The combination is only to be used if the higher would lead to unjustifiably low or high compensation. The formulation in my view suggests an awareness on the part of the legislature that there should be some limited room for manoeuvre by the regulator in circumstances where there could be anomalies if the higher of costs or revenues was invariably the measure of compensation, and possibly even manipulation of the system so that redispatching would be more profitable in a given case. Rather than impose a specific limit such as the 90% benchmark in the Commission proposal, the Regulation allows for some flexibility in assessing the appropriate level of compensation.

278. Such a textual reading of Article 13(7) is consistent with the contention of the applicants that the Regulation intends 100% compensation, and the examples proffered by them of anomalous instances where the higher of (a) or (b) could result in more or less than 100% compensation.

279. From a purely textual point of view, it does not seem to me, particularly in view of the legislative lineage of the Regulation, that there is any support for the proposition that the introduction of the "unjustifiably low/high" criterion was intended to permit a national regulator to implement the Regulation by introducing a number of policy-based measures. The respondent considers in particular that it was entitled in the Decision to separate the compensation mechanism for lost revenues from the revenues associated with foregone government support, so that decisions regarding the latter compensation could be made jurisdictionally. It would differentiate between renewable units commissioned before and after 4 July 2019, with different presumptions applying as to what should be considered "unjustifiably high". It is very difficult to see how such initiatives could be justified by a phraseology which is directed towards calculation of compensation which the Regulation clearly provides is payable from 01 January 2020. In my view, the phrase "unjustifiably low/high" – particularly in circumstances where the respondent all but concedes that, absent the inclusion of that criterion, Article 13(7) would be straightforward and of direct effect – does not bear the very considerable weight that the respondent seeks to attribute to it.

The extent of the implementing measures

280. There is no substantive dispute between the parties concerning the general principles distilled from the case law on direct effect/direct applicability of regulations set out at para. 86 above. The applicants do not rely on their position that the

Regulation is of direct effect, and do not go as far as to contend that the respondent was not entitled to adopt measures implementing the regulation. In this regard, the respondent at para. 35 of its written submissions draws attention to the averment of Mr Patrick Maguire at para. 18 – not para. 19 as stated in the submissions – of his affidavit of 20 February 2023: -

> "…. While Article 13(7) is mandatory in its terms and must be complied with, the Applicants do not contend either that 'there is no room for decisions applying Article 13(7)' or that such decisions are not necessary. However, such decisions must comply with the Regulation which, I am advised, the Decision does not do".

281. The CJEU summarised the position as follows in its decision in case C-316/10 *Danske Svineproducenter v. Justitsministeriet*: -

> "38 . . . It must be pointed out that, pursuant to the second and third paragraphs of Article 288 TFEU, whereas directives are binding upon Member States as to the result to be achieved but leave to the national authorities of the choice of form and methods, regulations are binding in their entirety and are directly applicable in the Member States.
>
> 39. Therefore, by virtue of the very nature of regulations and of their function in the system of sources of European Union law, the provisions of regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application (see case C-278/02 Handlbauer [2004] ECR I-6171, paragraph 25 and the case-law cited).

40. However, some of their provisions may necessitate, for their implementation, the adoption of measures of application by the Member States (Handlbauer, paragraph 26 and the case-law cited).

41. It also follows from settled case-law that Member States may adopt rules for the application of a regulation if they do not obstruct its direct applicability and do not conceal its Community nature, and if they specify that a discretion granted to them by that regulation is being exercised, provided that they adhere to the parameters laid down under it (Case C-113/02 Commission v Netherlands [2004] ECR I-9707, paragraph 16 and the case-law cited).

42. Consequently, the fact that the European Union legislation on the protection of animals during transport is now set out in a regulation does not necessarily mean that all national measures for the application of that legislation are now prohibited.

43. In order to determine whether a national measure for the application of Regulation No 1/2005 is in accordance with European Union law, it is therefore necessary to refer to the relevant provisions of that regulation in order to establish whether those provisions, interpreted in the light of the objectives of that regulation, prohibit, require or allow Member States to adopt certain measures of application and, particularly in the latter case, whether the measure concerned comes within the scope of the discretion that each Member State is recognised as having".

282. The question, then, is whether the Decision has exceeded what the principles suggest is permissible when implementing measures are introduced on foot of a directly applicable regulation. All parties accept that this is an issue of interpretation of the meaning of the Regulation and is thus a legal issue for the court. While the

expert evidence may assist in an understanding of the economic factors which inform the Regulation, evidence as to the meaning of the Regulation, if such were proffered, cannot be taken into account by the court.

283. The respondent contends that Article 13(7) "….is positioned in a regulation which has broad aims, and which emphasises the position of consumers, competitive prices, higher standards, security of supply, as well as promoting the aim of decarbonising the energy system. The overall aims are quite broad however, and this also informs the approach to interpreting Article 13(7)". [para. 55 written submissions].

284. The SEMC set out its approach to the "unjustifiably low/high" test at para. 24 of the Decision in a passage quoted at para. 206 above. The respondent describes this as a "balanced approach to the application of the Regulation in a complex field of [regulation]… well within the scope of the Regulation and, as discussed by Mr. Anstey in his two reports, is an entirely appropriate approach from an economics perspective…." [para. 67 written submissions].

285. As we have seen, the respondent rejects the "narrow" meaning of "unjustifiably low/high" for which the applicants contend, making the point that, if the Regulation had intended the interpretation that the generator be "indifferent to redispatch", it could simply have said so. It relies on the limitation on revenue of 90% in the Commission proposal and its ultimate replacement by "unjustifiably low/high" as "…a mechanism providing that full compensation to the level of foregone support is not made automatically available" [para. 58 written submissions]. It points out at para. 58 of those submissions that the representative body for wind producers, Wind Europe, noted in the course of the consultation on the Regulation as follows:

> "Wind Europe recognises that 'there may be a benefit from not compensating 100% of the opportunity cost. Reducing slightly the income could send an important incentive signal to investors to select locations with existing sufficient network capacity, Curtailment would then be likely to occur less frequently. The exact percentage of the opportunity cost needs to be carefully assessed in order to find the balance between an increase in policy cost and the increase of financing costs due to higher market risk" … [quoted at para. 23 of the Decision].

286. In relation to this latter issue, it is difficult to understand why the Decision should be the means of giving locational signals to operators. In linking an entitlement to compensation for curtailment as well as constraints to a requirement for firm access, the Regulation already gives a locational signal – the generator will not get compensation unless it locates in an area where it can obtain firm access. As we have seen, Article 13(5) places obligations on the TSO/DSO to take appropriate measures to ensure the minimisation of downward redispatching for renewable energy sources, which would include the imperative of providing firm access to generators.

287. The applicants contend that, in fact, the removal of the 90% limitation and its replacement by firm access and the "unjustifiably low/high" test makes it clear that what was intended in the Regulation was that generators were to be made whole. The removal of the 90% limitation might indeed suggest that this is what was intended, and the applicants could respond to the respondents' equivalent argument that, if there were intended to be a specific limitation on compensation, it would have been included in the text of the Regulation, as it had been in the Commission's proposal. There is some force in this argument; if a specific limitation in an earlier iteration of the draft legislation was removed, is it not more logical to infer that no such limitation

was ultimately intended, and that the "unjustifiably low/high" formulation was inserted to provide some flexibility to deal with exceptional circumstances and/or as a mechanism for removing anomalies, rather than conferring a wide jurisdiction to introduce policy-based initiatives on compensation?

288. Aside from the wording of Article 13(7) itself, the central issue between the parties is as to whether it is at all permissible to use implementation measures to introduce the sort of initiatives which the Decision sets out, such as dealing with pre- and post-4 July 2019 generators differently and on a generator-by-generator basis, the deferral to the two governments in the government support issue, and the phasing out of compensation for curtailment. The respondent insists that such measures are within the scope of the Regulation, and counsel in the course of submissions spoke of the difficulty which any court would have in interfering with the exercise by a national regulator of its discretion in what is undoubtedly an extremely complex and difficult area.

289. As against that, energy policy in the EU and the movement towards renewable energy sources and away from fossil fuels has been an inexorable evolution from 1996 onwards, with the introduction of a series of energy packages including the fourth such package which includes the Directive and the Regulation. There has been no shortage of policy initiatives in the EU over this period, and the recitals to the Regulation provide a helpful guide to the policy matters informing the Regulation itself.

290. It is impossible to read the cases on the directive effect/applicability of EU regulations without recognising the extremely limited room for manoeuvre which Member States have in implementing them. Under Article 288 TFEU, a regulation "shall have general application. It shall be binding in its entirety and directly

applicable in all Member States". While a regulation may confer a limited discretion on a Member State as to how it is to be implemented, a regulation "…has immediate effect and operates to confer rights on private parties which the national courts have a duty to protect" [Case 30/73 *Commission v Italy*]. As we have seen, where an implementing measure is necessary to give effect to the Regulation, that measure must be consistent with, and not impede the effectiveness, of the Regulation itself.

291. Other than the issue as to "unjustifiably low/high", there is no lack of clarity in Article 13(7). It follows logically on from, and is consistent with, the preceding provisions of Article 13. It is plainly intended to come into effect on 01 January 2020. There is nothing in the wording which would suggest that it would not come fully into force on that date. There is no basis in Article 13(7) for suggesting that it is a provision which must be implemented over several years with a view to achieving an "enduring solution", although it must be said that Article 13 does envisage that redispatch be administered using market-based mechanisms, with non-market based redispatching used only in limited circumstances.

292. At recital four of the Regulation, it is stated that the Regulation "establishes rules to ensure the functioning of the internal market for electricity…in particular specific rules for certain types of renewable power-generating facilities, concerning balancing responsibility, dispatch and redispatching…". Articles 1 and 3 in particular – see paras. 58 and 59 above – set out the aims and principles governing the Regulation. The Regulation was introduced following an exhaustive process of refining policy matters at EU level in the interests of harmonisation and efficiency of markets throughout the EU.

293. The Regulation was not implemented by the SEMC by 01 January 2020. That is not to say that the SEMC did not engage with the Regulation; it produced a

comprehensive consultation paper on 27 April 2020, and thereafter the consultation papers outlined at para. 20 above ensued, culminating in the issue of the Decision on 22 March 2022. The respondent contends that it is, in the words of counsel, "…still in the midst of the process of implementing and applying this very complex regulation…the fact that it became law on 1st January 2020 doesn't mean that a magic wand had to be waved on New Years Day on 2020 by the regulator and instantly bring into existence…this incredibly complex system to implement and administer what is contained in the Regulation…" [day 4, p.136, line 19 to p.137, line 3].

294. In response to a query from the court, Mr Collins did not agree that the CRU was "at large" in relation to implementing the Regulation, but he suggested that, notwithstanding that the Regulation became law on 01 January 2020, the respondent was entitled to take appropriate steps to bring about a workable system and to provide a period into the future by which this might be done. Mr Collins "absolutely resisted" the notion that the Regulation required to be fully implemented by 01 January 2020: [see generally day 4, p.140, line 23 to p.145, line 27].

295. The difficulty with this position is that there is no basis in the Regulation itself for inferring that the Regulation permits full implementation to take place over an extended period, much less an undefined period extending over a number of years. It is absolutely clear that the Regulation comes into force and is directly applicable as of 01 January 2020; the Regulation had a lead-in period of approximately six months between publication and the operative date. The respondent clearly took the view that implementation by that date was neither desirable nor workable, and set about embarking upon a comprehensive consultation process with stakeholders, culminating in the publication of its decision on 22 March 2022.

296. In his affidavits, Mr Melvin on behalf of the respondent sets out a detailed rationale as to why the SEMC considered that it should adopt this path. He refers to the Directive, which "provides for national regulatory authorities (such as the CRU) to play an expert and independent decision-making role in the application of the Regulation…" [para. 30, first affidavit in the *Greencoat* proceedings]. He goes on to refer to the role of the national regulatory authority as addressed in Articles 58 and 59 of the Directive, and avers as follows at para. 33:

> "33…. [Article 59(7)] provides that national regulatory authorities, 'shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the national methodologies used to calculate or establish the terms and conditions for: (a) connection and access to national networks, including transmission and distribution tariffs for their methodologies". Thus, the methodology for the payment of financial compensation by the TSO under Article 13(7) of the Regulation is a matter which falls to be fixed or approved by the national regulatory authorities".

297. In response to this averment, Mr Maguire on behalf of Greencoat avers at para. 10 of his affidavit of 20 February 2023 "…the reference in Article 59(7) to 'transmission and distribution tariffs or their methodologies' relates to connection changes and use of system charges which arise in the context of 'connection and access to national networks' to which Article 59(7)(a) of the Electricity Market Directive relates, not compensation payments pursuant to Article 13(7) of the Regulation". The applicants' net position is set out at para. 9 of that affidavit: that notwithstanding what the Directive says in general terms about the decision-making role of the national regulatory authorities, "…the Respondent's primary responsibility is to comply with the Regulation and (as provided for [in] Article 59(1)(b) of the

Electricity Market Directive which Mr Melvin quotes from at para. 32 of his affidavit) to ensure that the TSO complies with the Regulation…".

298. The Decision itself deals in detail with the consultation process and the SEMC's response to it. It refers to the "Proposed Decision" [SEM-21-027] issued for discussion in April 2021 and, at p.42 of the Decision under the heading "implementation", states as follows:

> "The SEM committee's minded-to positions presented in SEM-21-027 have not changed, in particular for the enduring treatment of new renewable units. However, following engagement with the TSOs it is clear that full implementation will not be feasible in the short-term due to the significant system changes required. A correct implementation for enduring solutions will require significant engagement with industry along with considerations and interactions in line with other future market design programmes such as System Service Future Arrangements, adjustments to the wind dispatch tool, and the integration of storage units to TSO dispatch systems.
>
> The SEM Committee is of the view that for an interim period, until these system issues are resolved, the current operation of the system will be maintained until the necessary system changes are in place. Until such time, the treatment of constraints should continue on a pro-rata basis within a constraint group and curtailment should continue to apply to all units on a pro-rata basis overall."

299. While there is no doubt that the Directive acknowledges, in general terms, a decision-making role for regulatory authorities, the cases and principles set out above make it clear that this role cannot be used to supercede or set at nought the provisions of the Regulation. The purpose of the Regulation is to provide for rules which give

effect to the considered policies of the EU. These policies have been formulated and given expression in the Directive and the Regulation, and are the product, as we have seen, of an evolution of policies for more than twenty years, and a specific process of consultation and refining of the Regulation intended to enact those policies. The role of the national regulator is to facilitate the implementation of the terms of the Regulation. The regulator cannot reopen or second-guess policies which have been determined by the EU and set out in the Regulation.

300. One of the purposes of legislation being imposed by regulation rather than a directive is to achieve uniformity in Member States. A regulation is usually of direct effect but always directly applicable, and does not leave the method of implementation to individual Member States although, as we have seen, it is sometimes permissible for a Member State to adopt implementing measures. Uniformity throughout the EU cannot be achieved if national regulators go beyond the remit of implementing the policy choices set out in the Regulation.

301. The applicants point out that the complexity of implementation is not an excuse for failing to implement a regulation. In case C-444/21, *Commission v Ireland,* a case concerning an alleged failure by Ireland to implement provisions of the Habitats Directive, and in particular a failure to designate over two-hundred sites as special areas of conservation "as soon as possible and within six years at most", the CJEU stated as follows at para. 55:

> "So far as concerns the complexity of the formal designation procedure highlighted by Ireland, which results in particular from the bringing of appeals by the owners of the sites concerned against such a designation, it should be recalled that Member States cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations

> arising under EU law (judgment of 12 November 2019, *Commission v Ireland (Derrybrien Windfarm)*, C-261/18, EU:C:2019:955, paragraph 89 and the case-law cited)."

302. The applicants do not accept in any event that there was in fact any complex system required: the redispatch due to constraints or curtailment are recorded, the day-ahead price is readily ascertainable, as are the foregoing financial supports. The uncertain element is of course the "unjustifiably low/high" criterion; the applicants' position is that this should be regarded as a means to "make whole" the generator in the few instances where the application of elements (a) or (b) does not suffice for that purpose. As Mr McGrath put it from the applicants' point of view:

> "…We don't accept at all that this is as complex as the respondent makes it out to be. The reason that it is complex from the respondent's point of view is it is trying to do this through the mechanism of the market in the context of other changes being made on the market to deal with other aspects of the Regulation. But if this is dealt with in the way that it should be, by way of compensation paid outside of the market, then none of those complications will arise. You don't have to redesign the single electricity market or any part of it to pay the compensation that's payable under Article 13(7)."

303. While the interpretation of Article 13(7) is a matter solely for this Court, Energia did adduce some evidence of the interpretation of the provision in other jurisdictions being consistent with its view of the sub-article. As Mr Baillie averred at para. 106 to 107 of his grounding affidavit in the *Energia* proceedings:

> "106. It is relevant to note that the approach adopted in the Decision is inconsistent with the approach adopted in other Member States of the EU. I beg to refer in this regard to a document entitled, CREG (2019) 'Study on the

> Best Forecast of Remedial Actions to Mitigate Market Distortion'…this document was prepared by the Belgium RA, Commission de Regulation de L'Electricite et du Gaz 'CREG', and explains that the Belgium RA has interpreted and given effect to Article 13(7) of the Energy Market Regulation so as to ensure that production units which are redispatched downwards are compensated by the TSO for their opportunity costs. The study states, at para. 46, that: 'This opportunity cost corresponds to the profit they would have made by selling their energy in the day-ahead market coupling, being the difference between the day-ahead clearing price and the variable cost of production or the bid price for being redispatched downwards". The Belgium RA, in the CREG study, notes that the compensation of generators who are redispatched down for loss of profit is clearly indicated by Article 13(7) (para. 29).
>
> 107. The German Federal Ministry for Economic Affairs and Energy commissioned a report in October 2019, entitled NEON [2019] 'Cost or market-based? Future redispatch procurement in Germany'. … This confirms, at page 13, that operators who are subject to redispatch in Germany are subsequently compensated for costs incurred and lost profits and are thus financially indifferent to redispatch provisions. I confirm that these reports were drawn to the attention of the SEMC by the Applicants in the consultation process".

304. In response to a submission from counsel for Greencoat, Mr Collins clarified that the respondent accepts that the Regulation is directly applicable from 01 January 2020, and that it is binding and the respondent is "at all times obliged to comply with it", but that he "found it hard to believe that non-transposition and non-application

proceedings would be taken by the European Commission against [the respondent] in the current situation…" [day 6, p.179, lines 10 to 29]. In an earlier submission, Mr Collins submitted that the contention that the respondents' obligation was to have the Regulation fully implemented by 01 January 2020 "…just couldn't be a reasonable interpretation of the Regulation" … [day 4, p.138, line 23 to p.139, line 1].

305. Whether or not action could be taken against Ireland by the Commission for failure to implement the Regulation from 01 January 2020, it does seem to me that the Regulation required to be implemented and to have full force of law from that date. While the lead-in period may have been deemed wholly insufficient by the respondent, it cannot in my view be argued that the Regulation's provisions were directly applicable, and yet somehow the effect of them was suspended, even to the extent of providing that, although compensation for non-market based redispatching was payable from January 2020, it would not actually be paid until October 2024.

306. It was not the case that the respondent simply did not have the time to implement the Regulation by the due date; it decided that the Regulation should be considered in an extensive consultative process with stakeholders, so that the Decision itself, which mapped out the way in which the SEMC ultimately decided that the Regulation should be implemented, did not issue until almost two years and four months after the implementation date.

307. Article 13(7) requires the payment of financial compensation for non-market based redispatch from 01 January 2020. The respondent accepts this. However, the Decision:

- provides that the payment of such compensation is deferred until the tariff year 2024/25;

- separates the compensation mechanism in terms of costs associated with lost revenues in the market and revenues associated with foregone government support associated with the various renewable support schemes;
- leaves the Decision as to whether compensation for foregone financial support should be paid to the governments of Ireland and Northern Ireland; and
- distinguishes between generators based on whether the date of commissioning is pre- or post- 4 July 2019 on the basis of presumptions as to whether, depending on the applicable date, compensation for priority dispatch generators will be considered unjustifiably high or low.

308. The Regulation is unequivocal in its requirement that compensation for non-market based redispatch be paid from 01 January 2020. It clearly provides that "financial support that would have been received without the redispatching request shall be deemed to be part of the net revenues". There is no basis in Article 13(7) for distinguishing between generators on the basis of date of commissioning. While it may be that compensation will therefore be paid to generators whose investment was made at a time when compensation for financial suppports was not payable, that is not a reason to distinguish between generators by creating presumptions which are not required by the wording of the Regulation.

309. In my view, each of the initiatives in the Decision set out at para. 307 above is in clear conflict with the provisions of Article 13(7), and in particular the imperative to provide for payment of compensation from 01 January 2020. The lack of clarity over what is meant by "unjustifiably low/high" may have caused difficulties or uncertainty as to how that criterion should have been applied in the system of

compensation adopted; there can on occasion be difficulty in interpreting a term in a regulation with a view to implementation, and a way to arrive at a satisfactory and appropriate interpretation must be found, even if this ultimately necessitates an application to the ECJ for a preliminary ruling under Article 267 of the TFEU.

310. However, what is not permissible is that an ambiguous term in an otherwise clear and unequivocal provision be used as a basis for initiating implementation measures based on a range of policy considerations relating to the market generally, none of which is envisaged by the Regulation itself, and in circumstances where the Regulation itself is the end-point of an extensive review of policy by the appropriate EU authorities. It may be that the "unjustifiably low/high" criterion gives rise to an element of choice on the part of the Regulator as to what might or might not be unjustifiable; however, as O'Donnell J remarked in *O'Sullivan v Sea Fisheries Protection Authority* – see para. 236 above – "…a choice does not imply a capacity to determine policy".

311. In his submissions, Mr Collins was at pains to take issue with any implication, whether intended or otherwise, of inactivity or lack of engagement by the CRU with its duty to implement the Regulation, particularly given that the Decision did not emerge until March 2022. It seems to me, having read the very extensive affidavits of Mr Melvin on behalf of the respondent, the lengthy consultation and position papers drafted by the SEMC, and its extensive correspondence with stakeholders, that no such accusation can be levelled against the respondent. Indeed, the documentation shows that the SEMC engaged fully with the Regulation and considered its implications from every angle, liaising closely with interested parties and producing firstly a "Proposed Decision" before ultimately issuing the Decision itself.

312. However, it seems that the SEMC overreached its role as regulator and took a misguided approach to implementing the Regulation, in particular by forming the view that the introduction of the criterion of "unjustifiably low/high" entitled it to exercise its regulatory powers to introduce initiatives which it considered served the interests of the market, but which in fact went far beyond the provisions of Article 13(7) and in a manner inconsistent with those provisions.

The meaning of Article 13(7)

313. The reader will at this stage perhaps be weary of being reminded of the broad distinction between the interpretations of the applicants and the respondent of Article 13(7): the applicants contending that the financial compensation is intended to make the operator "indifferent to redispatch", the respondent contending that the reference to compensation that might be "unjustifiably low or high" entitles it to take into account a range of considerations in the context of the market as a whole to ensure that compensation is justifiable.

314. The applicants drew back from relying on Article 13(7) as having direct effect, preferring to proceed on the basis that the direct applicability of the Regulation was impeded by the Decision. Given the level of debate over the meaning of the Article, it may be that the applicants would not have persuaded the court that it had sufficient clarity to be of direct effect.

315. In the event, I did not require to decide whether Article 13(7) has direct effect. However, it may be helpful to express a view as to the meaning of the provision.

316. On the basis of the textual analysis to which I refer above, and taking into account the evidence of Mr Roberts and Mr Anstey as to the economic rationale(s) behind the Regulation, I am of the view that it is more likely than not that the applicants are correct in contending that the intention behind Article 13(7) is that the

operator be "made whole", subject to adjustment for any anomalies. The express inclusion of foregone financial support as part of the net revenues is suggestive of an intention that all lost income arising from redispatch should be restored, as is the absence of any limitation – such as the 90% in the earlier draft of the Regulation – on the revenues forming part of the compensation. Payment of 100% compensation for redispatching across the board to all generators with firm access provides an incentive to TSO/DSOs to ensure by appropriate operational measures that redispatching is minimised, as envisaged by Article 13(5)(b). The "unjustifiable" element in the sub-article appears to me to relate solely to the calculation of the compensation, rather than to any policy consideration or wider context of the market. The fact that the applicants' interpretation finds support in other Member States – see paragraph 303 above – lends some comfort as to that interpretation being correct.

Other grounds of criticism of the Decision

317. In addition to the matters set out at para. 307 above, the Decision was subject to criticism in a number of respects: see paras. 71 to 76, 117 to 134 and 156 to 180 above. I propose to address each of these grounds below briefly, in view of my finding in relation to the "headline" matters set out at para. 307 above.

The phasing out of compensation for curtailment

318. The positions of the parties concerning the criticism of the Decision that it envisages the phasing out of compensation for curtailment are summarised at paras. 117 to 121 (the applicants) and paras. 210 to 211 (the respondent) above. It is submitted by the applicants that the Regulation clearly provides for compensation for both constraints and curtailment, and thus any aspect of the Decision providing for the phasing out of compensation for curtailment must be in breach of the Regulation.

319. The Decision does of course presently provide for compensation for both constraints and curtailment, albeit that compensation for the latter is deferred until October 2024. The phasing out of compensation is a "function of future market design", and may occur in the future; the respondent is in my view correct in submitting that it cannot, taken in isolation, be a basis for impugning the Decision at this time.

Limitation of compensation to generators with ex-ante positions

320. The applicants complain that the Decision limits compensation to generators with ex-ante positions, so that priority dispatch generators and *de minimis* generators that elected not to trade in the ex-ante markets do not receive compensation: see paras. 72 and 129 to 134 above.

321. The respondent takes the view that priority dispatch generators and *de minimis* generators are not excluded from compensation and such generators are entitled to participate in the market if they wish, and receive compensation under Article 13(7). It is contended that there is "no requirement for such generators to be included": see para. 74 of the respondent's written submissions which quotes para. 97 of Mr Melvin's first affidavit in the Greencoat proceedings as follows:

> "*De minimis* generators are, of course, entitled to participate in the market and benefit from compensation under Article 13(7). The costs of market participation are low, particularly for smaller units represented by existing large market participants. Only units above 5MW are impacted by constraints and curtailment. *De minimis* units receive significant compensation already *via* negative charges, and they are entitled, if they feel it is beneficial, to register in the market, thus foregoing their negative demand payments but receiving compensation under Article 13. Were compensation to accrue to *de minimis*

> generators under Article 13(7), the perverse situation would arise where they were receiving both compensations for curtailment and also receiving a negative charge for the tariff to which these costs are intended to be recovered".

322. This point was developed by Mr Collins in his oral submissions: see day 6, p.67, line 11 to p.70, line 8. Counsel submitted that the "ordinary meaning" of the reference in Article 13(7)(b) to "net revenues from the sale of electricity on the day-ahead market that the power generating would have generated without the redispatching request" was that a unit receiving compensation must necessarily be in the day-ahead market. It was submitted that this interpretation was "consistent with the policy objectives that underpin the Regulation…to get people into the markets". Units such as priority and *de minimis* generators were not discriminated against; they are free to choose to be treated as market participants. For such entities to get the benefits of remaining outside the markets – such as avoiding the imposition of the charges that accompany membership of the market – and yet to receive compensation for redispatch, would be a "perverse situation", which "couldn't be right".

323. There is no doubt that the wording in the first part of Article 13(7)(b) quoted in the paragraph immediately above might suggest that the net revenues lost due to redispatching would have to relate to "the sale of electricity on the day-ahead market", thus implying that market participation was a necessary prerequisite of compensation. However, in interpreting Article 13(7)(b), the court takes a teleological approach, examining the provision in the context of Article 13 and the Regulation as a whole in order to elicit an interpretation which is consistent and harmonious with the intention and scope of the legislative scheme.

324. The first sentence of Article 13(7) establishes the obligation to pay compensation "to the operator of the redispatched generation…except in the case of producers that have accepted a connection agreement under which there is no guarantee of firm delivery of energy". The rest of Article 13(7) actually consists of only one sentence – albeit a very long one with detailed sub-clauses – entirely dedicated to establishing the level of "financial compensation" to be paid. As we can see, the only proviso to the general principle expressed in the first sentence is the requirement of firm access; there is no requirement for participation in the market.

325. Article 12(6) of the Regulation makes it clear that units commissioned prior to 04 July 2019 which use renewable energy sources which were subject to priority dispatch "…shall continue to benefit from priority dispatch". Such units will generally not enter the market, as their priority ensures that access will be had to their electricity as a matter of priority. Counsel for the applicants – see generally day 2, pp. 89 to 102 at p.95 – makes the point that, the Regulation having preserved the priority of units commissioned prior to 04 July 2019, that priority will be undermined by forcing such units to trade in the market in order to get compensation. Counsel submits that such a stance is "not consistent with the grandfathering of the priority dispatch rights under Article 12(6)".

326. *De minimis* generators – who generate less than 10MW – do not, unlike all other generators, have to participate in the balancing model. As Mr Maguire on behalf of Greencoat puts it at para. 29 of his grounding affidavit:

> "Where the generator is less than 10MW in size (a *de minimis* generator**)**, it may choose to participate in the BM, or select a supplier to trade its generated power. *De minimis* generators frequently choose not to participate in the BM or the ex-ante markets, *i.e.,* the [day-ahead market] and the [intra-day market]

> discussed below. Instead, they choose to aggregate their produced power against a supplier's purchases from the market on behalf of their end customers, thus reducing the energy costs and charges faced by the supplier. Such generators cannot offer balancing services, but nevertheless remain dispatched and redispatched by the TSO".

327. The applicants argue that the fact that *de minimis* generators receive significant compensation *via* "negative charges" can be "addressed within the terms of the methodology provided for in Article 13(7). It is not a valid basis on which to exclude *de minimis* generators entirely from receiving such compensation" [para. 66 Mr Maguire's affidavit of 20 February 2023]. Mr Maguire goes on in that paragraph to aver that, in fact, where REFIT support is payable, such support is "reduced by the amount of such negative charges and, therefore, there will be no net benefit to the *de minimis* generator".

328. Mr Kennedy on behalf of Energia makes the point that, if the interpretation by the respondent is correct, the quantum of compensation for *de minimis* generators under Article 13(7)(b) will always be zero, which he asserts "has to be wrong or incorrect": see day 8, p.16, lines 20 to 29. Certainly, if the only feature of the second sentence of the Article "…[S]uch financial compensation…" onward is to prescribe the calculation of compensation, this would indeed be an odd result.

329. The net contention of the respondent is that the reference in Article 13(7)(b) to the revenues "from the sale of electricity on the day-ahead market" constitutes a further compulsory requirement, in addition to firm access, for an entitlement to compensation. It seems to me that, if such a far-reaching proviso involving exclusion of numerous generators from compensation was intended, it is unlikely that it would have been set out in such a passing and understated manner in the portion of the sub-

article which is solely concerned with the calculation of compensation, and not the criteria concerning eligibility for compensation.

330. The applicants contend that the reference to "the sale of electricity on the day-ahead market" is included to identify the price at which the compensation would be calculated; the day-ahead market price is a single clear price which, as the glossary furnished by the parties points out, "…is the main reference market for the settlement of renewable support schemes and financial contracts". It is contended that it was not intended to imply a necessity to participate in the day-ahead market.

331. While sub-Article 13(7)(b) does give rise to some confusion, and certainly could be more happily worded, it does not seem to me that, taking Article 13(7) in the context of Article 13 generally and the Regulation as a whole, the intention of Article 13(7)(b) was to make participation in the market a pre-condition of entitlement to compensation. To the extent that the Decision limits compensation to participants in the ex-ante markets, it creates a barrier to compensation for certain generators which in my view is not supported by Article 13(7) and obstructs and impedes the full and proper operation of the compensation system.

Compensation to be paid by SEMOpx through the SEM

332. Complaint is made by the applicants that compensation is to be paid by the SEMO – Eirgrid in this jurisdiction, SONI in Northern Ireland – through SEMOpx (see para. 25 above) to the licensed supplier and not the generator. See Greencoat submissions paras. 54 to 55; Energia submissions para. 81.

333. At para. 90 of his first affidavit in the Greencoat proceedings, Mr Melvin on behalf of the respondent addresses this point as follows:

> "The applicant argues that the SEM Committee has erred by not clarifying that revenues associated with compensation under the Regulation should be

> received by the owner of the generation asset that has been redispatched. This is not a matter for the SEMC to decide on to the extent it relates to foregone support, but an administrative matter, best resolved through the jurisdictional arrangements to be established in due course. It should be noted that GR's approach, if followed, would lead to enormous disruption in the electricity market due to the need to potentially reopen and renegotiate existing PPAs. I understand that both GR and Energia entities are contracted with each other through a PPA, whereby Energia provides trading and intermediary services to units owned by Greencoat. I wholly reject the suggestion that the SEMC has not implemented the Regulation by not addressing the issue of who might request and ultimately receive any additional compensation that might accrue. This issue is entirely a matter for the contract, or PPA, between the generator and the intermediary supply company."

334. The applicants contend that, where generators have entered into PPAs – see para. 161 above in this regard – compensation is paid to the licensed electricity supplier, who benefits from the compensation payment, and that this is plainly not envisaged by the Regulation, which refers to "financial compensation by the system operator…to the operator of the redispatched generation…", *i.e.*, from the TSO directly to the generator. As Mr Maguire on behalf of Greencoat points out at para. 60 of his affidavit of 20 February 2023, that payment be paid to the *operator* of the redispatched generation "…is a requirement of the Regulation, not as Mr Melvin describes it, 'GR's approach'. Nor is it, as he also describes it 'an administrative matter, best resolved through the jurisdictional arrangements to be established in due course'".

335. In the list of issues presented jointly by the applicants after the hearing had finished, the applicants listed, as examples of the Decision allegedly being inconsistent with and/or failing to implement Article 13(7):

> "(c) Provides for compensation for non-market based redispatch to be paid on behalf of SEMOpx through the SEM, rather than by Eirgrid and SONI in their capacity as TSOs;
>
> (d) Fails to provide for compensation for non-market redispatch to be paid by the TSO to the redispatched generator…".

336. Among the issues presented by the respondent in its list was the following:

> "9. Is it an obstruction of Article 13(7) for compensation for non-market based redispatch to be paid by SEMOpx on behalf of the TSOs?"

337. Oddly, the respondent's list of issues does not include the issue of the licensed supplier being the recipient of compensation, rather than the generator.

338. The statement of grounds in the Greencoat proceedings specifically seeks relief in relation to the issues identified above in the applicants' list of issues: see para. 7(iii) of the statement of grounds. It explains the issues as follows:

> "43. Separate to the grid connection agreements, a generator may conclude a power purchase agreement (a 'PPA') with a third party whereby the generator will sell all of the electricity it produces to a third party. As explained below, this third party will invariably be a licensed electricity supplier who will then sell the electricity into the SEM. The price paid by the supplier for the electricity under the PPA is a matter of commercial negotiation between the generator and the supplier.
>
> 44. Each of the GRW group entities sell their power to licensed electricity suppliers under PPAs. Under the REFIT and RESS support schemes for

renewable generation which are explained in greater detail below, a PPA with a licensed supplier is a requirement for participation in those schemes".

339. The statement of grounds points out at para. 80 that "…PPAs as required under REFIT and RESS are long term arrangements…generators have little ability to renegotiate PPAs". At para. 81, it is stated that:

> "Although the terms of REFIT and RESS allow generators to leave those schemes (and thereby be released from the obligation to appoint an intermediary) and the TSC provides for the termination of intermediary appointments, the PPAs that generators have entered into will often not permit generators to do so. As such, where payments are made from the SEMO or the NEMO in respect of electricity supplied to the SEM, those payments must be made to the intermediary (or an entity registered by it) and not the generator."

340. The respondent does not seem to maintain the position that Article 13(7) does not require payment to be made "to the operator of the redispatched generation". At para. 23(i) of the statement of opposition in the Greencoat matter, the respondent pleads that it "has no role in relation to the content of PPAs. The Decision to mandate a PPA is a decision for the respective departments of government in the State and Northern Ireland". To the extent that the respondent has a position on this issue, it is articulated by Mr Melvin at para. 90 of his first affidavit: see para. 333 above. As that paragraph makes clear, the "issue of who might request and ultimately receive any additional compensation that might accrue", is "entirely a matter for the contract, or PPA, between the generator and the intermediary supply company".

341. However, the wording in Article 13(7) is unequivocal in requiring payment of compensation "by the system operator…to the operator of the redispatched generation…". A common theme of the submissions by the applicants – see for

instance para. 302 above – is that the respondent is trying to provide for compensation through the mechanism of the market, whereas if the question of compensation were dealt with outside the market, none of the complications such as those referred to by Mr Melvin at para. 90 quoted above would arise.

342. The respondent does not have visibility on the contracts between PPAs and generators; neither does the court. It may be that there are complex contractual issues which would arise between those contracting parties in circumstances where compensation is paid to the generator rather than the intermediary. However, Article 13(7) unequivocally requires payment of compensation to be made by the TSO to the generator, and responsibility for giving effect to the Regulation cannot be deferred by the regulator on the basis that compensation for foregone supports is "best resolved through jurisdictional arrangements", or on the basis of an alleged complexity arising from private contractual arrangements to which the respondent is not privy.

343. It follows that, in providing for payment by SEMOpx through the SEM to parties other than "the operator of the redispatched generation", the Decision fails to implement and obstructs the provisions of Article 13(7).

Net revenues arising from CPPAs

344. The applicants contend that net revenues from CPPAs – corporate power purchase agreements – must be taken into account as "financial support" in order to assess compensation at opportunity cost, which they maintain is required under Article 13(7). This position is opposed by the respondent, which considers that "financial support" as referred to in Article 13(7)(b) comprises only State financial support rather than that arising from third party contracts. The respective arguments are summarised above at paras. 161 to 165. In the Energia written submissions, the point is addressed at para. 77(iii) as follows: -

> "No reasons are provided in the Decision for the exclusion of net revenues arising from corporate power purchase agreements (CPPAs). Irrespective of whether revenues from CPPAs amount to a form of financial support or form part of net revenues from the sale of electricity, the foregoing revenue arising from CPPAs ought to be included in the calculation of the compensation payable under Article 13(7), consistent with the objective or rationale for same, which is to compensation [sic] a generator for the opportunity cost for redispatch".

345. Mr Kennedy addressed this topic at day 3, pp. 165 to 172 of the transcript. He objected to the expression by Mr Melvin at paras. 90 to 93 of his first affidavit – see para. 162 above – of the respondent's position on this issue, on the basis that it was not articulated in the Decision itself and was inadmissible. Without prejudice to that position, he summarised Energia's stance as follows:

> "…In simple terms…it goes back to…the principal point that I made today, you should have a market-based outcome, you should recover, in the case of being redispatched downwards, the net revenues which you have foregone. That's the case clearly in the case of REFIT, it's the case equally in the case of RESS and, economically and structurally, a payment under a CPPA is no different to a payment under RESS. Insofar as Mr Anstey in particular refers to a concern about people gaming the system or engaging in inappropriate contractual behaviour, the point was made in response by Mr Roberts that there are other ways in which you can deal with that, including a requirement that the contract be made available and that one could examine its terms for commerciality. But certainly that of itself, we say, doesn't justify a different treatment of the CPPA". [Day 3, p. 171, line 20 to p.172, line 7].

346. Leaving aside counsel's objection for a moment, it is clear from paras. 90 to 93 of Mr Melvin's first affidavit that "…the CRU considers support as State support. CPPA policy is designed to remove the need for State support…" [para. 91]. While that may be, the task of the court is to discern the meaning of Article 13(7), and in particular Article 13(7)(b). That clause identifies the essential component of compensation as "…net revenues from the sale of electricity…that the power-generating…facility would have generated without the redispatching request". The rest of Article 13(7)(b) provides that "…financial support that would have been received without the redispatching request shall be deemed to be part of the net revenues". If financial support is to be taken into account in determining net revenues, the only question is whether the respondent is justified in inferring that "financial support" refers only to State support.

347. The words used in the sub-article provide some support for this inference. It could be argued that the expression "where financial support is granted" is more consistent with aid supplied by the State than a private contractual arrangement – a party to a commercial contract does not usually "grant" … "financial support". On the other hand, it would have been a simple matter for the legislature to specify that it was referring only to State support, rather than a private contractual arrangement.

348. If the essential task is to determine the "net revenues from the sale of electricity [the facility] would have generated without the redispatching request…", and revenue which a generator would have received under the terms of a CPPA is lost as a result of redispatching, it is not apparent to me that there is any reason in logic for excluding income derived through the operation of a CPPA. To do so would frustrate the object of enabling the net revenues which the generator "would have generated without the redispatching request" to be accurately estimated.

349. At para. 93 of his affidavit, Mr Melvin refers to the Regulation as being "part of a broader legislative package including Directive 2018/2021 on renewable electricity which draws a clear distinction between a "support scheme" and a "renewable power purchase agreement". Article 2 of that Directive – the so-called "Renewable Energy Directive" – does contain separate definitions for "support scheme" and "renewables power purchase agreement". However, I do not think this is of much assistance in the interpretation of Article 13(7) of the Regulation. The term "support scheme" is not used in that sub-article, which provides solely for the criteria for, and calculation of, compensation for redispatching. In my view, its very narrow context requires a teleological or purpose-driven view of its terms, and the wider ambit of the Renewable Energy Directive is not of assistance in this regard.

350. There may well be problems arising from the private nature of CPPAs in calculating whether compensation which takes income from that source into account is "unjustifiably low" or "unjustifiably high". Some of the possible solutions to these difficulties were canvassed by Mr Roberts and touched upon by Mr Kennedy in his submissions as set out above. However, these are difficulties of implementation; as we have seen, difficulty of implementation is not a reason not to ensure the appropriate implementation of an EU measure. It seems to me that Article 13(7) requires net revenues from CPPAs lost due to redispatch to be taken into account in calculating compensation, as is the case with State support. To the extent that it excludes this possibility, the Decision in my view obstructs and fails to implement Article 13(7).

BCoP/BMPCoP

351. The applicants' complaints about the retention of BCop – the "bidding code of practice" – are summarised above at paras. 158 to 160. Energia set out its arguments

at paras. 82 to 87 of its written submissions, with a brief response from CRU at para. 75 of its written submissions. Mr Kennedy addressed the topic at length in his submissions: see day 3, pp. 150 to 165; Mr Collins in turn replied at length on day 6 at pp. 92 to 95.

352. As will be apparent from para. 159 above, part of the problem on this issue is that the suggestion by CRU that BCoP and its successor BMPCoP ("balancing market principles code of practice") will continue to apply even after market-based redispatch has been implemented in the SEM was articulated in a letter of 27 May 2022 to Wind Energy Ireland, rather than in the Decision itself. The applicants complain that BCoP has no place in an enduring market-based arrangement, and that its retention is neither reasoned nor explained – or even articulated – in the Decision.

353. The Decision at p.39 discusses the applicability of BCoP/BMPCoP, and acknowledges that there were "some different suggestions" from "respondents" as to how to implement a market-based treatment, "including revisions to the BCoP/ BMPCoP". Mr Collins refers to p.41 of the Decision which states as follows:

> "As set out earlier in this paper, the SEM committee is of the view that based on the approach for implementation of compensation arrangements under Article 13(7) of the Regulation, no immediate changes to the BMPCoP are required to facilitate the renewable units in the SEM.
>
> This is not to say that a review of the BMPCoP in this area will not take place. This review will need to consider the modalities of the submission of COD [commercial offer data], both complex and simple, by non-priority dispatch renewable units to facilitate TSO scheduling and dispatch. Such work will progress as appropriate in light of the TSO's workshops on the treatment of new units".

354. It may be that BCoP, as the applicants contend, would not be consistent with a market-based bidding system, if and when that is introduced. Mr Collins submits that the Decision itself makes clear that the operation of the bidding code will be reviewed as the move to a market-based system progresses. It does not seem to me that the applicants can impugn the Decision on the basis of something which they themselves contend is not articulated, reasoned or justified in the Decision itself, and which the Decision seems to suggest – albeit not very clearly – will be the subject of ongoing review.

Breach of Article 15.2.1 of the Constitution

355. The applicants' arguments in relation to whether or not the Decision is in breach of Article 15.2.1 of the Constitution are summarised at paras. 166 to 170 above. Mr Lewis' submissions on behalf of the respondent are summarised at paras. 231 to 235 above. Greencoat addressed the issue at paras. 89 to 92 of its submissions; Energia did likewise at paras. 94 to 111 of its submissions. CRU replied very briefly at para. 89 of its submissions.

356. There was no substantive disagreement between the parties as to the legal principles to be applied. Both parties accept that the law is as stated in *Meagher* and *Maher*. The respondent does not dispute the net position of Energia as expressed at para. 109 of its submissions and reproduced at para. 169 above. However, Mr Lewis submitted that the issue was really whether or not the Decision was consistent with the Regulation; if it were not, it did not follow that the respondent had impermissibly purported to make law in contravention of Article 15.2.1.

357. It seems to me that the applicants' argument in this regard is more suited to a situation where a directive has issued, and the Member State authority is tasked with giving effect to the directive by a national measure. In such a situation, the national

authority must make choices as to how it will implement the directive, and the issue of whether the way in which this is done conflicts with the policies inherent in the directive may well be a more "live" or obvious issue. However, the role of a Member State authority as regards a directly applicable regulation is clear; the Regulation must be given *effet utile* and, in the words of Fennelly J in *Maher*, any act of implementation "…must not have the effect of impeding the effectiveness of EU law".

358. To the extent that the Decision impedes or obstructs the effect and intent of the Regulation, the Decision is invalid and cannot be allowed to stand. Whether the invalidity arises from the adoption in the Decision of policies not envisaged by, or at odds with, the Regulation, is, in a sense, neither here nor there. If the Decision is incompatible with the Regulation by virtue of the adoption of some policy not consistent with the Regulation, it does not seem to me to matter whether this might be regarded as an impermissible attempt to make laws for the State.

359. It does seem to me that the policy decisions set out at para. 307 above could be characterised as aspects of the Decision which affect rights or impose liabilities in a way that could be said to contravene Article 15.2.1 of the Constitution. However, it does not seem to me to be necessary to decide this given of the views expressed at paras. 308 to 312 above, and in particular the unequivocal finding at para. 309 that "…each of the initiatives in the Decision set out at para. 307 above is in clear conflict with the provisions of Article 13(7) …".

Pleadings/legal certainty/reasons

360. The applicants complain that the statement of opposition did not comply with the Rules of the Superior Courts: see paras. 172 to 174 above. They also complained about an alleged failure to give reasons in the Decision: see paras. 175 to 180 above,

paras. 112 to 121 of the submissions of Energia, and paras. 100 to 108 of the written submissions of Greencoat. This issue was addressed by the respondents: see paras. 227 to 229 above, and paras. 77 to 85 of its written submissions.

361. Energia in particular in its written submissions [paras. 114 to 121] sets out eight respects in which it maintains that the SEMC's reasoning as set out in the Decision was "wholly inadequate, to the extent that it is not possible to understand the basis for the Decision of the CRU in respect of the implementation of Article 13(7)". Most of these instances relate to matters in respect of which Energia maintains that the reasons for the stance taken on particular issues were not set out. There are also complaints generally about an alleged lack of clarity in the Decision in various respects.

362. The context in which the Decision issued must be borne in mind. The process which culminated in the enactment of the Directive and the Regulation was well known to all the parties. The SEMC embarked on an extensive consultative process to which all parties contributed. There was a "Proposed Decision", and then the Decision itself. There was extensive correspondence between stakeholders including the applicants with the SEMC as to the implications of the Decision. All of the participants were sophisticated, well-informed and well-advised parties capable of teasing out the implications of the Decision.

363. There is no doubt that the Decision is not a model of clarity. The reasons for the adoption of the headline initiatives set out at para. 307 above are not clear. It does not set out, in a systematic way, a list of issues addressed, the contentions of the various stakeholders, the individual decisions on the various issues and the reasons for those decisions. On the other hand, the respondent relies on the dicta of Clarke J in *Connolly v. An Bord Pleanála* [2021] 2 IR 752 at 769 as follows:

> "6.15. […] First, any person affected by a decision is at least entitled to know **in general terms** why the Decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have **enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision**. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision **to actually engage properly in such an appeal or review**…
>
> 6.16. However, in identifying this general approach, it must be emphasised that its application **will vary greatly from case to case** [depending on the various criteria] … which might distinguish one decision, or decision making process, from another". [Emphasis supplied by respondent in written submissions].

364. The respondent makes the point that the fact that the applicants were able to launch a wide-ranging challenge to the Decision runs contrary to the suggestion that the reasons given for the Decision are inadequate. I do not think this necessarily follows: much of the complaints of the applicants centred around the allegation that portions of the Decision were poorly reasoned or not reasoned at all. If the post-decision correspondence had provided the requisite degree of clarity as to what decisions were made and why, I would not have been inclined to hold that insufficient reasons had been given, as the applicants would then have been in a position to make a fully informed decision whether or not to challenge the Decision. I think that, in a complicated and technical consultative process, it may be necessary sometimes to

provide clarification after the fact, and I do not consider that this is necessarily impermissible.

365. While the lack of clarity in the Decision may have made the process of challenging the Decision more arduous and complicated, the applicants cannot go so far as to say that they were prevented by the lack of reasons or certainty from mounting a challenge to the substance of the Decision. Accordingly, any failure to give reasons as alleged by Energia in particular would not of itself be fatal to the Decision. That fatality, as we have seen, is based on other grounds.

366. Similarly, I am not disposed to grant relief solely on the basis of deficiencies in the statement of opposition. It is certainly not a very expansive or informative document; however, I think that Mr Lewis is correct in suggesting that there was little factual dispute between the parties, that the basic position of the respondent was that the SEMC had acted correctly and in accordance with the Regulation, and that accordingly the statement of opposition, while somewhat terse on the individual issues, did not provide grounds in itself for relief for the applicants.

Conclusion

367. Given the length of this judgment and the complexity of the issues, it is appropriate to summarise the main findings of the court.

(1) To the extent that the Decision

- provides that the payment of financial compensation for non-market based redispatch under Article 13(7) is deferred until the tariff year 2024/2025;
- separates the compensation mechanism in terms of costs associated with lost revenues in the market and revenues

associated with foregone government support associated with the various renewable support schemes;

- leaves the Decision as to whether compensation for foregone financial support should be paid to the governments of Ireland and Northern Ireland; and
- distinguishes between generators based on whether the date of commissioning is pre-or post-04 July 2019 based on presumptions as to whether compensation for priority dispatch generators will be considered unjustifiably high or low

the Decision is, for the reasons set out in detail in this judgment, in conflict with the provisions of Article 13(7). These aspects of the Decision are incompatible with those provisions and in particular the imperative to provide for payment of compensation from 01 January 2020 in accordance with the terms of the sub-article.

(2) Limiting compensation to participants in the ex-ante markets, both "…creates a barrier to compensation for certain generators which…is not supported by Article 13(7) and obstructs and impedes the full and proper operation of the compensation system" [see para. 331 above].

(3) In providing for payment by SEMOpx through the SEM to parties other than "the operator of the redispatched generation" the Decision is in conflict with the clear terms of Article 13(7) and fails to implement its provisions.

(4) To the extent that the Decision prevents net revenues from CPPAs lost due to redispatch to be taken into account in calculating compensation,

the Decision obstructs and fails to implement the terms of Article 13(7).

368. The main reliefs sought by the applicants in their respective proceedings are an order of *certiorari* quashing the Decision and an order of *mandamus* requiring the CRU to give effect to Article 13(7). Both applicants also seek a host of declaratory reliefs.

369. It seems to me that the findings of the court as set out above go directly to the validity and viability of the regime established by the Decision. The court has found that the compensation system established by the Decision is fundamentally flawed.

370. In such circumstances, it seems to me that an order of *certiorari* as sought by each of the applicants is warranted. However, the order of *mandamus* is sought by both applicants in very general terms; I am concerned that, if an order of *mandamus* were made, the respondent should be very clear as to what it is required to do in order to give "full effect" to Article 13(7).

371. The parties may also wish to consider, in view of the discussion of the issues and findings on each area of controversy, the extent to which declaratory relief is necessary.

372. In all the circumstances, it seems to me that the parties must have a period in which to assimilate the terms and findings of this judgment, and to confer with each other as to what might be appropriate orders. I propose to list the matter for mention at 10.00 am on 24 November 2023 so that the parties can apprise the court as to their views on the necessity for submissions and/or a hearing in relation to the orders to be made on foot of this judgment. Both sides will have liberty to apply in the meantime if anything significant arises.

APPENDIX A

ACER	Agency for the Cooperation of Energy Regulators.
BCoP	Bidding Code of Practice.
BMOCoP	Balancing Market Principles Code of Practice.
CPPA	Corporate Power Purchase Agreement.
CRU	The Commission for Regulation of Utilities.
DECC	The Department of Environment, Climate and Communications.
DSO	Distribution System Operator.
ERA	Electricity Regulation Act 1999 (as amended).
GCA	Grid Connection Agreement.
NEMO	Nominated Electricity Market.
NIAUR	Northern Ireland Authority for Utility Regulation.
NRA	National Regulatory Authority.
PPA	Power Purchase Agreement.
PSO	Public Service Obligation.
REFIT Schemes	Renewable Energy Feed in Tariff schemes (REFI 1, REFUT 2 AND REFIT 3).
RESS	Renewable Energy Support Schemes (RESS 1 & RESS 2).
SEM	Single Electricity Market.
SEMC	Single Electricity Market Committee.
SEMO	Single Electricity Market Operator.
SEMOpx	Single Electricity Market Power Exchange.
SNSP	System Non-Synchronous Penetration time.
SONI	System Operator for Northern Ireland.
TSC	Trading and Settlement Code.
TSO	Transmission System Operator.

APPENDIX B

Article 13:

1. The redispatching of generation and redispatching of demand response shall be based on objective, transparent and non-discriminatory criteria. It shall be open to all generation technologies, all energy storage and all demand response, including those located in other Member States unless technically not feasible.

2. The resources that are redispatched shall be selected from among generating facilities, energy storage or demand response using market-based mechanisms and shall be financially compensated. Balancing energy bids used for redispatching shall not set the balancing energy price.

3. Non-market-based redispatching of generation, energy storage and demand response may only be used where:

(a) no market-based alternative is available;

(b) all available market-based resources have been used;

(c) the number of available power generating, energy storage or demand response facilities is too low to ensure effective competition in the area where suitable facilities for the provision of the service are located; or

(d) the current grid situation leads to congestion in such a regular and predictable way that market-based redispatching would lead to regular strategic bidding which would increase the level of internal congestion and the Member State concerned either has adopted an action plan to address this congestion or ensures that minimum available capacity for cross-zonal trade is in accordance with Article 16(8).

4. The transmission system operators and distribution system operators shall report at least annually to the competent regulatory authority, on:

(a) the level of development and effectiveness of market-based redispatching mechanisms for power generating, energy storage and demand response facilities;

(b) the reasons, volumes in MWh and type of generation source subject to redispatching;

(c) the measures taken to reduce the need for the downward redispatching of generating installations using renewable energy sources or high-efficiency cogeneration in the future including investments in digitalisation of the grid infrastructure and in services that increase flexibility.

The regulatory authority shall submit the report to ACER and shall publish a summary of the data referred to in points (a), (b) and (c) of the first subparagraph together with recommendations for improvement where necessary.

5. Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria established by the

regulatory authorities, transmission system operators and distribution system operators shall:

(a)guarantee the capability of transmission networks and distribution networks to transmit electricity produced from renewable energy sources or high-efficiency cogeneration with minimum possible redispatching, which shall not prevent network planning from taking into account limited redispatching where the transmission system operator or distribution system operator is able to demonstrate in a transparent way that doing so is more economically efficient and does not exceed 5 % of the annual generated electricity in installations which use renewable energy sources and which are directly connected to their respective grid, unless otherwise provided by a Member State in which electricity from power-generating facilities using renewable energy sources or high-efficiency cogeneration represents more than 50 % of the annual gross final consumption of electricity;

(b)take appropriate grid-related and market-related operational measures in order to minimise the downward redispatching of electricity produced from renewable energy sources or from high-efficiency cogeneration;

(c)ensure that their networks are sufficiently flexible so that they are able to manage them.

6. Where non-market-based downward redispatching is used, the following principles shall apply:

(a)power-generating facilities using renewable energy sources shall only be subject to downward redispatching if no other alternative exists or if other solutions would result in significantly disproportionate costs or severe risks to network security;

(b)electricity generated in a high-efficiency cogeneration process shall only be subject to downward redispatching if, other than downward redispatching of power-generating facilities using renewable energy sources, no other alternative exists or if other solutions would result in disproportionate costs or severe risks to network security;

(c)self-generated electricity from generating installations using renewable energy sources or high-efficiency cogeneration which is not fed into the transmission or distribution network shall not be subject to downward redispatching unless no other solution would resolve network security issues;

(d)downward redispatching under points (a), (b) and (c)shall be duly and transparently justified. The justification shall be included in the report under paragraph 3.

7. Where non-market based redispatching is used, it shall be subject to financial compensation by the system operator requesting the redispatching to the operator of the redispatched generation, energy storage or demand response facility except in the case of producers that have accepted a connection agreement under which there is no guarantee of firm delivery of energy. Such financial compensation shall be at least

equal to the higher of the following elements or a combination of both if applying only the higher would lead to an unjustifiably low or an unjustifiably high compensation:

(a) additional operating cost caused by the redispatching, such as additional fuel costs in the case of upward redispatching, or backup heat provision in the case of downward redispatching of power-generating facilities using high-efficiency cogeneration;

(b) net revenues from the sale of electricity on the day-ahead market that the power-generating, energy storage or demand response facility would have generated without the redispatching request; where financial support is granted to power-generating, energy storage or demand response facilities based on the electricity volume generated or consumed, financial support that would have been received without the redispatching request shall be deemed to be part of the net revenues.