[2024] IEHC 129

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2022.0000458]

BETWEEN

AN TAISCE - THE NATIONAL TRUST FOR IRELAND

APPLICANT

AND

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

RESPONDENTS

AND

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

NOTICE PARTIES

(No. 1)

JUDGMENT of Humphreys J. delivered on Wednesday the 6th day of March, 2024

1. In these proceedings, An Taisce challenges the validity of Ireland's Nitrates Action Programme and related matters. As well as a full defence on the merits, the State, supported by the IFA and ICMSA, has deposited an unprecedented volume of pleading-type objections into the case, so much so that modularisation is required. Even dealing with the first module is requiring a judgment of 92,375 words, the length of a respectable PhD thesis, albeit without quite the same claim to originality. The question to be considered now is whether this indiscriminate scattershot of pleading objections is meritorious.

Legal context – the nitrates directive

2. Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources ("the nitrates directive") is described by the European Commission as an instrument that "aims at protecting water quality across Europe by reducing and preventing ground and surface water pollution caused by nitrates from agricultural sources, including by promoting the use of good farming practices and adopting Action Programmes." (FAQ note on the links between the Nature Directives and the Nitrates Directive Final document October 2019: https://www.ecologic.eu/sites/default/files/publication/2019/3535-_nature-directives.pdf).

3. Article 3 of the nitrates directive provides:

> "1. Waters affected by pollution and waters which could be affected by pollution if action pursuant Article 5 is not taken shall be identified by the Member States in accordance with the criteria set out in Annex I.
>
> 2. Member States shall, within a two-year period following the notification of this Directive, designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution. They shall notify the Commission of this initial designation within six months.
>
> 3. When any waters identified by a Member State in accordance with paragraph 1 are affected by pollution from waters from another Member State draining directly or indirectly in to them, the Member States whose waters are affected may notify the other Member States and the Commission of the relevant facts.
>
> The Member States concerned shall organize, where appropriate with the Commission, the concertation necessary to identify the sources in question and the measures to be taken to protect the waters that are affected in order to ensure conformity with this Directive.
>
> 4. Member States shall review if necessary revise or add to the designation of vulnerable zones as appropriate, and at last every four years, to take into account changes and factors unforeseen at the time of the previous designation. They shall notify the Commission of any revision or addition to the designations within six months.
>
> 5. Member States shall be exempt from the obligation to identify specific vulnerable zones, if they establish and apply action programmes referred to in Article 5 in accordance with this Directive throughout their national territory."

4. It can be noted on the last point that Ireland has chosen the "national territory" option - European Communities (Protection of Waters against Pollution from Agricultural Sources) Regulations, 2003 (S.I. No. 213).

5. Article 4 envisages codes of good agricultural practice:

"1. With the aim of providing for all waters a general level of protection against pollution, Member States shall, within a two-year period following the notification of this Directive:
(a) establish a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis, which should contain provisions covering at least the items mentioned in Annex II A;
(b) set up where necessary a programme, including the provision of training and information for farmers, promoting the application of the code(s) of good agricultural practice.
2. Member States shall submit to the Commission details of their codes of good agricultural practice and the Commission shall include information on these codes in the report referred to in Article 11. In the light of the information received, the Commission may, if it considers it necessary, make appropriate proposals to the Council."

6. Article 5 of the directive goes on to provide for nitrates action programmes:
"1. Within a two-year period following the initial designation referred to in Article 3 (2) or within one year of each additional designation referred to in Article 3 (4), Member States shall, for the purpose of realizing the objectives specified in Article 1, establish action programmes in respect of designated vulnerable zones.
2. An action programme may relate to all vulnerable zones in the territory of a Member State or, where the Member State considers it appropriate, different programmes may be established for different vulnerable zones or parts of zones.
3. Action programmes shall take into account:
(a) available scientific and technical data, mainly with reference to respective nitrogen contributions originating from agricultural and other sources;
(b) environmental conditions in the relevant regions of the Member State concerned.
4. Action programmes shall be implemented within four years of their establishment and shall consist of the following mandatory measures:
(a) the measures in Annex III;
(b) those measures which Member States have prescribed in the code(s) of good agricultural practice established in accordance with Article 4, except those which have been superseded by the measures in Annex III.
5. Member States shall moreover take, in the framework of the action programmes, such additional measures or reinforced actions as they consider necessary if, at the outset or in the light of experience gained in implementing the action programmes, it becomes apparent that the measures referred to in paragraph 4 will not be sufficient for achieving the objectives specified in Article 1. In selecting these measures or actions, Member States shall take into account their effectiveness and their cost relative to other possible preventive measures.
6. Member States shall draw up and implement suitable monitoring programmes to assess the effectiveness of action programmes established pursuant to this Article.
Member States which apply Article 5 throughout their national territory shall monitor the nitrate content of waters (surface waters and groundwater) at selected measuring points which make it possible to establish the extent of nitrate pollution in the waters from agricultural sources.
7. Member States shall review and if necessary revise their action programmes, including any additional measures taken pursuant to paragraph 5, at least every four years. They shall inform the Commission of any changes to the action programmes."

7. Annex III, specifying the content of programmes, is as follows:
"ANNEX III
MEASURES TO BE INCLUDED IN ACTION PROGRAMMES AS REFERRED TO IN ARTICLE 5 (4)
(a) The measures shall include rules relating to:
1. periods when the land application of certain types of fertilizer is prohibited;
2. the capacity of storage vessels for livestock manure; this capacity must exceed that required for storage throughout the longest period during which land application in the vulnerable zone is prohibited, except where it can be demonstrated to the competent authority that any quantity of manure in excess of the actual storage capacity will be disposed of in a manner which will not cause harm to the environment;
3. limitation of the land application of fertilizers, consistent with good agricultural practice and taking into account the characteristics of the vulnerable zone concerned, in particular:
(a) soil conditions, soil type and slope;
(b) climatic conditions, rainfall and irrigation;
(c) land use and agricultural practices, including crop rotation systems;
and to be based on a balance between:
(i) the foreseeable nitrogen requirements of the crops,
and
(ii) the nitrogen supply to the crops from the soil and from fertilization corresponding to:

— the amount of nitrogen present in the soil at the moment when the crop starts to use it to a significant degree (outstanding amounts at the end of winter),
— the supply of nitrogen through the net mineralization of the reserves of organic nitrogen in the soil,
— additions of nitrogen compounds from livestock manure,
— additions of nitrogen compounds from chemical and other fertilizers.
2. These measures will ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare.
The specified amount per hectare be the amount of manure containing 170 kg N. However:
(a) for the first four year action programme Member States may allow an amount of manure containing up to 210 kg N;
(b) during and after the first four-year action programme, Member States may fix different amounts from those referred to above. These amounts must be fixed so as not to prejudice the achievement of the objectives specified in Article 1 and must be justified on the basis of objectives criteria, for example:
— long growing seasons,
— crops with high nitrogen uptake,
— high net precipitation in the vulnerable zone,
— soils with exceptionally high denitrification capacity.
If a Member State allows a different amount under point (b) of the second subparagraph, it shall inform the Commission, which shall examine the justification in accordance with the regulatory procedure referred to in Article 9(2).
3. Member States may calculate the amounts referred to in paragraph 2 on the basis of animal numbers.
4. Member States shall inform the Commission of the manner in which they are applying the provisions of paragraph 2. In the light of the information received, the Commission may, if it considers necessary, make appropriate proposals to the Council in accordance with Article 11."

8. The Commission's FAQ summary includes the following (p. 7):
"Establishment of Action Programmes to be implemented by farmers within NVZs on a compulsory basis, or across the whole territory of the Member State if its authorities decided to avail themselves of whole-territory option. These Programmes must include (see Annex III of the Directive):
• measures already included in Codes of Good Agricultural Practice, which become mandatory in the areas covered by the Action Plan; and
• other measures, such as
    • periods when the land application of certain types of fertilizers is prohibited
    • capacity of storage levels for livestock manure, which must exceed that required for storage during the longest period in which land application is forbidden
    • limitation of fertilizer application (mineral and organic), taking into account crop needs, soil conditions and climatic conditions, and based on a balance between the foreseeable requirements of the crops and the nitrogen supply to the crops from the soil and fertilization ('balanced fertilization').
    • the maximum amount of livestock manure to be applied (corresponding to 170 kg nitrogen/hectare/year).
As confirmed by a recent Judgement of the Court of Justice [n8: Judgment of the Court (Ninth Chamber) of 21 June 2018. European Commission v Federal Republic of Germany. Case C-543/16. http://curia.europa.eu/juris/liste.jsf?num=C-543/16], as soon as it becomes apparent that the above measures will not be sufficient to achieve the Directive's objectives, Member States are obliged, within the framework of the Action Programmes, to take additional measures or reinforced actions. In the selection of these measures or actions, Member States have to take into account their effectiveness and their cost relative to other possible preventive measures. Member States are required to review and, if necessary, revise their Action Programmes (including any additional measures) at least every four years."

9. The Commission's assessment of progress as of the FAQ document in 2019 was (p. 10):
"The latest Commission Report on the implementation of the Nitrates Directive shows that water pollution caused by nitrates has decreased in Europe in the last two decades, but in sectors such as agriculture good practices need to be further extended in some regions. Despite the positive overall trend, nitrates pollution and eutrophication continue to cause problems in many Member States. Agricultural pressures on water quality are still increasing in some areas, as some agricultural practices are heavily dependent on fertilisers that can

cause local water quality to deteriorate. The trends observed in the Report thus may have a bearing on the supply of clean drinking water, and the costs that public authorities have to carry to treat polluted water.

Since the adoption of the EU Nitrates Directive, nitrates concentrations have fallen in both surface and groundwater. Eutrophication – the excess growth of weeds and algae that suffocates life in rivers, lakes and seas – has also decreased, while sustainable agricultural practices in relation to nutrients' management have become more widespread. Despite this positive overall trend, nitrates pollution and eutrophication continue to cause problems in many Member States.

Nitrogen is an essential element for all living organisms, including plants and animals. In soil and water environment, it is largely transferred in dissolved nitrate form, which is highly mobile and easily transported by leaching in soils and later in waters. However, increased nitrate concentrations in the water can be considered to be a contaminant, acting together with phosphates as a trigger of eutrophication process. A combination of poor agricultural management, resulting in e.g. excessive use of mineral and organic fertilizers, and high connectivity to sensitive aquatic environment are the main sources of increased levels of nitrates, as they cannot be taken up by plants and are leached to groundwater and reach surface waters through surface runoff and interflow.

Natural background levels of nitrates in water usually do not have a direct effect on aquatic species. However, nitrates concentrations above natural background ones can create unsuitable conditions especially for sensitive species. Aquatic insects and fishes do not utilize nitrates, but aquatic plants do. As the amount of nitrate may be limiting for the growth of algae and aquatic plants, any excess nitrate in the water bodies is a source of fertilizer for them. An excessive growth changes water ecosystem characteristics, by reducing light availability, increasing amounts of organic matter and causing an unstable amount of dissolved oxygen. This brings aquatic ecosystem functioning in imbalance and leads to eutrophication. The eutrophication mechanism leads to a chain reaction, notably a change in the structure of biological communities and trophic networks, as well as changes in biogeochemical cycles. Such conditions endanger many aquatic insects and fishes, leading in the long-term to reduced reproduction, leaving of the area or death, as well as potential extreme changes in habitats. For example, fishes that need gravel or sand for spawning may find nothing but mats of vegetation and so will be unable to breed (WRIG Website). Furthermore, fishes and macroinvertebrates serve as prey for other species and represent a limiting factor in their populations, for example the European Otter (Lutra Lutra) (Bedford, 2009). …"

Legal context – the water framework directive

10. Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (the water framework directive – see consolidated text at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02000L0060-20141120) envisages in Article 4 that a programme of measures should be envisaged within river basin management plans. It sets out objectives in that regard:

"Environmental objectives

1. In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iv) Member States shall implement the necessary measures in accordance with Article 16(1) and (8), with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances without prejudice to the relevant international agreements referred to in Article 1 for the parties concerned;
(b) for groundwater
(i) Member States shall implement the measures necessary to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);
(ii) Member States shall protect, enhance and restore all bodies of groundwater, ensure a balance between abstraction and recharge of groundwater, with the aim of achieving good groundwater status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);
(iii) Member States shall implement the measures necessary to reverse any significant and sustained upward trend in the concentration of any pollutant resulting from the impact of human activity in order progressively to reduce pollution of groundwater.
Measures to achieve trend reversal shall be implemented in accordance with paragraphs 2, 4 and 5 of Article 17, taking into account the applicable standards set out in relevant Community legislation, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;
(c) for protected areas
Member States shall achieve compliance with any standards and objectives at the latest 15 years after the date of entry into force of this Directive, unless otherwise specified in the Community legislation under which the individual protected areas have been established.
As regards Mayotte as an outermost region within the meaning of Article 349 of the Treaty on the Functioning of the European Union (hereinafter 'Mayotte'), the time limit referred to in points (a)(ii), (a)(iii), (b)(ii) and (c) shall be 22 December 2021.
2. Where more than one of the objectives under paragraph 1 relates to a given body of water, the most stringent shall apply.
3. Member States may designate a body of surface water as artificial or heavily modified, when:
(a) the changes to the hydromorphological characteristics of that body which would be necessary for achieving good ecological status would have significant adverse effects on:
(i) the wider environment;
(ii) navigation, including port facilities, or recreation;
(iii) activities for the purposes of which water is stored, such as drinking-water supply, power generation or irrigation;
(iv) water regulation, flood protection, land drainage, or
(v) other equally important sustainable human development activities;
(b) the beneficial objectives served by the artificial or modified characteristics of the water body cannot, for reasons of technical feasibility or disproportionate costs, reasonably be achieved by other means, which are a significantly better environmental option.
Such designation and the reasons for it shall be specifically mentioned in the river basin management plans required under Article 13 and reviewed every six years.
4. The time limits laid down in paragraph 1 may be extended for the purposes of phased achievement of the objectives for bodies of water, provided that no further deterioration occurs in the status of the affected body of water when all the following conditions are met:
(a) Member States determine that all necessary improvements in the status of bodies of water cannot reasonably be achieved within the timescales set out in that paragraph for at least one of the following reasons:
(i) the scale of improvements required can only be achieved in phases exceeding the timescale, for reasons of technical feasibility;
(ii) completing the improvements within the timescale would be disproportionately expensive;
(iii) natural conditions do not allow timely improvement in the status of the body of water.
(b) Extension of the deadline, and the reasons for it, are specifically set out and explained in the river basin management plan required under Article 13.

(c) Extensions shall be limited to a maximum of two further updates of the river basin management plan except in cases where the natural conditions are such that the objectives cannot be achieved within this period.
(d) A summary of the measures required under Article 11 which are envisaged as necessary to bring the bodies of water progressively to the required status by the extended deadline, the reasons for any significant delay in making these measures operational, and the expected timetable for their implementation are set out in the river basin management plan. A review of the implementation of these measures and a summary of any additional measures shall be included in updates of the river basin management plan.
5. Member States may aim to achieve less stringent environmental objectives than those required under paragraph 1 for specific bodies of water when they are so affected by human activity, as determined in accordance with Article 5(1), or their natural condition is such that the achievement of these objectives would be infeasible or disproportionately expensive, and all the following conditions are met:
(a) the environmental and socioeconomic needs served by such human activity cannot be achieved by other means, which are a significantly better environmental option not entailing disproportionate costs;
(b) Member States ensure,
— for surface water, the highest ecological and chemical status possible is achieved, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution,
— for groundwater, the least possible changes to good groundwater status, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution;
(c) no further deterioration occurs in the status of the affected body of water;
(d) the establishment of less stringent environmental objectives, and the reasons for it, are specifically mentioned in the river basin management plan required under Article 13 and those objectives are reviewed every six years.
6. Temporary deterioration in the status of bodies of water shall not be in breach of the requirements of this Directive if this is the result of circumstances of natural cause or force majeure which are exceptional or could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, or the result of circumstances due to accidents which could not reasonably have been foreseen, when all of the following conditions have been met:
(a) all practicable steps are taken to prevent further deterioration in status and in order not to compromise the achievement of the objectives of this Directive in other bodies of water not affected by those circumstances;
(b) the conditions under which circumstances that are exceptional or that could not reasonably have been foreseen may be declared, including the adoption of the appropriate indicators, are stated in the river basin management plan;
(c) the measures to be taken under such exceptional circumstances are included in the programme of measures and will not compromise the recovery of the quality of the body of water once the circumstances are over;
(d) the effects of the circumstances that are exceptional or that could not reasonably have been foreseen are reviewed annually and, subject to the reasons set out in paragraph 4(a), all practicable measures are taken with the aim of restoring the body of water to its status prior to the effects of those circumstances as soon as reasonably practicable, and
(e) a summary of the effects of the circumstances and of such measures taken or to be taken in accordance with paragraphs (a) and (d) are included in the next update of the river basin management plan.
7. Member States will not be in breach of this Directive when:
— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or
— failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities
and all the following conditions are met:
(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;
(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.

8. When applying paragraphs 3, 4, 5, 6 and 7, a Member State shall ensure that the application does not permanently exclude or compromise the achievement of the objectives of this Directive in other bodies of water within the same river basin district and is consistent with the implementation of other Community environmental legislation.

9. Steps must be taken to ensure that the application of the new provisions, including the application of paragraphs 3, 4, 5, 6 and 7, guarantees at least the same level of protection as the existing Community legislation."

11. As well as a management plan specifically, art. 11 of the directive requires that for each river basin there must be a "programme of measures":

"Programme of measures

1. Each Member State shall ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4. Such programmes of measures may make reference to measures following from legislation adopted at national level and covering the whole of the territory of a Member State. Where appropriate, a Member State may adopt measures applicable to all river basin districts and/or the portions of international river basin districts falling within its territory.

2. Each programme of measures shall include the 'basic' measures specified in paragraph 3 and, where necessary, 'supplementary' measures.

3. 'Basic measures' are the minimum requirements to be complied with and shall consist of:

(a) those measures required to implement Community legislation for the protection of water, including measures required under the legislation specified in Article 10 and in part A of Annex VI;

(b) measures deemed appropriate for the purposes of Article 9;

(c) measures to promote an efficient and sustainable water use in order to avoid compromising the achievement of the objectives specified in Article 4;

(d) measures to meet the requirements of Article 7, including measures to safeguard water quality in order to reduce the level of purification treatment required for the production of drinking water;

(e) controls over the abstraction of fresh surface water and groundwater, and impoundment of fresh surface water, including a register or registers of water abstractions and a requirement of prior authorisation for abstraction and impoundment. These controls shall be periodically reviewed and, where necessary, updated. Member States can exempt from these controls, abstractions or impoundments which have no significant impact on water status;

(f) controls, including a requirement for prior authorisation of artificial recharge or augmentation of groundwater bodies. The water used may be derived from any surface water or groundwater, provided that the use of the source does not compromise the achievement of the environmental objectives established for the source or the recharged or augmented body of groundwater. These controls shall be periodically reviewed and, where necessary, updated;

(g) for point source discharges liable to cause pollution, a requirement for prior regulation, such as a prohibition on the entry of pollutants into water, or for prior authorisation, or registration based on general binding rules, laying down emission controls for the pollutants concerned, including controls in accordance with Articles 10 and 16. These controls shall be periodically reviewed and, where necessary, updated;

(h) for diffuse sources liable to cause pollution, measures to prevent or control the input of pollutants. Controls may take the form of a requirement for prior regulation, such as a prohibition on the entry of pollutants into water, prior authorisation or registration based on general binding rules where such a requirement is not otherwise provided for under Community legislation. These controls shall be periodically reviewed and, where necessary, updated;

(i) for any other significant adverse impacts on the status of water identified under Article 5 and Annex II, in particular measures to ensure that the hydromorphological conditions of the bodies of water are consistent with the achievement of the required ecological status or

good ecological potential for bodies of water designated as artificial or heavily modified. Controls for this purpose may take the form of a requirement for prior authorisation or registration based on general binding rules where such a requirement is not otherwise provided for under Community legislation. Such controls shall be periodically reviewed and, where necessary, updated;

(j) a prohibition of direct discharges of pollutants into groundwater subject to the following provisions:

Member States may authorise reinjection into the same aquifer of water used for geothermal purposes.

They may also authorise, specifying the conditions for:

— injection of water containing substances resulting from the operations for exploration and extraction of hydrocarbons or mining activities, and injection of water for technical reasons, into geological formations from which hydrocarbons or other substances have been extracted or into geological formations which for natural reasons are permanently unsuitable for other purposes. Such injections shall not contain substances other than those resulting from the above operations,

— reinjection of pumped groundwater from mines and quarries or associated with the construction or maintenance of civil engineering works,

— injection of natural gas or liquefied petroleum gas (LPG) for storage purposes into geological formations which for natural reasons are permanently unsuitable for other purposes,

— injection of carbon dioxide streams for storage purposes into geological formations which for natural reasons are permanently unsuitable for other purposes, provided that such injection is made in accordance with Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide (22) or excluded from the scope of that Directive pursuant to its Article 2(2),

— injection of natural gas or liquefied petroleum gas (LPG) for storage purposes into other geological formations where there is an overriding need for security of gas supply, and where the injection is such as to prevent any present or future danger of deterioration in the quality of any receiving groundwater,

— construction, civil engineering and building works and similar activities on, or in the ground which come into contact with groundwater. For these purposes, Member States may determine that such activities are to be treated as having been authorised provided that they are conducted in accordance with general binding rules developed by the Member State in respect of such activities,

— discharges of small quantities of substances for scientific purposes for characterisation, protection or remediation of water bodies limited to the amount strictly necessary for the purposes concerned

provided such discharges do not compromise the achievement of the environmental objectives established for that body of groundwater;

(k) in accordance with action taken pursuant to Article 16, measures to eliminate pollution of surface waters by those substances specified in the list of priority substances agreed pursuant to Article 16(2) and to progressively reduce pollution by other substances which would otherwise prevent Member States from achieving the objectives for the bodies of surface waters as set out in Article 4;

(l) any measures required to prevent significant losses of pollutants from technical installations, and to prevent and/or to reduce the impact of accidental pollution incidents for example as a result of floods, including through systems to detect or give warning of such events including, in the case of accidents which could not reasonably have been foreseen, all appropriate measures to reduce the risk to aquatic ecosystems.

4. 'Supplementary' measures are those measures designed and implemented in addition to the basic measures, with the aim of achieving the objectives established pursuant to Article 4. Part B of Annex VI contains a non-exclusive list of such measures.

Member States may also adopt further supplementary measures in order to provide for additional protection or improvement of the waters covered by this Directive, including in implementation of the relevant international agreements referred to in Article 1.

5. Where monitoring or other data indicate that the objectives set under Article 4 for the body of water are unlikely to be achieved, the Member State shall ensure that:

— the causes of the possible failure are investigated,

— relevant permits and authorisations are examined and reviewed as appropriate,

— the monitoring programmes are reviewed and adjusted as appropriate, and

— additional measures as may be necessary in order to achieve those objectives are established, including, as appropriate, the establishment of stricter environmental quality standards following the procedures laid down in Annex V.

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

6. In implementing measures pursuant to paragraph 3, Member States shall take all appropriate steps not to increase pollution of marine waters. Without prejudice to existing legislation, the application of measures taken pursuant to paragraph 3 may on no account lead, either directly or indirectly to increased pollution of surface waters. This requirement shall not apply where it would result in increased pollution of the environment as a whole.

7. The programmes of measures shall be established at the latest nine years after the date of entry into force of this Directive and all the measures shall be made operational at the latest 12 years after that date.

As regards Mayotte, the time limits referred to in the first subparagraph shall be 22 December 2015 and 22 December 2018, respectively.

8. The programmes of measures shall be reviewed, and if necessary updated at the latest 15 years after the date of entry into force of this Directive and every six years thereafter. Any new or revised measures established under an updated programme shall be made operational within three years of their establishment.

As regards Mayotte, the time limit referred to in the first subparagraph shall be 22 December 2021."

12. The directive provides in art. 13 for a requirement for river basin management plans (making specific provision for both international frontiers and overseas departments and territories, specifically Mayotte in the Indian Ocean):

"Article 13

River basin management plans

1. Member States shall ensure that a river basin management plan is produced for each river basin district lying entirely within their territory.

2. In the case of an international river basin district falling entirely within the Community, Member States shall ensure coordination with the aim of producing a single international river basin management plan. Where such an international river basin management plan is not produced, Member States shall produce river basin management plans covering at least those parts of the international river basin district falling within their territory to achieve the objectives of this Directive.

3. In the case of an international river basin district extending beyond the boundaries of the Community, Member States shall endeavour to produce a single river basin management plan, and, where this is not possible, the plan shall at least cover the portion of the international river basin district lying within the territory of the Member State concerned.

4. The river basin management plan shall include the information detailed in Annex VII.

5. River basin management plans may be supplemented by the production of more detailed programmes and management plans for sub-basin, sector, issue, or water type, to deal with particular aspects of water management. Implementation of these measures shall not exempt Member States from any of their obligations under the rest of this Directive.

6. River basin management plans shall be published at the latest nine years after the date of entry into force of this Directive.

As regards Mayotte, the time limit referred to in the first subparagraph shall be 22 December 2015.

7. River basin management plans shall be reviewed and updated at the latest 15 years after the date of entry into force of this Directive and every six years thereafter.

As regards Mayotte, the time limit referred to in the first subparagraph shall be 22 December 2021."

13. Annex VI envisages that among other things, measures under the nitrates directive would be part of the programme of measures (notes omitted):

"LISTS OF MEASURES TO BE INCLUDED WITHIN THE PROGRAMMES OF MEASURES

PART A

Measures required under the following Directives:

(i) The Bathing Water Directive (76/160/EEC);

(ii) The Birds Directive (79/409/EEC);

(iii) The Drinking Water Directive (80/778/EEC) as amended by Directive (98/83/EC);

(iv) The Major Accidents (Seveso) Directive (96/82/EC);

(v) The Environmental Impact Assessment Directive (85/337/EEC);

(vi) The Sewage Sludge Directive (86/278/EEC);
(vii) The Urban Waste-water Treatment Directive (91/271/EEC);
(viii) The Plant Protection Products Directive (91/414/EEC);
(ix) The Nitrates Directive (91/676/EEC);
(x) The Habitats Directive (92/43/EEC);
(xi) The Integrated Pollution Prevention Control Directive (96/61/EC).
PART B
The following is a non-exclusive list of supplementary measures which Member States within each river basin district may choose to adopt as part of the programme of measures required under Article 11(4):
(i) legislative instruments
(ii) administrative instruments
(iii) economic or fiscal instruments
(iv) negotiated environmental agreements
(v) emission controls
(vi) codes of good practice
(vii) recreation and restoration of wetlands areas
(viii) abstraction controls
(ix) demand management measures, *inter alia*, promotion of adapted agricultural production such as low water requiring crops in areas affected by drought
(x) efficiency and reuse measures, *inter alia*, promotion of water-efficient technologies in industry and water-saving irrigation techniques
(xi) construction projects
(xii) desalination plants
(xiii) rehabilitation projects
(xiv) artificial recharge of aquifers
(xv) educational projects
(xvi) research, development and demonstration projects
(xvii) other relevant measures"

Legal context – SEA directive

14. The SEA directive (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0042) provides as follows in art. 2:

"Definitions
For the purposes of this Directive:
(a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
- which are required by legislative, regulatory or administrative provisions;
(b) 'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;
(c) 'environmental report' shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I;
(d) 'The public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups."

15. Article 3 provides for a requirement to carry out such SEA:

"Scope
1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or
(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.
3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2

shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

6. In the case-by-case examination and in specifying types of plans and programmes in accordance with paragraph 5, the authorities referred to in Article 6(3) shall be consulted.

7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public.

8. The following plans and programmes are not subject to this Directive:

- plans and programmes the sole purpose of which is to serve national defence or civil emergency,
- financial or budget plans and programmes.

9. This Directive does not apply to plans and programmes co-financed under the current respective programming periods(11) for Council Regulations (EC) No 1260/1999(12) and (EC) No 1257/1999(13)."

16. The content of the assessment is specified in part in art. 5:

"Environmental report

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

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

3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I.

4. The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report."

17. Article 10 imposes monitoring obligations:

"Monitoring

1. Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order*, inter alia*, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

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

18. Annex I of the directive sets out information to be included in the art. 5 examination (note omitted):

"ANNEX I

Information referred to in Article 5(1)

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

(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those

objectives and any environmental considerations have been taken into account during its preparation;
(f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;
(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;
(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;
(i) a description of the measures envisaged concerning monitoring in accordance with Article 10;
(j) a non-technical summary of the information provided under the above headings.
These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects."

Legal context – domestic law

19. There is no transposition challenge in the pleaded case, so it must be generally assumed that the Irish transposing legislation is sufficient, on a conforming interpretation if necessary, to comply with the obligations of EU law set out above, subject to the (perhaps theoretical) possibility that any actually pleaded point could have a pleaded consequence that could be viewed as calling into question the effectiveness of transposition. A failure to spell out that possible consequences doesn't detract from such points as the applicant has made, and nor of course does it seriously prejudice the State respondents who are parties anyway. But this may not actually arise in the manner feared and deprecated by the opposing parties.

20. Section 2 of the Planning and Development Act 2000 defines "agriculture" as including:
"horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, …"

21. Section 4(1)(a) of 2000 Act provides that "development consisting of the use of any land for the purpose of agriculture…" is exempted development.

22. Section 4(4) provides:
"(4) Notwithstanding paragraphs (a), (i), (ia), and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an AA of the development is required".

23. Article 28(1) of the European Communities (Birds and Natural Habitats) Regulations 2011 provides:
"28. (1) Where the Minister has reason to believe that any activity, either individually or in combination with other activities, plans or projects, is of a type that may— (a) have a significant effect on a European Site, (b) have an adverse effect on the integrity of a European Site, or (c) cause the deterioration of natural habitats or the habitats of species or the disturbance of the species for which the European Site may be or has been designated pursuant to the Habitats Directive or has been classified pursuant to the Birds Directive, in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive, the Minister shall, where he or she considers appropriate, direct that, subject to paragraph (2), the activity shall not be carried out, caused or permitted to be carried out or continued to be carried out by any person in the European Site or part thereof or at any other specified land except with, and in accordance with, consent given by the Minister under Regulation 30."

The derogation system – several levels of regulation

24. The derogation system consists of several levels of regulation and decision:

(i) At the high level we have the nitrates directive, which in turn envisages the making of national action programmes (art. 5 – see consolidated text at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1561542776070&uri=CELEX:01991L0676-20081211).

(ii) Legal provision to make a NAP was set out at the material time in S.I. No. 605/2017 - European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017 (https://www.irishstatutebook.ie/eli/2017/si/605/made/en/print), art. 28, which provided for the publication of a NAP by 31st December, 2021 and every four years thereafter. The 2017 regulations have since been revoked and the current provision to make a NAP is in art.

28 of the 2022 GAP regulations which envisages a NAP by 31st December, 2025 and every 4 years thereafter.

(iii) The current Irish nitrates action programme, made under the 2017 regulations, is the Fifth NAP 2022-2025 (https://www.gov.ie/pdf/?file=https://assets.gov.ie/218449/f1a6725a-6269-442b-bff1-2730fe2dc06c.pdf#page=null). Under Annex III of the directive, the NAP must ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare. The specified amount per hectare is to be the amount of manure containing 170 kg N unless a higher amount is specified on stated criteria. If so, the member state shall inform the Commission, which shall examine the justification. An NAP must include mandatory measures by way of good agricultural practice (GAP).

(iv) To implement the NAP, provision for GAP measures is made in the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022 (S.I. 113 of 2022) ("the GAP Regulations") (https://www.irishstatutebook.ie/eli/2022/si/113/made/en/print).

(v) Under the procedure envisaged by the directive, Ireland's proposed derogation was notified to and approved by the Commission – see Commission Implementing Decision (EU) 2022/696 of 29 April 2022 granting a derogation request by Ireland pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022D0696.

(vi) The Commission decision was implemented by way of amendment to the GAP Regulations, the European Union (Good Agricultural Practice for Protection of Waters) (Amendment) Regulations 2022 (S.I. No. 393 of 2022) (https://www.irishstatutebook.ie/eli/2022/si/393/made/en/pdf).

(vii) The GAP regulations, as so amended, provide that a farmer cannot rely on the derogation without authorisation from the Minister for Agriculture, Food and the Marine under regulation 35(1)(a) of the regulations. The regulations do not themselves require AA - the legal obligation seems to remain in the Planning and Development Act 2000 and the 2011 regulations. Approximately 6,500 farmers apply for a derogation each year out of over 130,000 farms in Ireland. The considerable majority of these applicants are dairy farmers. The individual derogations are not published, only aggregated data as to the location, by local electoral area (LEA), of the farms concerned (https://opendata.agriculture.gov.ie/dataset/https-assets-gov-ie-213396-fec4151b-4730-4c8c-a0e3-c2e50b0b2f26-xlsx). Whatever about the legal framework, it would appear that in practice AA has not been carried out for any of these decisions (although if I am incorrect about that, the State might provide any necessary clarifications on affidavit for the benefit of subsequent modules).

Facts – nitrates system

25. The Fifth NAP was adopted after several rounds of consultation. Approximately 700 submissions were received during the three consultation periods.

26. The first consultation occurred when the First Respondent initiated a Fourth Review of Ireland's Nitrates Action Programme – Stage 1 on 25th November, 2020. The applicant made a submission on 14th January, 2021.

27. The first respondent initiated a second public consultation on Ireland's Nitrates Action Programme on 9th August, 2021 with a deadline of 20th September, 2021 for public submissions.

28. The applicant made a submission on 20th September, 2021.

29. A third consultation period focused on the draft Natura Impact Statement and draft Strategic Environmental Assessment for the Programme then took place. The first respondent published a Natura Impact Statement and Strategic Environmental Impact Assessment for the Draft Fifth Nitrates Action Programme on 14th December, 2021 and invited further public submissions by 26th January, 2022. The applicant made a submission on 26th January, 2022.

30. An NIS was prepared by RPS dated 25th February, 2022 (https://www.gov.ie/pdf/?file=https://assets.gov.ie/218455/0ba5a7df-50dd-431e-a036-03218b30bdc2.pdf#page=null) which concluded as follows on p. 103:

> "This Natura Impact Statement has considered the potential of the measures proposed within the NAP to give rise to adverse effects on the integrity of European Sites, with regard to their qualifying interests, associated conservation status and the overall site integrity, alone and in combination with other relevant plans and programmes. The NAP does not determine the precise location of any development project or designate or allocate specific land uses, nor does it preclude the consideration of alternatives. In light of this and where necessary, a precautionary approach has been adopted in the NIS to ensure that the measures proposed with respect to implementing the actions of the NAP are, where necessary, subject to Appropriate Assessment. As such, the NAP will not adversely affect

the integrity of any European Site either alone or in combination with other relevant plans or programmes and subject to securing the mitigation prescribed above. In light of the conclusions of the assessment contained in this NIS, the authors are of the view that the adoption of the NAP alone, or in combination with other plans and programmes, will not adversely affect the integrity of any European site. Accordingly, and in light of the conclusions of the assessment contained here and the Appropriate Assessment that the Ecological Assessment Unit shall conduct on the implications for the European sites concerned, the competent authority is enabled to ascertain that the adoption of the NAP, alone or in combination with other relevant plans and programmes, will not adversely affect the integrity of any European Site."

31. A "Determination on Appropriate Assessment" was made on 4th March, 2022 by the Ecological Assessment Unit (https://www.gov.ie/pdf/?file=https://assets.gov.ie/218456/47a7d9ee-a69d-4fbf-9c0d-3d8af3c6f7eb.pdf#page=null).

32. On 9th March, 2022, the Minister for Housing, Local Government and Heritage approved the Fifth Nitrates Action Programme. On the same date, the Minister signed the GAP Regulations.

33. On 22nd April, 2022, the applicant says that the EPA engaged in a global categorisation of hitherto unclassified water bodies in the State.

34. On 29th April, 2022, the Commission extended the derogation previously granted to Ireland for the purposes of Paragraph 2 of Annex III to the Nitrates Directive.

35. Recital 23 of the Commission derogation states (note omitted):

"The derogation provided for in this Decision is without prejudice to the obligations of Ireland to apply Council Directive 92/43/EEC (16), including the ruling of the Court of Justice of the European Union in Case C-293/17 *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu*, in particular on the interpretation of Article 6(3) of that Directive."

36. The decision was recited in the amending GAP regulations in 2022 (SI No. 393 of 2022):

"2. In these Regulations :

(i) 'Commission Decision' means the Commission Implementing Decision of 29 April 2022 on granting a derogation requested by Ireland pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources;

(ii) 'The 2022 Regulations' means the European Union (Good Agricultural Practice for the Protection of Waters) Regulations 2022 (S.I. No. 113 of 2022)."

37. The regulations add a new Part to the principal regulations regarding implementation of the Commission decision. This envisages that individual farm derogations are "granted under the Commission Decision" - a fairly extensive set of consequences which is going to be highly relevant to the opposing argument that the decision can't be challenged due to the lack of implementing measures:

"17. The 2022 Regulations are amended by the insertion of the following after Part 6:

'Part 7

Implementation of Commission Decision

34. The Minister for Agriculture, Food and the Marine shall be the competent authority for the purposes of verifying compliance with a derogation granted under the Commission Decision.

35. (1) The application to land, on a holding in any year of livestock manure in excess of the amount specified in Article 20(1) shall be deemed not to be a contravention of that sub-article where all of the following conditions are met—

(a) the occupier of the holding has made application in respect of that year to the Minister for Agriculture, Food and the Marine for authorisation of a derogation from the requirements of that sub-article;

(b) the application under paragraph (a) is duly completed in the form and on or before the date specified for the time being by that Minister;

(c) the application under paragraph (a) is accompanied by an undertaking in writing by the occupier to comply with all the conditions specified in Schedule 5, and

(d) all the conditions set out in Schedule 5 are met by the occupier in relation to the holding.

(2) Where an application is made to the Minister for Agriculture, Food and the Marine in accordance with this Article that Minister shall consider the application and, where that Minister considers that the application does not comply with the conditions therein, he or she shall issue a notice of refusal to the occupier.

(3) Where it is established, in any year, that a grassland farm covered by an authorisation does not fulfil the conditions set out in Articles 6 to 9 of the Commission Decision, the holding shall not be eligible for an authorisation the following year.

36. The Minister for Agriculture, Food and the Marine shall carry out, or arrange for the carrying out of, such monitoring, controls and reporting as are necessary for the purposes of Articles 10, 11 and 13 of the Commission Decision.
37. The Agency shall prepare annually a report of the results of water quality monitoring carried out by local authorities for the purposes of Article 10(4) of the Commission Decision and, where appropriate and as agreed from time to time between the Agency and the Minister for Agriculture, Food and the Marine, shall assist that Minister in compiling water quality data for reporting in accordance with the requirements of the Commission Decision.
38. The Agency shall submit, by 30 June 2023, the assessment described in Article 10 of the Commission Decision, corresponding to the year 2022, an annex containing the results of monitoring as regards the nitrates concentrations of groundwater and surface waters and the trophic status of surface water bodies as outlined in Article 12 (1) and (2) of the Commission Decision.
39. In accordance with the requirements of Article 12 (3) and (4) of the Commission Decision the Minister for Agriculture, Food and the Marine, shall assist the Minister in informing the Commission, by 30 September 2023, of the outcomes of this two-year review, and in particular on the areas and farms with an authorisation where the maximum amount of manure to be applied is 220 kg nitrogen/ha per year and of the additional measures to be applied within the Nitrates Action Programme.
40. The Agency shall make such recommendations and give such directions to a local authority in relation to the monitoring of water quality as it considers appropriate and/or necessary for the purposes of the Commission Decision.'"

Facts – water catchment management system

38. The current River Basin Management plan was published in 2018 for the period 2018-2021 – https://www.gov.ie/en/publication/429a79-river-basin-management-plan-2018-2021/. It was subject to AA and SEA.

39. Under the heading " 3.1.1 Legal Framework for Water Framework Directive Implementation and Associated Actions" it states *inter alia*:

"The European Communities Environmental Objectives (Surface Water) Regulations 2009 (S.I. 272 of 2009) and the European Communities Environmental Objectives (Groundwater) Regulations 2010 (S.I. 9 of 2010) establish the legal framework needed to implement the environmental objectives of the WFD. They lay down the criteria and environmental quality standards for classifying water status and impose an obligation on public authorities to take the necessary steps to achieve the objectives set out in river basin management plans. Both sets of Regulations, *inter alia*, require licensing authorities to examine, and where necessary, review discharge licences where these are needed to achieve the water-quality objectives as set out in river basin management plans."

40. The Government has prepared a draft River Basin Management Plan 2022 to 2027 (https://www.gov.ie/pdf/?file=https://assets.gov.ie/199144/7f9320da-ff2e-4a7d-b238-2e179e3bd98a.pdf#page=null). Page 10 clarifies one basic definition:

"A water catchment (or 'river basin') is an entire area of land from which surface water run-off flows until it reaches a river, lake, groundwater or the coast."

41. The NIS for that document, prepared by RPS in September, 2021, states at p. 45:

"The new NAP is being prepared; however it is not yet published in draft. There are expectations as to what actions may be included within the new NAP, however these are not confirmed. The actions arising from the new NAP have potential for significant adverse effects on European Sites; particularly mindful of nutrient loss to water from agriculture is one of the most significant pressures on water quality in Ireland. The new NAP will be subject to AA and SEA in its own right and the new NAP will be required to be cognisant of the RBMP; including the mitigations identified within this NIS for the RBMP. In the context of nitrates derogations, it is noted that where a farm has a derogation and has an eco-hydrological pathway to a European site, there is potential risk to the favourable conservation status objective of those European sites. The derogations will be decided as part of the NAP process. However, it is estimated that over 5,000 farms within the state would seek to avail of the derogation status, covering significant land areas. The list of farms and /or their location is not available. From a precautionary perspective it is assumed that these some of these farms and their activities have eco-hydrological pathways to European sites and that some of these European sites are within the landholding. Therefore, there is significant potential for adverse effects on maintaining and achieving conservation objectives and therefore integrity of European Sites with respect to these derogations both individually and in combination with other derogations, plans and projects. Given the scale of derogations under previous cycles of the NAP, the potential for in-combination effects is significant. It will therefore be vital that any derogations which emerge from the NAP will

be subject to AA; which should include a robust assessment of in-combination adverse effects."

Procedural history

42. The proceedings were initiated on 31st May, 2022.

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

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

45. On 21st November, 2022, representatives of the Irish Farmers Association were added as notice parties on the basis of being represented by a single legal team. The second named respondent (Ecological Assessment Unit) was struck out on the grounds of not being a legal entity and as being already covered by having named the relevant Minister. Relief 4 (*certiorari* of the appropriate assessment as distinct from the actual plan) was struck out on the basis that it was unnecessary to be claimed as a separate relief and would be deemed included in the overall claim for *certiorari*. The approach to be taken with the main relief was that a declaration of invalidity would normally be the appropriate relief for a measure of general application (like a statute, statutory instrument, or policy document), but *certiorari* could be claimed as a fall-back (this principle is now reflected in statutory Practice Direction HC124.)

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

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

48. The case was in effect modularised so that the initial module related primarily to the large number of pleading and evidential objections. The hearing concluded on 15th December, 2023, following which the matter was adjourned to the following Monday 18th December, 2023, to finalise the issue paper (that finalised version is set out in Schedule I to this judgment). The parties were permitted to file supplementary written submissions in a sequence (the State by 26th January, 2024, notice parties by 2nd February, 2024, and the applicant by 13th February, 2024) to be completed by a mention date on 19th February, 2024. The final submissions were in fact delivered on the morning of the latter date, at which point judgment was reserved.

Relief sought

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Grounds of challenge

50. The core grounds of challenge are as follows:

"1. The decision to prepare and publish ('the impugned decision') the Fifth Nitrates Action Program ('the NAP') is invalid because the NAP was authorised on the basis of an appropriate assessment determination which was made in breach of Regulation 42A(11) of the Birds and Natural Habitats Regulations 2011 and/or of Article 6(3) of the Habitats Directive because it did not ensure that there was no reasonable scientific doubt as to the absence of adverse significant effects from the NAP on the integrity of European Sites which are likely to be affected by the NAP, further particulars of which are contained at Part B below.

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

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

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

51. Core ground 4 is essentially derivative on the applicant succeeding on one or more of the first three core grounds.

Disposition of agreed points and pleading-type objections

52. The present case involved an embarrassment of issues. A total of 78 different questions were identified on the issue paper – a record-breaking number in this list. For comparison, counsel referred to a set of cases regarding aircraft leasing in Russia, currently being heard together in the Commercial Court, with 112 issues in the current module, with something in the order of 4 months being afforded for those to be heard. In that context, trying to deal with this many issues in one go after a 4 day hearing seems ambitious, even for this list. There comes a point where the complexity of a matter reaches a critical level such that the most practical way of navigating through it is to take matters in a bite-sized way. To try to answer that many issues in one go would be virtually impossible and would ensure that one would not give due attention to one or more of the myriad of aspects of the problem. The first natural module is the collection of 42 pleading objections, which the applicant suggested was also a record-breaking number, together with the matters where clarification of what was agreed would be helpful.

53. The issue paper (finalised on 18th December, 2023 without objection from the parties) consists of a list of the questions that appear potentially to arise as matters stood at that date, with a provisional note as to whether the issue is (a) apparently agreed or (b) of a pleading/evidential nature. Other categories of issues were not given labels at that stage.

54. The next step was to confirm the status of the issues that didn't in fact need to be decided and also to receive further focused submissions on those of a pleading or evidential objection-type nature.

55. Having received those submissions, I now propose to determine the pleading and evidential objections and confirm the matters that are agreed. As the State were keen to point out, there is ultimately a degree of overlap in some of the questions, and the proposed disposition of the issues will take that into account. All general comments were considered and were of assistance although these are not all expressly quoted below. Not all issues were individually addressed by all parties, and it can be noted that generally the IFA and ICMSA associated themselves with the State's responses. Certain points are being postponed for a possible later module as discussed further below.

Core ground 1 - alleged breach of article 6(3) of habitats directive and transposing legislation

56. Core ground 1 alleges a breach of art. 6(3) of the habitats directive and the transposing legislation, reg. 42A(11) of the European Communities (Birds and Natural Habitats) Regulations 2011:

"1. The decision to prepare and publish ('the impugned decision') the Fifth Nitrates Action Program ('the NAP') is invalid because the NAP was authorised on the basis of an appropriate assessment determination which was made in breach of Regulation 42A(11) of the Birds and Natural Habitats Regulations 2011 and/or of Article 6(3) of the Habitats Directive because it did not ensure that there was no reasonable scientific doubt as to the absence of adverse significant effects from the NAP on the integrity of European Sites which are likely to be affected by the NAP, further particulars of which are contained at Part B below."

57. A threshold question is the extent to which the habitats directive applies.

58. Article 6(3) provides that:

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

59. Following European Commission guidance, I held in *Friends of the Irish Environment v. Government of Ireland* [2023] IEHC 562, [2023] 10 JIC 1904 that an assessment by reference to the conservation objectives of particular sites was not possible if a plan was too general to permit it being related to particular sites. That is slightly different from saying that no assessment at all under art. 6(3) is possible, just that it is not possible to do so by reference to particular "sites".

60. As put in the Commission notice, "Managing Natura 2000 sites The provisions of Article 6 of the Habitats' Directive 92/43/EEC", 21 November 2018, C(2018) 7621 Final at para. 4.4.2:

> "Of obvious relevance under the Habitats Directive are land-use or spatial plans. Some plans have direct legal effects for the use of land, others only indirect effects. For instance, regional or geographically extensive spatial plans are often not applied directly but form the basis for more detailed plans or serve as a framework for development consents, which then have direct legal effects. Both types of land-use plan should be considered as covered by Article 6(3) to the extent that they are likely to have significant effects on a Natura 2000 site. The Court upheld this view (C-6/04 paragraph 52) stating that although land-use plans do not always authorise developments and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land-use plans must be subject to appropriate assessment of their implications for the site concerned (see also C-418/04). Sectoral plans should also be considered as covered by the scope of Article 6(3), again in so far as they are likely to have a significant effect on a Natura 2000 site. Examples might include transport network plans, energy plans, waste management plans, water management plans or forest management plans (see C-441/17, 122-124). However, a distinction needs to be made with 'plans' which are in the nature of policy statements, i.e. policy documents which show the general political will or intention of a ministry or lower authority. An example might be a general plan for sustainable development across a Member State's territory or region. It does not seem appropriate to treat these as 'plans' for the purpose of Article 6(3), particularly if any initiatives deriving from such policy statements must pass through the intermediary of a land-use or sectoral plan (C 179/06, paragraph 41). However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is clear and direct, Article 6(3) should be applied. Where one or more specific projects are included in a plan in a general way but not in terms of project details, the assessment made at plan level does not exempt the specific projects from the assessment requirements of Article 6(3) at a later stage, when much more details about them are known." [footnotes omitted]

61. This is also reflected in the analogous EIA context as held by the CJEU in the judgment of 29 July 2019, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministers*, C-411/17, ECLI:EU:C:2019:622:

> "85 Furthermore, where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all potential effects of the project on the environment (judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 52, and of 28 February 2008, *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 26).
>
> 86 Where one of those stages is a principal decision and another an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of the latter procedure (judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 52, and of 28 February 2008, *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 26)."

62. The court then went on to apply this principle to the habitats directive context:

> "140 The second sentence of Article 6(3) of the Habitats Directive specifies that following an appropriate assessment, the competent national authorities are to 'agree' to the project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> 141 It follows that the assessment must be conducted before agreement is given.
>
> 142 Furthermore, while the Habitats Directive does not define the conditions governing how the authorities 'agree' to a given project under Article 6(3) of that directive, the definition of 'development consent' in Article 1(2)(c) of the EIA Directive is relevant in defining that term.
>
> 143 Accordingly, by analogy with the Court's findings on the EIA Directive, if national law provides for a number of steps in the consent procedure, the assessment under Article 6(3) of the Habitats Directive, should, in principle, be carried out as soon as the effects which the project in question is likely to have on a protected site are sufficiently identifiable.
>
> 144 Consequently, for reasons similar to those set out in paragraphs 87 to 91 of the present judgment, national legislation such as the Law of 28 June 2015 has the characteristics of an agreement given by the authorities in respect of the project concerned, for the purposes of Article 6(3) of the Habitats Directive, and the fact that subsequent acts

must be adopted in order to proceed with that project, specifically a new specific consent for production of electricity for industrial purposes at one of the two power stations in question, does not justify the failure to conduct an appropriate assessment of those effects before the adoption of that legislation. Moreover, as regards the work that is inextricably linked to the measures at issue in the main proceedings, if its nature and potential effects on the protected sites are sufficiently identifiable, a finding which it is for the national court to make, an assessment must be conducted of that work at that stage of the consent procedure.

145 In the light of the foregoing, the answer to Question 8(a) to (c) is that Article 6(3) of the Habitats Directive must be interpreted as meaning that measures such as those at issue in the main proceedings, together with the work of upgrading and of ensuring compliance with current safety standards, constitute a project in respect of which an appropriate assessment of its effects on the protected sites concerned should be conducted. Such an assessment should be conducted in respect of those measures before they are adopted by the legislature. The fact that the implementation of those measures involves subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be subject to such an assessment before the adoption of those measures if its nature and potential impact on the protected sites are sufficiently identifiable at that stage, a finding which it is for the referring court to make."

63. The message of that decision is that impacts that are not identifiable don't need to be assessed until the stage when they are identifiable.

64. In the judgment of 12 June 2019 *Terre Wallonne ASBL v Région Wallonne*, C-321/18, ECLI:EU:C:2019:484, the CJEU said:

"30. In the present case, it is clear from the order for reference that the Decree of 1 December 2016 is directly connected to the management of all sites in the Walloon region. It therefore does not concern a particular site, for the purposes of Article 6(3) of the Habitats Directive and, accordingly, nor does it require an environmental assessment pursuant to Article 3(2)(b) of the SEA Directive.

31. That being said, the fact that a measure, such as that at issue in the main proceedings, need not be preceded by an environmental assessment on the basis of the combined provisions of Article 6(3) of the Habitats Directive and Article 3(2)(b) of the SEA Directive does not mean that it is exempt from any obligation in that regard, since it is not excluded that such a measure could enact rules which lead to it being placed on the same footing as a plan or programme for the purposes of the latter directive, in respect of which an environmental impact assessment may be mandatory."

65. This is reinforced by the transposing legislation, the European Communities (Birds and Natural Habitats) Regulations 2011. Regulation 2 defines plan as follows:

"'plan', subject to the exclusion, except where the contrary intention appears, of any plan that is a land use plan within the meaning of the Planning Acts 2000 to 2011, includes— (a) any plan, programme or scheme, statutory or non-statutory, that establishes public policy in relation to land use and infrastructural development in one or more specified locations or regions, including any development of land or on land, the extraction or exploitation of mineral resources or of renewable energy resources and the carrying out of land use activities, that is to be considered for adoption or authorisation or approval or for the grant of a licence, consent, permission, permit, derogation or other authorisation by a public authority, or (b) a proposal to amend or extend a plan or scheme referred to in subparagraph (a);"

66. The Commission's FAQ document envisages that a site specific approach may not be viable in the case of a nitrates action plan (pp. 21-22):

"In case of NVZs covering a limited geographical area overlapping or adjacent to Natura 2000 site(s), the Action Programme's measures and restrictions could be aligned relatively easily with the necessary conservation measures for the site(s). However, in the opposite scenario, e.g. those cases where Action Programmes are applied to the whole territory of a Member State, or when a single Action Programme is developed for 22 many /large NVZs in a Member State, a full alignment of the content and measures of Nitrates Directive Action Programmes' measures with the nature protection/conservation measures applicable to every single covered site does not seem viable. In this case, the measures established in the Action Programmes will in principle benefit protected habitats and species. This can be further promoted by selecting measures that can simultaneously contribute to the environmental objectives of different directives and ensure the needs and requirements applicable in Natura 2000 areas are met. However, it is also important to consider the following situations:

• As already mentioned, some Natura 2000 sites will require stricter targeted measures, according to the ecological requirements of the habitats and species for which they have been designated. For instance, the relevant timeframes in which certain agricultural practices are not to be implemented can be different in relation to the implementation of the different directives, which has implications for Natura 2000 sites. The directives themselves do not set out such timeframes, it is for the relevant Member State to define them. For example, restrictions on fertilisers application under the Nitrates Directive tend to apply in late autumn and winter (when there is hardly any vegetation growth and thus crop uptake of nitrogen; fertiliser application during this period would increase the risk of nitrate leaching). Whereas these restrictions are important for the protection of water habitats from eutrophication, other important requirements from the nature conservation perspective are likely to be related to breeding seasons of birds and other species on fields and grassland during springtime. The Nitrates Directive does not, however, include temporal restrictions on nitrogen application in the growing season.

• Also, it is clear that Action Programmes should not lead to a breach of Article 6(2) of the Habitats Directive, which requires that the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the Natura 2000 sites have been designated is avoided in Natura 2000 sites.

• Finally, the Nitrates Directive allows the possibility to derogate from the maximum amount of 170 kg of nitrogen per hectare per year from livestock manure in areas covered by the Action Programme, provided that objective criteria set in Annex III to the Directive are met and that the derogated amounts do not prejudice the achievement of the Directive's objectives. The standards of management required to farmers who benefit from derogations are higher than those of the Action Programmes, with additional obligations for nutrient planning and extra constraints on land management. The application of derogations allowing higher amount of manure than 170 kg of nitrogen per hectare per year should not lead to a breach of Article 6(2) of the Habitats Directive."

67. It goes on to pose the bald question: "Does Article 6(3) of the Habitats Directive apply to action programmes and /or derogations granted under the Nitrates Directive?" (p. 22).

68. It goes on to say the following:

"The Habitats Directive does not define the term 'plan'. The European Court of Justice has clarified the following:

- Measures taken outside or inside a protected area may be subject to an assessment of the implications under the Habitats Directive. [Judgment of 10 January 2006, *Commission v. Germany*, C-98/03, ECLI:EU:C:2006:3 paras. 39-45.]
- Land use plans require an appropriate assessment under Article 6(3) Habitats Directive although they do not as such authorise development and planning as they have great influence on the final development or planning decision. [Judgment of 20 October 2005, *Commission v. United Kingdom*, C-6/04, ECLI:EU:C:2005:626 para 52.]
- Action Programmes should be subject to strategic environmental assessment [Joint cases C-105/09 and C-110/09, 17 June 2010, *Terre wallonne ASBL* (C-105/09) and *Inter-Environnement Wallonie ASBL* (C-110/09) v *Région wallonne*, ECLI:EU:C:2010:355 and ECLI:EU:C:2009:238 para. 35-42.]
- Article 6(3) of the Habitats Directive must be interpreted as meaning that the grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a 'project' within the meaning of that provision, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of the EIA Directive [Joined Cases C-293/17 and C-294/17, REQUESTS for a preliminary ruling under Article 267 TFEU from the *Raad van State* (Council of State, Netherlands) Judgement of 7 November 2018, para 73.]
- Article 6(3) of the Habitats Directive must be interpreted as precluding national programmatic legislation, such as that at issue in the main proceedings, which allows a certain category of projects, in the present case the application of fertilisers on the surface of land or below its surface and the grazing of cattle, to be implemented without being subject to a permit requirement and, accordingly, to an individualised appropriate assessment of its implications for the sites concerned, unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites, which it is for the referring court to ascertain. [Joined Cases C-293/17 and C-294/17, requests for a preliminary ruling under Article 267 TFEU from the *Raad van State* (Council of State, Netherlands) Judgement of 7 November 2018, para 120.]

According to the Commission notice 'Managing Natura 2000 sites' … the term 'plan' has a potentially very broad meaning for the purpose of Article 6(3) of the Habitats Directive. Examples of such plans are land-use or spatial plans as well as sectoral plans provided they are likely to have significant effects on Natura 2000 sites. Examples for sectoral plans might include transport network plans, energy plans, waste management plans, water management plans or forest management plans. In the event that potential adverse effects of a draft Nitrates Directive Action Programme are identified on one or several Natura 2000 sites, including in the context of the Strategic Environmental Assessment of the Action Programme, an assessment under Article 6(3) would have to be conducted. The practice concerning the application of Article 6(3) of the Habitats Directive to Action Programmes varies from Member State to Member State."

69. There then follows an interesting table of practices in different member states:

"Appropriate assessment under Article 6 (3) Habitats Directive in Member States

Austria has conducted a strategic environment assessment for its 2016 revision of the nitrate Action Programme. This assessment covered Natura 2000 sites.

France has adopted nitrate Action Programmes on national and regional level. Prior to the adoption of these programmes, an appropriate assessment under Article 6(3) of the Habitats Directive has been conducted.

Germany has conducted a strategic environment assessment for its nitrate Action Programme in 2016. This did not explicitly cover an appropriate assessment according to Article 6(3) of the Habitats Directive.

Ireland conducted an appropriate assessment according to Article 6(3) Habitats Directive for its draft nitrates action programme.

It has been conducted concurrently, but separately from the strategic environment assessment. The Natura Impact Statement issued to document the results describes the content of the draft Action Programme, gives an overview of the receiving environment, describes a two-step assessment with a screening as the first step and the appropriate assessment as the second step, and identifies mitigation measures. The competent authorities have consulted interested parties and the public during the assessment procedure.

Malta carried out a screening for its 2011 nitrate Action Programme and came to the conclusion that it was unlikely to have significant effects on Nature 2000 sites. Therefore, no appropriate assessment according to Article 6(3) of the Habitats Directive was conducted.

Denmark: In Denmark the Nitrates Directive is not implemented in a single legal act or order. The Nitrates Action Programme consists of different legal instruments, which are assessed individually.

Slovakia: At present, the Slovak Republic has not performed such an assessment of the impact of Action Programmes on Natura 2000 sites.

Belgium (Flanders): In the region of Flanders an appropriate assessment according to Article 6(3) of the Habitats Directive was conducted for the 6th Action Programme 20192022." [emphasis added]

70. Finally the FAQ document deals with strict protection in rather muted terms:

"Strict species protection rules established under Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive apply in the whole territory of the Member States, i.e. beyond Natura 2000 sites. Article 12, paragraph 1, of the Habitats Directive requires Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting (a) all forms of deliberate capture or killing of specimens of these species in the wild; (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; (c) deliberate destruction or taking of eggs from the wild; (d) deterioration or destruction of breeding sites or resting places.

Article 13, paragraph 1, of the Habitats Directive requires Member States to take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV (b), prohibiting: (a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild; (b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.

Therefore, Action Programmes under the Nitrates Directive, as well as the application of derogations granted under the Nitrates Directive, should not lead to a breach of the above provisions. There is little information available concerning the application of these provisions of the Habitats Directive in relation to Action Programmes under the Nitrates Directive in Member States."

71. The State's submission here (footnote omitted) comments as follows:

"130. It is accepted that the test for AA is that set out in the cases cited by the Applicant: Case C-127/02 *Waddenzee,* Case C-404/09 *Commission v Spain* and *Kelly v. An Bord Pleanála* [2014] IEHC 400. However, what the Applicant fails to recognise is that the application of that test will – as is clear from the Commission Guidance – depend on the nature of the plan."

72. The pleading-type objections including those related to core ground 1 are addressed below.

Issues arising under CG1 (Issues 1-34)

Issue 1

73. Issue 1 is:

"Is a nitrates action programme under article 5 of the nitrates directive a 'plan' for the purposes of art. 6(3) of the habitats directive? APPEARS AGREED

74. The State submitted:

"The Respondents have not put the application of Article 6(3) of the Habitats Directive to the Fifth Nitrates Action Plan ('the NAP') at issue in these proceedings, and do not seek to do so now."

75. My decision, if that's the correct word, on this issue is that it follows that the case must proceed on the basis that insofar as relevant to this action, a nitrates action programme under article 5 of the nitrates directive is a "plan" for the purposes of art. 6(3) of the habitats directive.

Issue 2

76. Issue 2 is :

"Alternatively, is the NAP subject to art. 6(3) because of the fact that the NAP underwent AA which engages the Aarhus Convention *per* the judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15 LZ II §47? APPEARS AGREED (insofar as it may be agreed that this does not arise because of previous question)"

77. The State submitted:

"The Respondents agree that a reply to Question 2 is not required, in light of the Respondents' reply to Question 1.

For the avoidance of doubt, however, the Respondents do not accept the contention advanced by the Applicant and reflected in Question 2. If the application of Article 6(3) of the Habitats Directive to the NAP were at issue in these proceedings (and as confirmed in response to Question 1 it is not), the fact that the NAP *underwent* AA would not mean that the Court could, or should, assume that the NAP is subject to Article 6(3).

Rather, as the Supreme Court has unequivocally determined in *Friends of the Irish Environment v Government of Ireland* [2022] IESC 42, the scope of application of the Habitats Directive must be ascertained objectively. This is the case irrespective of whether the Aarhus Convention is engaged."

78. My decision (again, probably not the right word) on this issue is that this does not need to be decided in the light of issue 1.

Issue 4

79. Issue 4 is:

"If site-specific analysis of the plan under art. 6(3) is not possible, must there still be an appropriate assessment of the plan in general terms? APPEARS AGREED"

80. The State submitted:

"As stated in reply to Question 1, the Respondents have not put the application of Article 6(3) to the NAP at issue in these proceedings, and do not seek to do so now. It is not possible to conduct a site-specific assessment of the NAP for the purposes of the Habitats Directive, given its geographical scope and nature. This will be addressed in further detail in due course, if necessary, in reply to Question 3. Where site-specific assessment is not possible, any appropriate assessment of the NAP must necessarily be at a general level."

81. My decision on this issue is that it follows that the case must proceed on the basis that if site-specific analysis of the plan under art. 6(3) is not possible, there must still be an appropriate assessment of the plan in general terms.

Issue 5

82. Issue 5 is:

"Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an impermissible merits-based challenge to the compliance of the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE"

83. The applicant submitted:

"The attempt to characterise the challenge to the adequacy of the AA as an impermissible merits-based challenge to the compliance of the NAP with the requirements of the Nitrates Directive is incorrect. The adequacy of the AA is clearly a justiciable benchmark; to avoid the defects in the AA, the State incorrectly endeavour to portray that challenge to the AA as

something else. Notably this is not done by reference to the pleadings, but rather is based on words like 'gravamen' or alleged assumptions on the part of the Applicant.
The State's argument appears to be premised on the idea that the NAP has 'been shown to be protective'.
Regarding the extent to which the NAP has been shown to be protective, para 164 of Mr Flynn's affidavit asserts (emphasis added) that 'The SEA and AA of the NAP and the River Basin Management Plan have concluded that the measures in the NAP are protective measures that subject to mitigation will not have any significant adverse effects on the environment including with respect to the deterioration of the status of water bodies.'
However, Dr McGoff, in her second affidavit, quotes from the NIS for the draft RBMP in relation to 'Assessment of Effects and Requirement for Mitigation' in respect of the GAP Regulations and the forthcoming NAP, now impugned in these proceedings. The entire quote need not be repeated here but it includes – 'The actions arising from the new NAP have potential for significant adverse effects on European Sites; particularly mindful of nutrient loss to water from agriculture is one of the most significant pressures on water quality in Ireland.'
Further, the AA screening for the NAP states (p12) (emphasis added) – 'Just over half of Ireland's monitored surface water bodies have satisfactory water quality and agriculture is the most widespread and significant pressure impacting on the water environment. The EPA report that nearly half of all river sites and one quarter of all groundwater sites have elevated nitrate concentrations. Given the known and observed significant impact that the previous Nitrate Action Programmes have had on water quality and water dependent ecosystems, the fifth NAP is considered to have potential for significant direct, indirect or cumulative effects to European Sites'.
The Respondents' contend (emphasis in original) 'what is being assessed under Article 6(3) is the potential effects on the environment of the protective measures put in place by the NAP, not the underlying agricultural activities that are restricted by the NAP. In that respect, protective measures may, despite being beneficial with respect to the targeted environmental objective, still cause damage to another environmental objective. It is in that context that AA of a protective measure remains essential.'
The NIS is in fact clear as to its purpose; as to what it being assessed; and as to why it is being assessed. As identified at p.2, §1.2 of the NIS 'The overall purpose of the AA process is to ensure that the NAP does not result in any adverse effects on the integrity of any European sites in view of its conservation objectives.' At p.18, Section 3.5, Table 3.1 identifies clearly those elements of the NAP which are subject to AA – and the reasons for subjecting to them to AA.
The reason for assessing Part 7 'Implementation of the Commission Decision' (i.e. the Nitrates Derogation) is explained as follows – 'This part of the NAP contains the specific requirements relating to derogations on the application of livestock manure. While it is not certain that the EU will grant Ireland such a derogation, the continued facilitation of the increased application of nitrogen against the current baseline has potential for LSEs on European Sites and this part is considered further in this NIS. The continued facilitation of the increased application of nitrogen against the current baseline has potential for likely significant effects on European Sites.' The NIS does not identify the 'continued facilitation of the increased application of nitrogen against the current baseline' as a 'protective' measure, for the simple reason that it is not.
If a particular element of the NAP – protective or otherwise - is subject to AA, then that assessment must be carried out in accordance with the requirements of Article 6(3) Habitats Directive; and the Applicants are entitled to challenge that assessment if it does not accord with the requirements of the Directive.
If a lawfully conducted AA were to conclude that a particular measure did not meet the requirements of the Habitats Directive, the terms of its replacement or re-design would of course be a matter for the Minister. However, that does not preclude the Applicant from challenging the validity of the AA itself. If the mitigation measures relied for a particular measure on do not dispel doubt to the requisite standards, the AA is unlawful in that regard."

84. The State submitted:
"Overview
The Applicant is precluded from mounting a challenge to the adequacy of the AA of the NAP, as pleaded in the Statement of Grounds, having regard *inter alia* to the issues raised by the Court in Question 5, Question 6, and Question 7, which must be considered together.
In particular, the Applicant's challenge to the NAP, based on Article 6(3) of the Habitats Directive, constitutes:

i. an impermissible merits-based challenge to the level of ambition of the NAP (addressed in response to Question 5), and/or
ii. an unpleaded and unparticularised challenge to the compliance of the NAP with the requirements of the Nitrates Directive [Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (the 'Nitrates Directive')] (addressed in response to Question 6).

In either case, the Applicant is precluded from mounting the challenge as pleaded.

Impermissible challenge to the level of ambition in the NAP

The Respondents do not take the position that an applicant could never challenge the compliance of the NAP with the requirements of the Nitrates Directive, on the basis that this would necessarily be an impermissible merits-based challenge.

Ireland's substantive obligations to adopt measures to protect water bodies from pollution caused by nitrates are delimited by the requirements of Article 5 of the Nitrates Directive and Article 11 WFD [Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (the 'Water Framework Directive' or 'WFD')]. An evidence-based challenge alleging that the NAP failed to satisfy Ireland's positive obligations under Article 5 of the Nitrates Directive, or that Ireland's programme of measures failed to satisfy Ireland's positive obligations under Article 11 WFD, would therefore in theory be open to an applicant, and would not necessarily constitute an impermissible merits-based challenge [The Respondents reserve their position as to the appropriateness of such a challenge, and the nature of the assessment to be carried out by the Court on such a challenge, for a case where such a challenge is taken.].

However, the Respondents submit that only a challenge alleging that the NAP fails to satisfy Ireland's positive obligations under Article 5 of the Nitrates Directive, or that the programme of measures fails to satisfy Ireland's positive obligations under Article 11 WFD, could raise a justiciable benchmark sufficient to permit the Court to engage in an analysis of the Respondents' level of ambition when adopting those measures, with respect to the reduction of nitrates from agricultural sources.

The Applicant has not pleaded any failure to satisfy Ireland's positive obligations under Article 5 of the Nitrates Directive, or under Article 11 WFD, as addressed in more detail in reply to Question 6 and Question 7. The NAP therefore enjoys a presumption of legality, with respect to those obligations, and it is respectfully submitted that the Court must proceed on the basis that those obligations are met.

The gravamen of the Applicant's arguments in these proceedings, based on Article 6(3) of the Habitats Directive, is nevertheless that the Respondents, when adopting the NAP, should have done more to reduce nitrates pollution. In that respect, the Applicant clearly seeks to put at issue the level of ambition of the NAP, with respect to the reduction of nitrates from agricultural sources.

Where the Applicant does not plead non-compliance with Article 5 of the Nitrates Directive or Article 11 WFD, it is respectfully submitted that it has identified no justiciable benchmark as against which the Court could measure the level of ambition of the NAP, with respect to the reduction of nitrates from agricultural sources. It is in those circumstances that the Respondents submit that the Applicant is asking the Court to engage in an impermissible review of the merits of a non-justiciable policy decision by the Respondents, as to the degree of ambition that should be adopted to reduce nitrate pollution.

As this Court recently held in *Friends of the Irish Environment CLG v the Government of Ireland & Ors* [2023] IEHC 562 *('FIE v Ireland (FV2030)'* (§8), the role of the Court is not 'to assess the merits of any given strategy or other action or omission under challenge, or to agree or disagree with any policy criticisms of it'. Nor is it 'to hazard a view as to how ambitious any given policy should be'. Rather, it is only to assess the measure 'against such justiciable benchmarks as may be properly pleaded in any given case.'

A similar point is made in *Kerins v An Bord Pleanála* [2023] IEHC 186, §58:

> 'Where this particular development lies on the merits spectrum is something for the court of public opinion: <u>any given judge in any given case is only concerned with legality, and more specifically only with legality by reference exclusively to the particular legal points that are both properly pleaded</u> … <u>and pursued at the hearing.</u>' (emphasis added)

Having regard to that jurisprudence, it is clear that the Applicant's pleaded case based on Article 6(3) in fact amounts to an impermissible merits-based challenge to the level of ambition of the NAP, with respect to the reduction of nitrates from agricultural activities.

<u>The Applicant's reliance on Article 6(3) as a justiciable benchmark</u>

For the avoidance of doubt, the Applicant's attempt to ground its merit-based challenge to the level of ambition of the NAP in the requirements of Article 6(3) of the Habitats Directive does not alter that conclusion [The Applicant also relies on Article 4(1) WFD and Articles 5(1) and (10) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the 'SEA Directive'), which are addressed further below].

Compliance with Article 6(3) is a justiciable benchmark against which the Court can assess a measure, even if that measure relates to policy choices that typically would not be justiciable. However, any such assessment must be restricted to the compliance of the measure at issue with Article 6(3); it cannot permit a Court to go beyond the narrow scope of Article 6(3), to review the merits of non-justiciable policy decisions.

In that respect, the Applicant's attempt to re-purpose Article 6(3) to ground a merit-based challenge, seeking to require the State to adopt more ambitious policies with respect to environmental protection than is required by EU law, is unsustainable.

The Applicant relies on two related arguments when seeking to make that case.

First, the Applicant contends that the environmental assessment of a measure aimed at environmental protection under Article 6(3) must assess, not the effect of the measure itself, but the effect of the underlying environmental damage the measure is trying to prevent.

On that basis, the Applicant assumes that Article 6(3) of the Habitats Directive requires the Minister for Housing, Local Government and Heritage (the 'Minister') to refuse to adopt a national plan aimed at reducing an environmental risk, unless it is established beyond reasonable scientific doubt that the protective measure is sufficiently ambitious to prevent that environmental risk from having any effect on the integrity of any site.

This assumption is misplaced. Article 6(3) does not impose a positive obligation on the State to adopt protective measures with the aim of environmental protection. Nor does Article 6(3) require the State to refuse to adopt a protective measure with the aim of environmental protection, on the basis that the measure could or should have done more to protect the relevant protected site and/or water body. Rather, Article 6(3) requires Member States refrain from adopting a measure, where the measure under consideration would adversely impact the integrity of the site.

In that respect, Article 6(3) of the Habitats Directive is preventative in nature, aimed at prohibiting the adoption of plans or programmes that will harm protected sites. Once a measure is shown to be protective, in that it provides greater environmental protection as compared to baseline, it is illogical to contend, as the Applicant does, that Article 6(3) would prohibit its adoption unless it can be shown to offer complete protection against the environmental harm it targets. This would result in an impossible standard, and would ultimately reduce environmental protections in the EU. This is contrary to the intent of the Habitats Directive.

The Applicant contends that the Respondents' position on this issue amounts to an argument that, because the NAP is a protective measure, it does not require assessment under Article 6(3). That is not the argument that the Respondents seek to make. Rather, the Respondents' position is that what is being assessed under Article 6(3) is the potential effects on the environment of the protective measures put in place by the NAP, not the underlying agricultural activities that are restricted by the NAP. In that respect, protective measures may, despite being beneficial with respect to the targeted environmental objective, still cause damage to another environmental objective. It is in that context that AA of a protective measure remains essential.

The only jurisprudence relied on by the Applicant to the contrary, is the Opinion of Advocate General Kokott in Case C-434/22 *AS 'Latvijas valsts meži'* EU:C:2023:595. The Applicant argues:

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

However, that Opinion is entirely consistent with the Respondents' position. The Advocate General concluded that the felling of trees for the purposes of fire prevention, despite being a measure aimed at environmental protection through fire prevention, required assessment under the Habitats Directive (and that decision was affirmed by the CJEU on 7 December 2023).

The assessment envisaged, however, was not an assessment of whether the planned felling of trees was sufficiently ambitious to achieve the environmental aim of fire prevention, or whether more could or should have been done to achieve that aim. Rather, the assessment

that was envisaged was whether the protective measure at issue, the felling of trees and reduction in the frequency of fires, might itself cause environmental harm, for example by damaging a habitat.

That Advocate General's Opinion therefore does not support the Applicant's position. On the contrary, it is consistent with the Respondents' position, and with the approach taken to the AA of the NAP. What is to be assessed for the purposes of Article 6(3) is not whether the protective measures put in place are sufficiently ambitious with respect to the prevention of nitrates pollution, but rather whether the implementation of those protective measures might of itself cause environmental harm to protected sites.

The Applicant's argument, that Article 6(3) requires that competent authorities refuse to adopt a protective measure unless that measure offers complete protection against the environmental harm it targets, is therefore misplaced, and cannot be relied on to re-purpose Article 6(3), so as to ground a merits-based challenge to the level of ambition of the NAP with respect to the prevention of nitrates from agricultural sources.

The second argument with which the Applicant seeks to justify its approach to Article 6(3) is an impermissible conflation of the environmental assessment of the NAP, with the separate issue of farm-level permitting for agricultural activities.

As addressed in detail in Part III of the Respondents' Written Submissions, and in reply to Question 15 below, this issue is outside the pleaded case, and the Applicant's conflation of the AA of the NAP with the separate issue of farm-level permitting for agricultural activities is in any event unsustainable. This argument is therefore also incapable of justifying the Applicant's attempted repurposing of Article 6(3), to ground a merits-based challenge to the level of ambition of the NAP.

The Applicant therefore has not identified any justiciable benchmark sufficient to permit the Court to engage in an analysis of the level of ambition of the NAP. In those circumstances, the Applicant's pleaded case based on Article 6(3) amounts to an impermissible merits-based challenge to the level of ambition of the NAP with respect to the reduction of nitrates from agricultural activities. The Respondents respectfully submit that this is a fundamental flaw in the Applicant's approach to these proceedings, and is sufficient, of itself, to dispose of the Article 6(3) challenge." [some emphasis added]

85. The ICMSA submitted:

"The ICMSA expressly notes, and agrees with, the State Respondents' submission under Issue 5, at p.5 of their Response document that: 'The NAP therefore enjoys a presumption of legality, with respect to those obligations, and it is respectfully submitted that the Court must proceed on the basis that those obligations are met.'"

86. My decision on this issue is essentially "No". Some of the argument under this heading strays beyond the identified issue on the issue paper. The question arising under Issue 5 is whether the applicant is precluded from challenging the AA because it did not plead that the NAP was contrary to the nitrates directive, but only contrary to the habitats, SEA and water framework directives. The answer is no, since the two points are logically separate, but the failure to argue that the NAP is contrary to the nitrates directive does have the consequence that the case must proceed on the basis that the NAP is in accordance with the nitrates directive, save to the extent that provisions of the nitrates directive overlap with other pleaded points such as the AA requirements of the habitats directive, for example by providing that relevant matters should be taken into account.

87. To that extent, I think that Issue 26 for example needs to be reformulated, because it tendentiously asserts that the NAP complies "fully" with the nitrates directive. The correct position is that its compliance with the nitrates directive is not specifically challenged which has the effect that the applicant can't rely on any alleged breach of the nitrates directive that doesn't otherwise come within its pleaded grounds by reason of also constituting some other legal breach that *is* pleaded. I will discuss this further later in the context of the situation where a given alleged wrong constitutes multiple legal breaches, only some of which are pleaded. Failure of an applicant to plead all ramifications doesn't mean that the applicant can't pursue the ramifications she *did* plead.

88. That doesn't in itself mean that the AA cannot be challenged, even bearing in mind that by definition the AA relates to the NAP itself and not directly to the activities by farmers to which the NAP relates. However it may arguably relate indirectly to such activities in the sense that inadequate governance of such activities may, subject to further submission, raise issues appropriate for assessment. The rights and wrongs of that are a matter not of pleading but of substantive EU law to be addressed in due course. The merits of the scope of AA are not something to be summarily disposed of as a preliminary objection. Insofar as the State, understandably, seizes on the concept that the court isn't concerned with the level of ambition of government policy, as referred to in *Friends*, the situation here isn't analogous. The food policy at issue in *Friends* wasn't something the State was obliged by European law to create for the purposes of regulating pollution-causing activities. It was an autonomous act, and thus the freedom of policy decision was quite wide,

rendering its level of ambition essentially non-justiciable. That level of freedom doesn't necessarily exist here due to the European legislative context.

Issue 6

89. Issue 6 is:

"Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE"

90. The applicant submitted:

"The attempt to characterise the challenge to the adequacy of the AA as an unpleaded challenge to the compliance of the NAP with the requirements of the Nitrates Directive is incorrect.

The corollary of the pleading jurisprudence cited by the State is that the Applicant is in fact entitled to pursue the grounds on which it has got leave. Those grounds must be assessed on their own merits.

The State submissions fail to identify why the challenge to the adequacy of the AA constitutes an unpleaded challenge to the compliance of the NAP with the requirements of the Nitrates Directive.

Compliance of the NAP (presumed or otherwise) with the requirements of the Nitrates Directive does not resolve the question of assessment under the Habitats Directive. If every NAP was as a matter of principle compliant with the Habitats Directive, then this NAP would have be screened out of the need for AA; however, it wasn't."

91. The State submitted:

"Insofar as the Applicant were to seek to rely on the requirements of the Nitrates Directive as a justiciable benchmark permitting it to challenge the level of ambition of the NAP (and the Applicant has not sought to do so to date) that case is not pleaded.

In that respect, despite the Applicant's repeated submissions that the NAP and the GAP Regulations [European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022 (S.I. 113 of 2022) (as amended) (the 'GAP Regulations')] do not do enough to protect water bodies from nitrates pollution, it is not pleaded that those measures are insufficient to meet Ireland's substantive obligations under Article 5 of the Nitrates Directive.

Nor is it pleaded that Ireland's decision to seek the Derogation is contrary to those obligations. Indeed, it is unclear how that case could have been made, absent annulment of the Commission Decision [Commission Implementing Decision (EU) 2022/696 of 29 April 2022 granting a derogation request by Ireland pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (the 'Commission Decision')], where the Commission concluded that the Derogation is 'justified on the basis of objective criteria' [Commission Decision, Recital 15], 'will not prejudice the objectives set out in [the Nitrates Directive]' [Commission Decision, Recital 16] and 'is coherent with the legally binding targets of the WFD' [Commission Decision, Recital 17.].

The Amended Statement of Grounds also does not plead that the Commission Decision is invalid as being inconsistent with the requirements of the Nitrates Directive or WFD. Nor has the Applicant sought annulment of the Commission Decision before the General Court on that basis, or on any basis.

There is therefore no *pleaded* case that the *substantive content* of the NAP, or the State's *level of ambition* when adopting that measure, either with respect to the NAP generally or the decision to seek the Derogation specifically, are non-compliant with the Respondents' obligations under the Nitrates Directive.

In those circumstances, the Applicant is precluded from seeking to and cannot be permitted to seek to challenge the NAP as lacking sufficient ambition to meet the requirements of the Nitrates Directive, either directly, or by way of a misconceived collateral challenge under Article 6(3).

Order 84, Rule 20(1) of the Rules of the Superior Courts ('RSC') provides that '[n]o application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.'

In this regard, Murray CJ in *A.P. v DPP* [2011] 1 IR 729 stated that (§5):

'In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.'

Murray CJ continued to state (§§8–10):

'There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant that in

reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds.
The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because it goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear. Although it did not arise in this particular case, it is also unsatisfactory for objections of this nature to be raised by the respondents at the appeal stage when no objection had been expressly raised at the trial or there is controversy as to whether this was the case.
In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained.' (Emphasis added).
Critically, Denham J (as she then was) in *A.P. v DPP* stated (§17) '[o]nce an application for leave to appeal has been granted the basis for the review by the court is established' and that (§19):
'A court, including this court, is limited in a judicial review to the grounds ordered for the review on the initial application, unless the grounds have been amended. In this case the grounds for review are limited, essentially that a fourth trial would be an abuse and unfair, and were not amended.' (Emphasis added).
Moreover, O'Donnell J (as he then was) in *Keegan v Garda Síochána Ombudsman Commission* [2015] IESC 68 stated that (§42):
'It is not merely a procedural complaint that the ground upon which the case was decided was not one upon which leave was sought or indeed granted nor was there an appropriate amendment. The purpose of pleadings is to define the issues between the parties, so that each party should know what matters are in issue so as to marshal their evidence on it, and so that the Court may limit evidence to matters which are only relevant to those issues between the parties, and so discovery and other intrusive interlocutory procedures limited to those matters truly in issue between the parties. This is particularly important in judicial review, which is a powerful weapon of review of administrative action. But administrative action is intended to be taken in the public interest, and the commencement of judicial review proceedings may have a chilling effect on that activity, until the issue is resolved one way or another. Because of the impact of such proceedings, it is necessary to obtain leave of the court before commencing proceedings. It is important therefore that the precise issues in respect of which leave is obtained should be known with clarity from the outset. This also contributes to efficiency so that judicial review is a speedy remedy.' (Emphasis added).
Further, Barniville J in *Rushe v an Bord Pleanála* [2020] IEHC 122 referred to the *dicta* of Murray CJ in *A.P. v DPP* and stated that (§113):
'[i]n my view, these pleading obligations imposed upon an applicant in planning judicial review proceedings are particularly important where those cases involve issues of very considerable complexity and give rise to issues under EU Directives, such as the Habitats Directive and the EIA Directive. It is especially important in those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded in order that the parties opposing the application (whether they be the respondents or the notice parties or both) are clearly aware prior to the hearing of the application for judicial review of what precisely the case is. Such precision is also required, as Murray C.J. pointed out in *AP*, to ensure that there is no doubt, ambiguity or confusion as to what the applicant's case is before the High Court, in the context of any appeal from the judgment of that Court to the Court of Appeal or the Supreme Court. It is not appropriate that a case brought on a particular basis, in which reliefs are sought on stated grounds is, when the case comes on for hearing, transformed into one in which different or additional grounds are sought to be advanced in support of the reliefs sought or new and additional reliefs are sought. Such a course would be unfair on the parties opposing the application for judicial review and on the court.' (Emphasis added).

> 'In *People Over Wind and Another v an Bord Pleanála and Others* [2015] IEHC 271, Haughton J stated that (§55) in assessing the scope of the Statement of Grounds the approach that should be adopted is that of a '*fair and reasonable reading*' - but not from the point of view of one or other parties to the proceedings but rather from the point of view of the Court on an objective basis. Accordingly, in his application,

> Haughton J rejected (§56) '*an attempt to apply general pleas to a specific and detailed complaint which was not pleaded, contrary to Order 84 rule 20(3).*'.
> These decisions make clear – were it in any doubt – that the Applicant is confined to the case as pleaded in the Statement of Grounds. The Respondents' position is that the Applicant has not pleaded a justiciable case under Article 6(3) of the Habitats Directive.'"

92. My decision on this issue is that this issue is ultimately just a reformulation of Issue 5 and adds nothing to the negative answer to that. Insofar as the opposing parties make the point that the applicant shouldn't be allowed to make a complaint which is equivalent to a breach of the nitrates directive without also pleading that explicitly, that is misconceived for reasons set out elsewhere in this judgment.

Issue 7

93. Issue 7 is :

> "Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the Respondents' programme of measures with Article 11 of the WFD? PLEADING-TYPE ISSUE"

94. The applicant submitted:

> "The attempt to characterise the challenge to the adequacy of the AA as an unpleaded challenge to the compliance of the compliance of the Respondents' programme of measures with Article 11 of the WFD is incorrect.
> The corollary of the pleading jurisprudence cited by the State is that the Applicant is in fact entitled to pursue the grounds on which it has got leave. Those grounds must be assessed on their own merits.
> The State submissions fail to identify why the challenge to the adequacy of the AA constitutes an unpleaded challenge to the compliance of the NAP with the requirements of the Nitrates Directive.
> Compliance of the NAP (presumed or otherwise) with the requirements of Article 11 WFD does not resolve the question of assessment under the Habitats Directive. If every NAP was as a matter of principle compliant with the Habitats Directive, then this NAP would have be screened out of the need for AA; however, it wasn't."

95. The State submitted:

> "The Respondents reiterate their response to Question 6 above, which applies equally with respect to Article 11 WFD.
> The Applicant has not pleaded that Ireland's programme of measures fails to comply with the requirements of Article 11 WFD. It therefore cannot seek to put at issue the compliance of Ireland's programme of measures with Article 11 WFD in these proceedings, or otherwise challenge the Respondents' level of ambition with respect to the prevention of nitrates from agricultural activities, either directly, or by way of a collateral challenge under Article 6(3).
> The precise issues that arise with respect to Article 11 of the WFD are addressed in more detail in response to Questions 38 and 41 below."

96. My decision on this issue is that the failure to plead any breach of art. 11 of the WFD only has the consequence that the NAP must be presumed to comply with art. 11 save insofar as non-compliance necessarily follows from any pleaded legal breach. That doesn't preclude the applicant from challenging the AA by reference to its adequacy in preventing pollution caused by nitrates used in agricultural activities, provided of course that when we get to the substantive EU law module the applicant can establish the (hotly contested) proposition that there is an EU law obligation to address such matters in the AA, as opposed to carrying out an assessment only of the "protective" measures in the NAP.

97. I should add here that insofar as the applicant's challenge to the AA involves a number of separate issues, the scope of AA and the question of exclusion of doubt as a matter of fact and evidence, as well as the timing of AA (see further Schedule III to this judgment), I have amended the drafting of the issues to reflect this.

Issue 9

98. Issue 9 is:

> " Are individual derogation decisions published? APPEARS AGREED"

99. The applicant submitted:

> "The State has confirmed that it does not publish individual derogation decisions. That position is not changed by the other matters identified."

100. The State submitted:

> "The Department of Agriculture, Food and the Marine ('the Department') does not publish individual authorisations permitting farmers to rely on the derogation under Regulation 35(1)(a) of the GAP Regulations.

A list of Nitrates Derogation farm locations by Local Electoral Area ('LEA') is published, however. This provides the number of derogation herds and the total number of herds at LEA level by year [See: https://opendata.agriculture.gov.ie/dataset/https-assets-gov-ie-213396-fec4151b-4730-4c8c-a0e3-c2e50b0b2f26-xlsx].

An annual report regarding the nitrates derogation is submitted by DAFM to the European Commission each year. It also contains maps showing the locations of derogation holdings, as well as details at county level regarding the proportion of farmers/holdings, land and grazing livestock units covered by the derogation.

Moreover, the Department has published an Implementation Map showing the areas for 2024 where the maximum derogation stocking rate of 220 kg livestock manure nitrogen per hectare will apply [https://opendata.agriculture.gov.ie/dataset/national-water-quality]. This is an interactive map [Instructions regarding how to use the interactive map are contained in the '*Water Quality Review Implementation Map User Manual*' published in October 2023. See: https://www.gov.ie/pdf/?file=https://assets.gov.ie/272234/adaa22c8-b920-40c4-af1b-8c49a9cb1c1f.pdf#page=null] allowing anybody to zoom into a particular area, and identify the maximum stocking rate appliable for derogation applicants in that area.

Separately, the EPA publishes a water quality monitoring report on nitrogen and phosphorus concentrations in Irish waters each year. This report also contains the map showing the derogation herd locations for the year in question.

If members of the public require further information, available information can be sought under the AIE Regulations, subject to the requirements of those Regulations, and in particular the Department's obligations under the GDPR [Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('GDPR').] with respect to the processing of personal data."

101. The IFA submitted:

"The IFA parties note the response of the State Respondents in identifying the numerous different means by which the Applicant might have identified any farm-specific land holding for the purposes of accessing derogation decisions. This ought not be news to the Applicant. Notwithstanding the wide availability of public information, which was neither sought not relied upon by the Applicant prior to commencing proceedings, the Applicant made no effort to identify any specific land holding; derogation decision; protected site with specific characteristics; or any other attempt at identifying any specific sites and/or individual derogations, whether by request through Access on Information on the Environment Regulations ('AIE') or simply relying on the available data (which would have provided a basis for any more detailed information to be sought by AIE request, which never occurred). Such steps prior to the commencement of proceedings might have better served the Applicant –and the Court - in respect of any pleaded challenge to any alleged implementation and/or non transposition matters in respect of the various named Directives (which the IFA Parties do not accept are adequately pleaded, if at all). It is significant that the Applicant took no such steps and instead seeks to offload unto the Court the burden of joining the alleged dots. This approach undermines, fatally, any attempt to challenge the purported absence of farm-level specific permitting. Farming activities and development are already subject to wide range of statutory consenting / permitting schemes, none of which have been subject to the broad-brush challenge foisted upon the Court in these proceedings. In this regard, the IFA Parties rest upon their submissions already made at the substantive hearing, and the submissions of the Respondents and ICSMA Notice Party."

102. My decision on this issue is that the case must proceed on the basis that there is no system in Irish law or practice for the systematic publication of individual derogation decisions. The information published is general or aggregated. There are no means, still less numerous means, by which *specific* decision information can be readily obtained. Rather any interested party would be obliged to pursue express requests for environmental information under the AIE directive. Surprisingly perhaps, the applicant hasn't challenged this lack of publication in the proceedings so the legality of the lack of a publication system as such will have to be considered in some other case at some other time. However the fact of there being no such individual publication of decisions must be taken to be established and indeed not properly disputed, for the purpose of any of the pleaded grounds to which that fact is relevant (if there are any such grounds - again a matter of substantive law to be considered further, not of pleading-type objection).

Issue 10

103. Issue 10 is:

"If individual derogation decisions are not published, does the objection that the applicant could have pursued challenges to individual derogations arise at all for consideration? PLEADING-TYPE ISSUE"

104. The applicant submitted:

"The applicant submits that the objection does not arise at all.

The point made in Ground 3 ASOG about the absence of a farm-level permitting system is that such absence supports the contention that the requisite scientific certainty as to the absence of significant effects must necessarily be contained in the AA of the NAP. The NAP *inter alia* regulates the conditions under which the cultivation of grassland for the sustenance of cattle for agricultural production is facilitated through the application of fertilisers on the surface of land or below its surface across the territory of Ireland, including in the vicinity of, and by way of hydrological connectivity to, Natura 2000 sites. That Plan therefore determines the conditions under which farm-level projects for the grazing of cattle and the application of fertilisers on the surface of land or below its surface may be carried out.

The contention that sufficient information is published to identify the location of derogation herds is incorrect; for example the map relied in in answer to Q9 is vague and unspecific. Reliance on information published on an annual basis will mean that most individual challenges will be outside the time-limit. The State effectively acknowledge that the AIE procedure will not yield the requisite information. JR proceedings must name the recipient of the derogation, which is not available.

The State's apparent enthusiasm for challenges to individual derogation is inconsistent with the failure to publish the relevant details. The failure to publish the relevant details is liable to make the excise of rights under the Habitats Directive and the Aarhus Convention excessively difficult. In the circumstances, the objection advanced by the State and the Notice Parties does not arise at all."

105. The State submitted:

"The Respondents respectfully submit that their objection to the Applicant seeking to challenge farm-level agricultural activities by way of a challenge to the NAP – which objection is significantly wider than a contention that the Applicant should have pursued challenges to individual derogation decisions – does arise for consideration, despite individual derogation decisions not being published.

First, sufficient information is available online for the Applicant to have identified the location of derogation herds and, if the Applicant believes that the presence of derogation herds in any particular location is likely to have significant effects on a Natura 2000 site, to challenge the decision to grant the derogations at issue and/or to otherwise bring an evidence-based, site-specific challenge with respect to those derogation farms.

Second, it is also open to the Applicant to challenge individual farm-level activities, if it believes those activities require AA, in addition to individual derogation decisions. Again, if the Applicant believes that there is a specific Natura 2000 site that is at risk of significant adverse effects by reason of agricultural activities in its vicinity, it could have taken an evidence-based challenge with respect to those activities.

Third, while the nature of the challenge to a derogation farm or farm-level activity available to an applicant might differ depending on the circumstances, and the particular concerns arising for an applicant with respect to any specific Natura 2000 site, there are a range of potential avenues open to the Applicant if it were concerned with respect to the impact of nitrates on a Natura 2000 site, none of which it has exercised.

In that respect, if the Applicant believes that any specific agricultural land use falls under section 4(4) of the Planning and Development Act 2000 ('the 2000 Act'), on the basis that it requires AA and therefore is not exempted development, and thus requires consent under the 2000 Act, it is entitled to litigate that matter in the normal manner. It has not done so.

If the Applicant believes that any specific authorisation for a derogation requires AA, it could have sought to challenge that authorisation, and to argue *inter alia* that the Minister was required to carry out an AA: (i) having regard to its obligations under Regulation 27(2) of the 2011 Regulations [S.I. No. 477/2011 - European Communities (Birds and Natural Habitats) Regulations 2011.] to exercise its functions so as to secure compliance with the requirements of the Habitats Directive, and/or (ii) under section 42 of the 2011 Regulations, on the basis that the activities at issue were a 'project' for which the Minister for Agriculture received an application for consent and that required AA. Again, the Applicant has not taken that course of action.

More generally, if the Applicant is concerned as to the impact of nitrates on any particular Natura 2000 site, it is open to the Applicant to bring that concern to the attention of the Minister, and to ask the Minister to exercise its statutory power under Regulations 28 or 29 of the 2011 Regulations.

> If the Minister, having considered that concern, were satisfied that any particular agricultural activity did require AA screening or AA, it could make a direction under Regulation 28(1) to the effect that the activity must cease unless consent is granted under Regulation 30, which requires AA screening and where appropriate AA. Alternatively, if the Minister had reason to believe that any such agricultural activity, either individually or in combination with other activities, plans or projects, is of a type that may *inter alia* have an effect on a protected site, it could make a direction regulating the activity under Regulation 29(1).
> However, again, the Applicant has not taken that course of action, or asked the Minister to exercise its powers under Regulations 28 to 30, or even identified in these proceedings any specific agricultural activity it alleges there is 'reason to believe' is having a significant effect on a specific Natura 2000 site within the meaning of Regulation 28 or 29. Nor has it identified any Natura 2000 site it argues is at risk.
> It is respectfully submitted that the publication of derogation decisions is not necessary to permit an applicant to avail of the foregoing remedies, if that applicant has an evidence-based concern that a particular Natura 2000 site is at risk by reason of nitrates from agricultural activities in its vicinity.
> *Fourth*, even if the Applicant were entitled to bring a *systemic* challenge to the framework governing the regulation of agricultural activities in Ireland in the abstract, rather than on a site-specific basis, the appropriate remedy would be to bring a transposition challenge that engaged with the entirety of the legislative framework governing the regulation of agricultural activities in Ireland. Again, the Applicant has not availed of this option.
> Finally, it is important to emphasise that the fact that there are legitimate avenues open to the Applicant to ventilate its argument with respect to the appropriate assessment of farm-level activities, which could and should have been availed of by the Applicant, is not the Respondents' primary basis for arguing that the Applicant's pleaded claim is procedurally inappropriate and fundamentally misconceived, but rather is only one part of the Respondents' objections to the Applicant's pleaded claim, as detailed in Part II and Part III of the Respondents' Written Submissions.
> Thus, even if the Court were to conclude (contrary to the submission of the Respondents), that the Applicant were precluded from challenging individual derogation decisions by reason of the fact that those decisions are not published, it would not permit the Applicant to litigate its argument with respect to farm-level activities in these proceedings.
> In that respect, the Applicant's apparent contention that the lack of published derogation decisions means that it can seek to ventilate its concerns through an inappropriate procedural route, has no basis in law."

106. My decision on this issue is that this is an example of what I referred to in *Flannery v. An Bord Pleanála* [2021] IEHC 140, [2021] 3 JIC 1216 and *T.A. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 98, [2018] 1 JIC 1607 of "sending the fool further". Despite the lack of any individual publication system outside AIE, and the practice of only general or aggregated information being circulated, the State criticises the applicant for failing to challenge the individual decisions and claims this is disqualifying for the challenge that *is* being made. Given the indiscriminate battery of pleading-type objections in the present module, one mightn't need extraordinary clairvoyance to wonder whether, if the applicant had tried to challenge the individual consents, it would have been condemned as out of time and precluded from challenge by reason of failing to challenge the plan-level arrangements, the AA or something else. The State's position here is pure cakeism - no we are not going to publish the individual decisions but yes we denounce you for not challenging them. Such a posture gives the impression of being more inspired by Franz Kafka and Joseph Heller than by the Ombudsman's guide to good public administration.

107. As the applicant correctly says, "The State's apparent enthusiasm for challenges to individual derogation is inconsistent with the failure to publish the relevant details." Where the applicant goes on to say that "The failure to publish the relevant details is liable to make the excise of rights under the Habitats Directive and the Aarhus Convention excessively difficult", I interpret this as reinforcing the obvious difficulty of challenging what is unpublished, rather than a demand for a declaration in the present case (although maybe it will arise in some future case) that the inadequate legal framework and/or practical operation of the system is failing to enforce AA legislation on an industrial scale across the whole agricultural sector, or something to that effect. Fortunately for the State they don't need to reply to that allegation in quite that context here.

108. The conclusion is that no relevant consequences flow from the applicant's failure to challenge individual decisions, for several independent reasons: because the AA of the NAP is logically separate, because individual challenges would be impracticable in any event given their quantity, because any systematic process of individual challenges is not reasonably possible in the absence of a publication system, and because EU law requires the law of a member state to make such

challenges not excessively difficult, thereby rendering it inappropriate to hold against an applicant a failure to operate a mechanism that is, objectively, excessively difficult.

Issue 11

109. Issue 11 is:

"Even if the option of challenges to individual derogations falls for consideration, is the applicant precluded from bringing a challenge at a general systemic level by reason of the existence of the theoretical possibility of challenging individual derogations or individual agricultural activities carried on without AA on a site-by-site basis or by the possibility of calling on the Minister either on a site-by-site basis or generally to exercise powers to require AA under domestic law (art. 28(1) of the 2011 regulations)? PLEADING-TYPE ISSUE"

110. The applicant submitted:

"The Applicant's point about the absence of a farm-level assessment is simply that this absence supports the contention that the requisite scientific certainty as to the absence of significant effects must necessarily be contained in the AA of the NAP.

It is important to recall that p.82 of the NIS states 'In making the decision as to whether a derogation is to be granted in respect of a farm the minister should have due regard to the potential for this decision to effect upon European sites which may be linked or in proximity to the farm holding.' However, it is clear from the description of the derogation application process as set out in the affidavit of Edward Massey that this does not in fact happen; it is not part of the decision-making process. It is no answer to the State's failure to assess individual derogations to say that that somebody could challenge that failure; and is thereby precluded from bringing other challenges"

111. The State submitted:

"The Respondents do not argue that the Applicant is necessarily precluded from bringing a challenge at a systemic level, by reason of the possibility of challenging individual derogations, or individual activities on a site-by-site basis. Whether an applicant would be permitted to bring a systemic challenge – properly pleaded – would depend on all of the circumstance of the case.

The Respondents do submit that such a systemic challenge could be taken only where it arose on the facts of the case, and was grounded in a site-specific context. In addition, such a challenge would have to be properly pleaded, and brought on an appropriate procedural basis. An applicant is not entitled to raise a legal point in the abstract, without first going through the correct procedural channels or invoking the relevant statutory obligations to address its concerns. Nor is it permissible for an applicant to utilise a challenge to a measure for the purposes of seeking to ventilate an issue unrelated to that measure, and that does not properly arise in the factual matrix of the proceedings.

In the case as pleaded, the Applicant meets none of those requirements which must be satisfied in order to bring a systemic challenge to the regulation of farm-level activities in Ireland.

A similar issue recently arose in *Carrownagowan Concern Group v An Bord Pleanála & Ors* [2023] IEHC 579*,* where the Applicant argued that the Minister had failed to comply with a remedial obligation with respect to historic forestry consents, in the context of a challenge to a development consent for a wind farm, and where the Applicant had established no relationship between that complaint and the consent. The Court made clear that seeking to invoke that point in those proceedings, where the Applicant had not pursued appropriate procedural channels or called on the Minister to exercise relevant statutory powers, was an unacceptable method of pursuing the issue that the Applicant wished to raise.

It is respectfully submitted that, despite the different factual context in which that case arose, there are analogies to be drawn here."

112. My decision on this issue is that the applicant is not so precluded. Inadequacies of AA at farm level are one thing but not challenging those (even if it were practicable, which it isn't) doesn't mean one can't challenge inadequacies of AA at plan level. There is no analogy with *Carrownagowan* which was a challenge to a site-specific consent where the applicants hadn't asked for the remedial action by reference to the lack of which the consent was being impugned. That is a totally different situation. While much of the language in the State's submission is reasonably valid as a set of abstract propositions, it doesn't have any great bite in terms of its impact on the actual issue here. To be a bit clearer:

(i) "such a systemic challenge could be taken only where it arose on the facts of the case" - of course but that begs the question somewhat, and we are going to address the issue of whether the applicant's points arise on the facts of the case when we get to Module II;

(ii) "and was grounded in a site-specific context" - only to the extent that the point being made is dependent on there being a need for a site-specific impact, which is not the case with all of the applicant's points here;

(iii) "such a challenge would have to be properly pleaded" - that doesn't add anything to the other pleading objections;
(iv) "and brought on an appropriate procedural basis" - again that doesn't add anything to the more specific objections;
(v) "an applicant is not entitled to raise a legal point in the abstract" - indeed, but likewise an opposing party isn't really helping by raising points of opposition in the abstract;
(vi) "without first going through the correct procedural channels" - absolutely right, but the State hasn't shown how this was breached - *Carrownagowan* was a very different situation where there was a clear need to make a request before running to court;
(vii) "or invoking the relevant statutory obligations to address its concerns" - again perfectly reasonable provided that there are statutory obligations an applicant can invoke prior to litigating - which doesn't seem to be the case here;
(viii) "nor is it permissible for an applicant to utilise a challenge to a measure for the purposes of seeking to ventilate an issue unrelated to that measure" - agreed, but it's not clear how the applicant has impermissibly done that here; and
(ix) "and that does not properly arise in the factual matrix of the proceedings" - again agreed but that also begs the question somewhat and again is a Module II issue where it will have to be looked at in a more granular way.

Issue 12

113. Issue 12 is:
"Alternatively, is the applicant precluded from bringing such a claim by reason of its failure to do so by way of a transposition challenge? PLEADING-TYPE ISSUE"

114. The applicant submitted:
"No. The points made in response to Issue 11 above apply here also.
The State has identified nothing in the statutory scheme which precludes it from doing what the NIS said should be done – 'In making the decision as to whether a derogation is to be granted in respect of a farm the minister should have due regard to the potential for this decision to effect upon European sites which may be linked or in proximity to the farm holding.' Rather the point is that the State chooses not to do so. The attempt to frame this as a 'transposition' issue is misplaced."

115. The State submitted:
"The Respondents submit that the Applicant is so precluded.
If the Applicant wished to challenge any systemic deficiency it contends arises in the legislative framework governing the AA of agricultural activities, it was open to it to bring a transposition challenge, identifying with precision how it alleges the Irish system fails to properly transpose EU law, in accordance with the requirements detailed in the Respondent's Submissions, §§65–68.
It has not done so, and where that case not been pleaded the Applicant cannot be permitted to make that case, for the reasons set out in response to Question 6."

116. My decision on this issue is that the State's objection is misconceived. The NAP is a time-limited measure, not a part of the general framework of the legal system. Transposition generally arises in the context of the latter, whereas inadequacies in the former are matters of failure to apply EU law rather than to transpose it. The AA challenge is not a transposition challenge but an argument that the habitats directive was not properly applied when the NAP was being adopted. Insofar as the State is saying that the transposition regime such as the 2011 regulations hasn't been challenged, and that this means the applicant can't raise any systemic deficiency, it depends what one means by "systemic deficiency". If by systemic deficiency one means that Ireland's AA system is legislatively defective in principle, then the State is broadly correct subject to the point that not challenging transposition doesn't generally cut down the case that the applicant *did* plead. If on the other hand one means that that system wasn't correctly applied to the NAP, then such an argument isn't precluded by not challenging the 2011 regulations, or any other transposing measure, for the simple reason that an argument about inadequate application of (transposed) EU law is not dependent on making a prior argument about inadequate transposition of EU law. The failure to appreciate the transposition-application distinction is the basic flaw in the State's objection.

Issue 13

117. Issue 13 is:
"Alternatively, is the applicant precluded from bringing such a claim by reason of its failure, if the Applicant believes derogations should be published as a matter of EU law, to bring a challenge to the failure to publish those decisions? PLEADING-TYPE ISSUE"

118. The applicant submitted:
"The Applicant's point about the absence of a farm-level assessment is simply that this absence supports the contention that the requisite scientific certainty as to the absence of significant effects must necessarily be contained in the AA of the NAP.

The objection raised here is an example of the 'send the fool further' approach."

119. The State submitted:

"If the Applicant believes that derogations should be published as a matter of EU law, and/or that it is prevented from challenging derogation decisions by reason of the fact that derogation decisions are not published, its remedy is to bring a challenge to the failure to publish those decisions.

Even if that were not the case, the Applicant would be required to avail of appropriate procedures to challenge the farm-level activities with which it is concerned and/or to bring a challenge at a systemic level in a procedurally appropriate manner, as addressed in Questions 10, 11 and 12.

Again, the Applicant's contention that the lack of published derogation decisions means that it can seek to ventilate its concerns through an inappropriate procedural route has no basis in law."

120. My decision on this issue is that this is a complaint about a case that the applicant hasn't made. Given how much stress was laid on the absence of any farm-level AA practice is, it is perhaps puzzling that the applicant didn't challenge this in a more head-on way. But not doing so doesn't dispose of the points that the applicant *did* challenge.

Issue 14

121. Issue 14 is:

"Is the applicant precluded from any claim of environmental consequences arising from the manner of implementation of, or a failure to properly implement, the NAP, having regard to the presumption of legality? PLEADING-TYPE ISSUE"

122. The applicant submitted:

"The Applicant's claim is that the NAP was not properly assessed by reference to the Habitats Directive, the WFD and the SEA Directive. It is not required to establish environmental consequences arising from those failures of assessment. The objection appears to stem from the State's attempt to re-write the case being made."

123. The State submitted:

"It is the Respondent's position that the Applicant is precluded from any claim of environmental consequences arising from the manner of implementation of and/or a failure to properly implement the NAP having regard to the presumption of legality.

Ireland's substantive obligations to adopt measures to protect water bodies from pollution caused by nitrates are delimited by the requirements of Article 5(1) of the Nitrates Directive and Article 11 WFD. It follows that only a challenge alleging that the NAP fails to satisfy Ireland's positive obligations under those provisions could raise a justiciable benchmark sufficient to permit the Court to engage in an analysis of the *level of ambition* of the NAP.

As detailed above, it is striking that, despite the Applicant's repeated submissions that the NAP and the GAP Regulations do not do enough to protect water bodies from nitrates pollution, it is *not* pleaded that those measures are insufficient to meet Ireland's substantive obligations under Article 5(1) of the Nitrates Directive or Article 11 WFD.

Nor is it pleaded that Ireland's decision to seek the Derogation is contrary to those obligations. Indeed, it is unclear how that case could have been made, absent annulment of the Commission Decision, where the Commission concluded that the Derogation is 'justified on the basis of objective criteria' [Commission Decision, Recital 15.], 'will not prejudice the objectives set out in [the Nitrates Directive]' [Commission Decision, Recital 16.] and 'is coherent with the legally binding targets of the WFD' [Commission Decision, Recital 17].

The Amended Statement of Grounds also does not plead that the Commission Decision is invalid as being inconsistent with the requirements of the Nitrates Directive or WFD. Nor has the Applicant sought annulment of the Commission Decision before the General Court on that basis, or on any basis.

There is therefore no pleaded case impugning the *substantive content* of the NAP, or the State's *level of ambition* when adopting that measure. Where neither the NAP nor the Derogation have been challenged as non-compliant with those provisions, they enjoy a presumption of legality in that respect.

It is respectfully submitted that the Court's determination of these proceedings must therefore be based on the uncontested position that the NAP and the GAP Regulations (including the Derogation) are fully compliant with Ireland's substantive obligations under the Nitrates Directive and WFD, to adopt measures to reduce water pollution caused by nitrates from agricultural sources. Any inference to the contrary in the Applicant's submissions must be rejected."

124. My decision on this issue is that I don't accept that the applicant's complaints can be dismissed as non-"substantive". The pleaded breaches of SEA, AA and the WFD collectively amount

to a complaint of inadequate environmental protection, even if the provisions relied on could also be viewed as procedural (relating to assessment or to ensuring that certain adverse consequences are ruled out). While the State is correct that there is no pleaded breach of the nitrates directive (as already discussed), there *is* a pleaded breach of the WFD. The lack of a plea that the Commission decision is invalid on some separate basis from that pleaded doesn't preclude the challenge that *is* made. The presumption of legality is a principle applicable to the determination on the substance, not a basis to "preclude" a challenge in the first place.

Issue 15

125. Issue 15 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any relief seeking to quash any specific derogation decision, or agricultural activity? PLEADING-TYPE ISSUE"

126. The applicant submitted:

"No. This objection appears to be based on the State's attempt to re-write the case being made.

The NAP *inter alia* regulates the conditions under which the cultivation of grassland for the sustenance of cattle for agricultural production is facilitated through the application of fertilisers on the surface of land or below its surface across the territory of Ireland, including in the vicinity of, and by way of hydrological connectivity to, Natura 2000 sites. That Plan therefore determines the conditions under which farm-level projects for the grazing of cattle and the application of fertilisers on the surface of land or below its surface may be carried out.

The Applicant's point about the absence of a farm-level assessment is simply that this absence supports the contention that the requisite scientific certainty as to the absence of significant effects must necessarily be contained in the AA of the NAP.

The inclusion of a challenge to a specific derogation decision, or agricultural activity would be completely arbitrary and dependent on the proximity in time of such derogation or activity to the point at which the NAP was adopted. The inclusion of a challenge would add nothing to the case actually being made - that the NAP was not properly assessed by reference to the Habitats Directive, the WFD and the SEA Directive.

The points made about the obstacles to challenging such decisions in the absence of publication are re-iterated."

127. The State submitted:

"The Respondents submits that the Applicant is so precluded.

The Applicant pleads five reliefs in the Amended Statement of Grounds. Each of those reliefs seeks either *certiorari* of the NAP or the GAP Regulations, or a declaration that the NAP or the GAP Regulations are contrary to law and/or *ultra vires* and/or invalid.

None of the reliefs pleaded seek to challenge any farm-level agricultural activities in Ireland. Nor do any of those reliefs allege non-transposition of the Habitats Directive, or invalidity of any legislative measure on the basis that it is incompatible with the Habitats Directive.

The additional complaints that the Applicant seeks to introduce therefore fall outside the reliefs as pleaded.

The Applicant seeks to avoid that inevitable conclusion by characterising the NAP and/or the GAP Regulations as constituting: (i) an authorisation for all farm-level agricultural activities, and/or (ii) a programmatic measure governing the authorisation and AA of agricultural activities, and/or (iii) the sole framework regulating relevant agricultural activities in Ireland (see also: Respondents' Submissions, §§29–39).

On that basis, the Applicant appears to assume that the issues raised by it with respect to farm-level agricultural activities, and the alleged lack of a farm-level permitting system, fall under the reliefs as pleaded. However, there is no basis for characterising the NAP or the GAP Regulations as carrying out any of those functions. On the contrary, it is clear from the basis on which those measures were prepared and adopted, and the content of those measures, that there was no intention that they would serve those functions.

Notably, in that respect, the reliefs seek, *inter alia*, *certiorari* of the NAP as 'prepared, published or adopted by the first named Respondent pursuant to the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017' (the '2017 Regulations').

The 2017 GAP Regulations under which the NAP was adopted, make the purpose of the NAP clear: it is 'an action programme' for 'the protection of waters against pollution from agriculture' [2017 GAP Regulations, Regulation 28(1).] that 'shall include all such measures as are necessary for the purposes of Article 5 of the Nitrates Directive' [2017 GAP Regulations, Regulation 28(2).].

There is nothing in the 2017 Regulations or the NAP that indicates an intent that, in adopting that measure, the Minister is *authorising* any agricultural activity that does not offend against

the restrictions in that measure (as opposed to prohibiting those activities that do), or that it intends to serve as a programmatic measure for the AA of agricultural activities.

Equally, there is nothing in the GAP Regulations that indicate an intention to *authorise* all activities that are not contrary to its terms, or to serve as a programmatic measure for the AA of agricultural activities. Indeed, the long title of the GAP Regulations makes clear that it is not intended to serve any function in regulating the AA of agricultural activities. That long title confirms that the GAP Regulations are adopted under the European Communities Act 1972 for the purpose of giving further effect to Directive 91/676/EEC, Directive 2000/60/EC, Directive 2003/35/EC, Directive 2006/118/EC, and Directive 2008/98/EC. It makes no reference to giving further effect to the Habitats Directive.

There is therefore no basis to suggest that the NAP and the GAP Regulations authorise farm-level agricultural activities, or function as programmatic measures for the AA of agricultural activities. In asserting that they do, the Applicant conflates two separate categories of measures: (i) those that place restrictions on activities, such as the NAP and the GAP Regulations, and (ii) those that regulate the environmental assessment and authorisation of activities, which the NAP and the GAP Regulations clearly do not. The contention by the Applicant that they *do* appears to be based solely on an assumption that there is no *other* legislative framework relevant to the authorisation and AA of farm-level agricultural activities.

However, a number of legislative measures *are* relevant to the authorisation and environmental assessment of agricultural activities, including *inter alia* the 2000 Act and the 2011 Regulations (see: Respondents' Submissions, §§78–88). The Applicant has failed to consider or address those provisions, in the context of the claim it now seeks to make, despite a lack of regulation of farm-level activities constituting the entire premise of their position.

In light of the foregoing, it is clear that the case the Applicant seeks to make falls entirely outside the reliefs pleaded. The reality is that the Applicant seeks to argue that individual farm-level activities are invalid and/or should be required to cease on the basis that they require AA, but have not undergone AA. That challenge is not pleaded, and the Applicant is therefore precluded from pursuing it."

128. My decision on this issue is that this issue adds nothing to the point about the failure to challenge individual decisions, already dealt with. As also already mentioned, the scope of AA is a matter of substantive EU law which can be addressed in due course and is not a point to be decided at the pleading objection stage. The State may or may not turn out to be correct on the point that, because the NAP is protective rather than constituting an authorisation, the matters to be considered in the AA process are restricted in the manner submitted. But that is a matter of substantive EU law for a merits module, not a pleading objection, and is adequately covered by the remaining identified issues.

Issue 16

129. Issue 16 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that any specific derogation decision or agricultural activity, requires appropriate assessment? PLEADING-TYPE ISSUE"

130. The applicant submitted:

"Like the State, the Applicant re-iterates its response to Issue 15."

131. The State submitted:

"The Respondents submit that the Applicant is so precluded and reiterate their response to Question 15 above."

132. My decision on this issue is that this also adds nothing to the negative answer to the previous related question. The answer here is also No.

Issue 17

133. Issue 17 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that derogation decisions or agricultural activities generally, require appropriate assessment? PLEADING-TYPE ISSUE"

134. The applicant submitted:

"Like the State, the Applicant re-iterates its response to Issue 15."

135. The State submitted:

"The Respondents submit that the Applicant is so precluded and reiterate their response to Question 15 above."

136. My decision on this issue is that maybe had it pleaded the issue more extensively the applicant could have got more mileage out of the point about a systemic failure to implement

domestic law on AA, but not doing so in these particular proceedings doesn't detract from the points that it *has* pleaded.

Issue 18

137. Issue 18 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any derogation decision or agricultural activity that it alleges required appropriate assessment? PLEADING-TYPE ISSUE"

138. The applicant submitted:

"Like the State, the Applicant re-iterates its response to Issue 15."

139. The State submitted:

"The Respondents submit that the Applicant is so precluded and reiterate their response to Question 15 above."

140. My decision on this issue is that this is just a reformulation of previous issues, so the answer here is also No for reasons already articulated.

Issue 19

141. Issue 19 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any protected site alleged to be affected by any derogation decision or agricultural activity? PLEADING-TYPE ISSUE"

142. The applicant submitted:

"The reliance on *Friends of the Irish Environment CLG v the Government of Ireland & Ors* [2023] IEHC 562 is misplaced, as the issue in that case (which is under appeal) concerned whether the measure in question required Appropriate Assessment at all.

The State's own NIS specifically identifies protected sites and Qualifying Objectives that are potentially affected by the implementation of the NAP. It says:

> 'As set out above at Section 6.3.2, the NAP has potential to give rise to a range of impacts upon European Sites throughout Ireland. Such potential impacts are set out within Section 6.3.3. While it is noted that a large proportion of European Sites within Ireland and Northern Ireland will be potentially affected by measures within the NAP, in order to address the specific vulnerability of such sites to these potential impacts it is considered that further consideration of the qualifying features of the sites, their conservation objectives and their relative sensitivity is required. As set out in Table 4.1, the Republic of Ireland supports 439 SACs and 165 SPAs. Northern Ireland supports a further 58 SACs and 16 SPAs. Table 6.2 details a further breakdown of the qualifying features for which these SACs and SPAs are designated.'[Book of Exhibits, p.557]

It then addressed the specific water dependent Natura 2000 sites and identifies these habitats by species and number of SAC. Having identified 14 habitat types and listed them by reference to environmental indicators the NIS says:

> 'On the basis of the information presented in Table 6.3, it is considered that the following water dependant habitats are those which have the most potential to be subject to adverse effects as a result of impacts arising via the NAP*:*
>
> • Turloughs;
> • Transition mires and quaking bogs;
> • Calcareous fens with Cladium mariscus and species of the Carex davalliana;
> • Petrifying springs with tufa formation (Cratoneurion);
> • Alkaline fens;
> • Oligotrophic waters containing very few minerals of sandy plains (Litttorelletalia);
> • Oligotrophic to mesotrophic standing waters with vegetation of the Littorelletea uniflorae and/or IsoetoNanojuncetea;
> • Natural dystrophic lakes and ponds;
> • Coastal lagoons;
> • Margaritifera (Freshwater pearl mussel);
> • Salmo salar (Atlantic salmon); • Najas flexilis (Slender naiad);
> • Rivers with muddy banks with Chenopodium rubric p.p. and Bidention p.p. vegetation; and
> • Watercourses of plain to montane levels with the Ranunculion fluitantis and Callitricho-batrachion vegetation. …
>
> Of the habitats and species listed above the vast majority, with the exception of Rivers with muddy banks [3270], are in sub-favourable condition, with many of these habitats also exhibiting a negative trend. In the majority of cases identified

> threats include those arising through nutrient inputs from agriculture. In this context it is considered that any potential further deterioration of the conservation status of these habitats and species arising as a result of nutrient inputs associated with agriculture would be associated with inadequate provisioning of mitigation measures in the NAP, or inadequate enforcement of these measures.'[Book of Exhibits, p.565]

The Applicant cannot fairly be criticised for not identifying sites when the State itself has specifically identified 14 Qualifying Objectives and their locations as potentially affected by the implementation of the NAP. There was no necessity for the Applicant to unnecessarily repeat this exercise as the State itself identified the potential for significant effects in a wide range of Natura 2000 sites; and the need for AA is not in dispute."

143. The State submitted:

"The Respondents maintain that the Applicant is so precluded. In the context of the Habitats Directive specifically, this Court made clear in *Friends of the Irish Environment CLG v the Government of Ireland & Ors* [2023] IEHC 562 that an Applicant seeking to impugn a measure by reference to the Habitats Directive is required to situate that claim by reference to particular sites. The Applicant has failed to do so here. Rather, it alleges a breach of and/or inconsistency with the Habitats Directive entirely in the abstract."

144. My decision on this issue is that the answer here is also No. The State's summary of *Friends* is over-simplified. A more acceptable summary would be to say that a challenge (to an AA of a general measure) that depends logically on a breach of an obligation of assessment of particular sites depends on establishing that the impugned measure has an impact on particular sites. Here by contrast the State has conceded the AA obligation – see Issue 1. That gets the applicant over the hurdle that the State now impermissibly attempts to re-erect. Even if the applicant had to go on to show, on the evidence, potential impact (of the underlying agricultural activities) on specific sites, which it doesn't necessarily, that wouldn't be implausible in principle given the content of the NAP here. That doesn't take away from the more substantive objection as to what exactly needs to be assessed, but that is a point on the substance rather than the pleadings.

Issue 20

145. Issue 20 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any non-transposition claim? PLEADING-TYPE ISSUE"

146. The applicant submitted:

"No. The claim is not dependent on transposition. The State has identified nothing in the statutory scheme which precludes it from carrying out a valid AA. The attempt to frame this as a 'transposition' issue is misplaced. The State have failed to identify what the supposedly missing transposition claim should be."

147. The State submitted:

"The Respondents maintain that the Applicant is so precluded.

A transposition point (even a transposition point not expressly stated as such) cannot be raised at hearing if it has not been pleaded. Where the Applicant has not pleaded any inadequate transposition of the Habitats Directive, 'it can't argue that the [domestic provisions] don't faithfully reflect the EU law obligation' [*Friends of the Irish Environment CLG v the Government of Ireland & Ors* [2023] IEHC 562*,* §85.]*.* The reality of the Applicant's position is that this is precisely what is being argued.

Further, and relatedly, a transposition point is 'a serious complaint which needs to be pleaded with a great deal of specificity' [*Friends of the Irish Environment CLG v the Government of Ireland & Ors* [2023] IEHC 562*,* 102. See also: *Sweetman v. An Bord Pleanála* [2020] IEHC 39*,* §103.]. If it is to be determined, 'the point should properly arise within the factual matrix of any given case' [*Sweetman v. An Bord Pleanála* [2020] IEHC 39*,* §103.]. A court cannot and should not 'engage in some kind of line-by-line comparison of the directive and the regulations unharnessed from any particular factual context or from any detailed and particularised pleaded case' *Sweetman v. An Bord Pleanála* [2020] IEHC 39*,* §135].

The point the Applicant seeks to make here is in all but name a transposition point. The Applicant argues that EU law requires the AA of agricultural activities such as grazing, contends (incorrectly) that there is no method in Irish law that would permit AA of farm-level activities, and thus asserts that the NAP must be assumed to be a programmatic measure aimed at authorising and carrying out AA of farm-level activities. The *gravamen* of that complaint is clearly that Ireland has not properly transposed the Habitats Directive in the context of agricultural activities. The Applicant cannot be permitted to raise that point without properly pleading it."

148. The ICMSA submitted:

"The text of Issue 20 correctly notes that 'the Applicant has not pleaded any nontransposition claim'.

The ICMSA agrees with the points and authority referenced by the State under this Issue, and would merely draw attention to further passages from Friends of the Irish Environment (in addition to those already noted in the State's footnotes). Humphreys J. stated (§138):
'138. That reinforces the problem that the applicant hasn't engaged in the pleadings with how exactly the transposition is defective insofar as it relates to these particular facts. But the applicant's problem is wider than that. Arguments about non-transposition are serious and solemn issues that need to be expressly claimed, not only fully identified mid-hearing. The fact that art. 7(2) refers back to art. 7(1) doesn't suffice here to haul the applicant out of the hole created by its own defective pleadings. An applicant has to be clear on what exactly it is challenging when it launches a non-transposition claim.'
Humphreys J. continued (§139):
'The only specific complaint of non-transposition is in relation to art. 7(2)(f), which doesn't apply. This isn't an authorisation. Furthermore no relief is sought corresponding to any grounds complaining of non-transposition of art. 7(2)(f).'"

149. My decision on this issue is that the analogy with *Friends* is misplaced, because that actually *was* a transposition challenge. I don't think this issue adds anything to the issues already discussed, specifically that transposition is a matter of the general legal framework whereas the applicant's essential complaint here regarding the NAP is a failure to apply that framework. The NAP is an instrument made under a directive and is not in any meaningful or helpful sense an act of transposition in itself, unless one wants to completely collapse the distinction between transposition and application. I appreciate that for many litigants, even on occasion official litigants, any commitment to further the cause of clarity, enlightenment and intellectual understanding can struggle to compete with the more pressing urge to score some ephemeral and not necessarily particularly meritorious advantage in heat of the immediate needs of an individual case, but that isn't a strategy that the court should particularly encourage. The answer to the State's objection, again therefore, is No.

Issue 21

150. Issue 21 is:
"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not engaged, at all, with the legislative framework governing agricultural activities? PLEADING-TYPE ISSUE"

151. The applicant submitted:
"The Applicant's point about the absence of a farm-level assessment is simply that this absence supports the contention that the requisite scientific certainty as to the absence of significant effects must necessarily be contained in the AA of the NAP.
The Applicant does not understand how alleged failure to engage with a legislative framework can prevent from pursuing the pleaded points. In any event, in this case, no such engagement is necessary."

152. The State submitted:
"The Respondents submit that the Applicant is so precluded and that it is unclear why the Applicant chose to seek to ventilate its concerns with respect to farm-level assessment in the abstract, and *via* the unusual (and impermissible) procedural route that has been adopted here. What is clear, however, is that the Applicant took that approach without giving any real consideration to the legislative framework that in fact governs agricultural activities, and AA, or how these issues might properly be raised before the Court.
The Applicant is correct that there is no specific or tailored permitting system for farm-level agricultural activities in Ireland. However, it is incorrect in assuming that this means that there is no legislative framework relevant to that issue.
A review of the legislative framework reveals that (i) the Applicant's characterisation of the NAP as an authorisation or programmatic appropriate assessment of agricultural activities is incorrect (as addressed in response to Question 15), and (ii) the procedural basis on which this issue is raised is therefore manifestly deficient.
Certain key legislative provisions relevant to the concerns raised by the Applicant, and with which the Applicant has not engaged at all, are summarised below.
First, that there is typically no permitting obligation for the use of land for the purposes of relevant agricultural activities is not, as the Applicant appears to infer, because the NAP acts as a blanket authorisation for those activities. Rather, it is because section 4(1)(a) of the 2000 Act provides that 'development consisting of the use of any land for the purpose of agriculture' is exempted development.
Section 2 of the 2000 Act defines 'agriculture' as including:
'horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of

bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, …'

These provisions therefore clearly apply to the type of agricultural activity with which the Applicant is concerned.

Section 4(1)(a) will be subject to the provisions of section 4(4), which provides:

'(4) Notwithstanding paragraphs (a), (i), (ia), and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an AA of the development is required'.

If the Applicant believes that any specific agricultural land use falls under section 4(4) on the basis that it requires AA, so that it is not exempted development, it is entitled to litigate that matter in the normal manner. It has not done so.

Second, a farmer cannot rely on the Derogation without authorisation from the Minister for Agriculture, Food and the Marine under regulation 35(1)(a) of the GAP Regulations, as amended. It is the case that section 7 of the GAP Regulations does not reference AA. However, if the Applicant believes that any specific authorisation for a derogation requires AA, it could have sought to challenge that authorisation, and to argue *inter alia* that the Minister was required to carry out an AA:

(i) having regard to its obligations under Regulation 27(2) of the 2011 Regulations to exercise its functions so as to secure compliance with the requirements of the Habitats Directive, and/or

(ii) under section 42 of the 2011 Regulations, on the basis that the activities at issue were a 'project' for which the Minister for Agriculture received an application for consent and that required AA.

Again, the Applicant has not taken this course of action.

Third, insofar as there is any agricultural activity that concerns the Applicant and that falls outside the foregoing provisions, it is open to the Applicant to bring that activity to the attention of the Minister and ask the Minister to exercise its statutory power under Regulation 28 of the 2011 Act, which provides:

'28. (1) Where the Minister has reason to believe that any activity, either individually or in combination with other activities, plans or projects, is of a type that may—

a) have a significant effect on a European Site,

b) have an adverse effect on the integrity of a European Site, or

c) cause the deterioration of natural habitats or the habitats of species or the disturbance of the species for which the European Site may be or has been designated pursuant to the Habitats Directive or has been classified pursuant to the Birds Directive, in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive,

the Minister shall, where he or she considers appropriate, direct that, subject to paragraph (2), the activity shall not be carried out, caused or permitted to be carried out or continued to be carried out by any person in the European Site or part thereof or at any other specified land except with, and in accordance with, consent given by the Minister under Regulation 30. …'

If the Minister were satisfied that the particular agricultural activity did require AA screening or AA, it could make a direction under Regulation 28(1) to the effect that the activity must cease unless consent is granted under Regulation 30, which requires AA screening and where appropriate AA. Alternatively, it could make a direction regulating the activity under Regulation 29(1).

Regulation 28(2) sets out certain exceptions to the Minister's power, where the activity has been granted a consent and is carried out in compliance with that consent. However, if that were the case the Applicant would have had an opportunity to challenge the consent, if it believed AA was necessary but not carried out.

However, again, the Applicant has not taken that course of action, or asked the Minister to exercise its powers under Regulations 28 to 30, or even identified in these proceedings any specific agricultural activity where it alleges that there is 'reason to believe' it is having a significant effect on a specific European Site within the meaning of Regulation 28.

Where the Applicant has not engaged with that legislative framework at all in these proceedings, even if the Applicant had sought declaratory relief with respect to any alleged non-transposition of the Habitats Directive, that claim would necessarily fail."

153. My decision on this issue is that the existence or otherwise of farm-level regulation is a matter to be considered insofar as (if at all) it is relevant to the substantive issue of the adequacy of the AA. Such regulation is not a reason to preclude a challenge to the AA at the level of principle and thus the alleged preclusion does not arise.

Issue 22

154. Issue 22 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has therefore neither pleaded nor made out either a specific or systemic challenge with respect to the appropriate assessment of farm level agricultural activities? PLEADING-TYPE ISSUE"

155. The applicant submitted:

"The Applicant's point about the absence of a farm-level assessment is simply that this absence supports the contention that the requisite scientific certainty as to the absence of significant effects must necessarily be contained in the AA of the NAP. This does not require a specific or systemic challenge with respect to the appropriate assessment of farm level agricultural activities."

156. The State submitted:

"The Respondents submit that the Applicant is so precluded.

The Respondents reiterate their response to Question 15 above that the Applicant has not made out a specific challenge with respect to the appropriate assessment of farm-level agricultural activities.

Moreover, the Respondents submit that the Applicant has not made out a systemic challenge with respect to the appropriate assessment of farm-level agricultural activities and reiterate their response to Question 20. If the Applicant wished to challenge any systemic deficiency it contends arises in the legislative framework governing the AA of agricultural activities, it was open to it to bring a non-transposition claim, identifying with precision how it alleges the Irish system fails to properly transpose EU law, in accordance with the requirements detailed above, which the Applicant failed to do."

157. My decision on this issue is that this adds nothing to issues already addressed. As with those issues, and for the same reasons, the answer is negative.

Issue 23

158. Issue 23 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous if the Applicant's conclusion that the NAP 'authorises' farm-level activities is incorrect? PLEADING-TYPE ISSUE"

159. The applicant submitted:

"It is not clear what 'conclusion' is being referred to here. In any event, the need for the NAP to undergo AA is not in dispute; and accordingly it must comply with the requirements for AA."

160. The State submitted:

"The Respondents submit that the Applicant is so precluded. This has already been addressed above, in Question 15 above."

161. My decision on this issue is as follows. I accept, for present purposes, that the applicant's terminology is incorrect insofar as it suggests that the NAP "authorise[s]" (see e.g., sub-ground 3) the activities complained of. A more accurate term would be something in the ball-park of "regulates" or "mitigates". The point so phrased essentially involves a challenge to the AA based on the argument that the NAP is insufficiently rigorous. It would be undue formalism to dismiss the point based on a wholly semantic infelicity if there is an issue on the substance to be debated further.

Issue 24

162. Issue 24 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because a challenge based on an alleged failure to carry out appropriate assessment on derogation decisions or agricultural activities could never be pursued through a challenge to the NAP? PLEADING-TYPE ISSUE"

163. The applicant submitted:

"The Applicant's point about the absence of a farm-level assessment is simply that this absence supports the contention that the requisite scientific certainty as to the absence of significant effects must necessarily be contained in the AA of the NAP."

164. The State submitted:

"The Respondents submit that the Applicant is so precluded.

The complex and far-reaching case the Applicant seeks to make is entirely divorced from the reliefs sought, and it is unclear how quashing Ireland's action programme under Article 5(1) of the Nitrates Directive could possibly address the concerns raised by the Applicant. The Applicant cannot be permitted 'to build a tottering edifice reaching to *certiorari* on such an ephemeral foundation' [*O'Donnell and Others v an Bord Pleanála and Others* [2023] IEHC 381, §107].

The Applicant's attempt to ventilate its concerns with respect to the permitting an appropriate assessment of farm-level agricultural activities in these proceedings must be rejected. As detailed in the Respondents' responses above, no such claim has been pleaded, or properly particularised, and this is in any event a manifestly inappropriate forum to ventilate those concerns.

The logical fallacy inherent in the Applicant's approach is perhaps best illustrated by the consequences if the Applicant were to succeed in quashing the NAP on this basis. The purpose of quashing an authorisation is to prevent the impugned development or activity from commencing or continuing. Quashing the NAP would have no effect on the legality of any ongoing agricultural activities with which the Applicant takes issue. Nor would it address any transposition issue that the Applicant might say arises, or require the introduction of a farm-level permitting system. All that it would accomplish would be to quash the protective measures that *are* in place, reducing rather than increasing environmental protection."

165. My decision on this issue is that this issue ultimately relates to the merits of the AA process as a matter of EU law rather than being a matter of preclusion on a pleadings-type basis. The point can be revisited at the appropriate stage. At this moment one can't rule out a *priori* that a more rigorous NAP could have been adopted and that consideration of this was something that should have occurred in the AA process, even if quashing the NAP hypothetically would not rectify this. An alternative way of looking at the problem with the State's objection is that the fact that a remedy would be very nuanced if hypothetically a remedy was called for does not in itself mean that the challenge can't get off the ground in the first place.

Issue 25

166. Issue 25 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because any failure with respect to any farm-level activity could not go to the validity of the NAP? PLEADING-TYPE ISSUE"

167. The applicant submitted:

"The Applicant's point about the absence of a farm-level assessment is simply that this absence supports the contention that the requisite scientific certainty as to the absence of significant effects must necessarily be contained in the AA of the NAP."

168. The State submitted:

"The Respondents submit that the Applicant is so precluded and reiterate their response to Question 24 above."

169. My decision on this issue is that it is overly simplistic to say categorically that failures at farm level assessment can't go to the validity of the NAP. If there is no effective system in practice for farm level assessment (despite the theoretical relevance of the 2000 Act and 2011 regulations), that may (or may not – to be decided) have implications for AA requirements at NAP level, which in turn could have implications for the validity of the NAP. So this is an issue of substantive EU law, not a knock-out pleading point.

Issue 27

170. Issue 27 is:

"Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not challenged the compliance of the measures in the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE"

171. The applicant submitted:

"No. The Applicant is entitled to challenge the adequacy of the AA without challenging the compliance of the measures in the NAP with the requirements of the Nitrates Directive. Like the State, the Applicant refers to its answers to Issues 10, 11 and 12."

172. The State submitted:

"The Respondents submit that the Applicant is so precluded, having regard to the basis for the challenge to the AA of the NAP. This has already been addressed in reply to Questions 10, 11 and 12 above."

173. My decision on this issue is that this doesn't raise any distinct question from issues already addressed and also therefore requires a negative answer.

Issue 28

174. Issue 28 is:

"Is the applicant precluded from maintaining the challenge in particular as to the likelihood of adverse environmental effects as a result of the impugned decisions by reason of the applicant's failure to contest the evidence of the opposing parties by means of cross-examination? PLEADING-TYPE ISSUE"

175. The applicant submitted:

"No. There is no necessity for cross-examination in relation to the actually pleaded case. That relies on well-worn principles in respect of Article 6(3) of the Habitats Directive and

there is no necessity to cross-examine where the nub of the case is the legal question as to whether the NIS and AA of the NAP has reached the requisite degree of scientific certainty. This is, with respect, the type of issue raised and addressed every week in the Planning and Environment Court without any suggestion, let alone obligation, to engage in cross-examination."

176. The State submitted:

"This issue was raised by the Second to Sixth Notice Parties and is more appropriately addressed by those parties"

177. The IFA (being the relevant notice parties) did not specifically address this issue in the invited supplemental submissions.

178. My decision on this issue is that in that the absence of a more detailed submission from the party making the objection as to how the applicant is allegedly precluded from making its case, such an objection can't simply be accepted as a global complaint. The point is best reformulated as a question as to whether the applicant has established each of the various factual propositions that are required to enable it to make the different legal points it wants to make. I have attempted to clarify this in the issue paper at Schedule II to this judgment, and submissions can be made more specifically in this regard in Module II. But if the opposing parties want to pursue the objection, it will have to be made clear what are the precise averments that the applicant has not sought to contest by cross-examination and how precisely that failure would determine the issue against the applicant, and it will also have to be established that such statements are genuinely evidential and not bland generalities in the nature of "everything was done properly - nothing to see here"-type rolled-up attempts to assert the ultimate issue or make a submission in the guise of an affidavit. Likewise the applicant will have to be precise about the averments made on its behalf that establish the necessary factual points.

Issue 29

179. Issue 29 is :

"Are the proceedings misconceived because the Applicant's real complaint is that the State is able to avail of a derogation at all and indeed has obtained such a derogation from the European Commission and because these proceedings are no more than a Trojan horse and an impermissible collateral attack on the decision to grant Ireland a derogation from the 170kg limit of livestock manure per hectare, available under Annex III2(b) of the Nitrates Directive (Directive 91/676/EEC) as is said to be manifest from the pleadings (see Affidavit of Elaine McGoff, §§14-19)? PLEADING-TYPE ISSUE"

180. The applicant submitted:

"The proceedings are not misconceived. The Applicant has raised a justiciable issue regarding the adequacy of the AA. Dr McGoff's affidavit at 14-19 describes the derogation process; it is difficult to see what is supposedly objectionable about those paragraphs."

181. The State submitted:

"The Respondents submit that the proceedings are so misconceived.

As detailed above, the Applicant has failed to plead any challenge to the substantive validity of the Derogation. Yet, it is apparent from the pleadings, and was confirmed at the hearing, that the Applicant's main concern in these proceedings is Ireland's decision to apply for the Derogation and/or the Commission's Decision to grant the Derogation. Where the Applicant has not challenged those decisions, and in particular has not challenged the compliance of those decisions with Article 5(1) of the Nitrates Directive or Article 11 WFD, it cannot challenge the Derogation by way of a collateral attack under Article 6(3)."

182. My decision on this issue is that this isn't an obstacle to the proceedings. The allegation that the applicant's real complaint is the existence of the derogation at all is the stuff of forensic knockabout comment and swordsmanship. It would be a more crushing complaint if the applicant didn't plead any other more plausibly justiciable issue, but that isn't the case. Insofar as the applicant *has* raised potentially justiciable issues, the court isn't excused from dealing with those simply because there is a school of thought that would suspect that the applicant would have sought more sweeping remedies if the law so allowed.

Issue 30

183. Issue 30 is:

"Is the applicant precluded from raising issues that flow from the Government's decision to seek a derogation by reason of its failure to challenge that decision? PLEADING-TYPE ISSUE"

184. The applicant submitted:

"The Applicant has raised a justiciable issue regarding the adequacy of the AA. It is far from clear that the Government's decision to seek a derogation was justiciable."

185. The State submitted:

"The Respondents plead that the Applicant is so precluded. The Respondents reiterate their response to Question 29."

186. My decision on this issue is as follows. Annex III para. 2 of the nitrates directive provides, in relation to measures in a NAP:

> "These measures will ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare.
> The specified amount per hectare be the amount of manure containing 170 kg N. However:
> (a) for the first four year action programme Member States may allow an amount of manure containing up to 210 kg N;
> (b) during and after the first four-year action programme, Member States may fix different amounts from those referred to above. These amounts must be fixed so as not to prejudice the achievement of the objectives specified in Article 1 and must be justified on the basis of objectives criteria, for example:
> — long growing seasons,
> — crops with high nitrogen uptake,
> — high net precipitation in the vulnerable zone,
> — soils with exceptionally high denitrification capacity.
> If a Member State allows a different amount under point (b) of the second subparagraph, it shall inform the Commission, which shall examine the justification in accordance with the regulatory procedure referred to in Article 9(2)."

187. Article 9(2) referred to, provides obliquely as follows:

> "2. Where reference is made to this Article, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
> The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months."

188. That refers to 1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission. That decision is no longer in force, having been repealed by Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. Articles 5 to 8 of the latter provide:

> "Article 5
> Examination procedure
> 1. Where the examination procedure applies, the committee shall deliver its opinion by the majority laid down in Article 16(4) and (5) of the Treaty on European Union and, where applicable, Article 238(3) TFEU, for acts to be adopted on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in those Articles.
> 2. Where the committee delivers a positive opinion, the Commission shall adopt the draft implementing act.
> 3. Without prejudice to Article 7, if the committee delivers a negative opinion, the Commission shall not adopt the draft implementing act. Where an implementing act is deemed to be necessary, the chair may either submit an amended version of the draft implementing act to the same committee within 2 months of delivery of the negative opinion, or submit the draft implementing act within 1 month of such delivery to the appeal committee for further deliberation.
> 4. Where no opinion is delivered, the Commission may adopt the draft implementing act, except in the cases provided for in the second subparagraph. Where the Commission does not adopt the draft implementing act, the chair may submit to the committee an amended version thereof.
> Without prejudice to Article 7, the Commission shall not adopt the draft implementing act where:
> (a) that act concerns taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures;
> (b) the basic act provides that the draft implementing act may not be adopted where no opinion is delivered; or
> (c) a simple majority of the component members of the committee opposes it.
> In any of the cases referred to in the second subparagraph, where an implementing act is deemed to be necessary, the chair may either submit an amended version of that act to the same committee within 2 months of the vote, or submit the draft implementing act within 1 month of the vote to the appeal committee for further deliberation.
> 5. By way of derogation from paragraph 4, the following procedure shall apply for the adoption of draft definitive anti-dumping or countervailing measures, where no opinion is delivered by the committee and a simple majority of its component members opposes the draft implementing act.

The Commission shall conduct consultations with the Member States. 14 days at the earliest and 1 month at the latest after the committee meeting, the Commission shall inform the committee members of the results of those consultations and submit a draft implementing act to the appeal committee. By way of derogation from Article 3(7), the appeal committee shall meet 14 days at the earliest and 1 month at the latest after the submission of the draft implementing act. The appeal committee shall deliver its opinion in accordance with Article 6. The time limits laid down in this paragraph shall be without prejudice to the need to respect the deadlines laid down in the relevant basic acts.

Article 6

Referral to the appeal committee

1. The appeal committee shall deliver its opinion by the majority provided for in Article 5(1).

2. Until an opinion is delivered, any member of the appeal committee may suggest amendments to the draft implementing act and the chair may decide whether or not to modify it.

The chair shall endeavour to find solutions which command the widest possible support within the appeal committee.

The chair shall inform the appeal committee of the manner in which the discussions and suggestions for amendments have been taken into account, in particular as regards suggestions for amendments which have been largely supported within the appeal committee.

3. Where the appeal committee delivers a positive opinion, the Commission shall adopt the draft implementing act.

Where no opinion is delivered, the Commission may adopt the draft implementing act.

Where the appeal committee delivers a negative opinion, the Commission shall not adopt the draft implementing act.

4. By way of derogation from paragraph 3, for the adoption of definitive multilateral safeguard measures, in the absence of a positive opinion voted by the majority provided for in Article 5(1), the Commission shall not adopt the draft measures.

5. By way of derogation from paragraph 1, until 1 September 2012, the appeal committee shall deliver its opinion on draft definitive anti-dumping or countervailing measures by a simple majority of its component members.

Article 7

Adoption of implementing acts in exceptional cases

By way of derogation from Article 5(3) and the second subparagraph of Article 5(4), the Commission may adopt a draft implementing act where it needs to be adopted without delay in order to avoid creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests of the Union within the meaning of Article 325 TFEU.

In such a case, the Commission shall immediately submit the adopted implementing act to the appeal committee. Where the appeal committee delivers a negative opinion on the adopted implementing act, the Commission shall repeal that act immediately. Where the appeal committee delivers a positive opinion or no opinion is delivered, the implementing act shall remain in force.

Article 8

Immediately applicable implementing acts

1. By way of derogation from Articles 4 and 5, a basic act may provide that, on duly justified imperative grounds of urgency, this Article is to apply.

2. The Commission shall adopt an implementing act which shall apply immediately, without its prior submission to a committee, and shall remain in force for a period not exceeding 6 months unless the basic act provides otherwise.

3. At the latest 14 days after its adoption, the chair shall submit the act referred to in paragraph 2 to the relevant committee in order to obtain its opinion.

4. Where the examination procedure applies, in the event of the committee delivering a negative opinion, the Commission shall immediately repeal the implementing act adopted in accordance with paragraph 2.

5. Where the Commission adopts provisional anti-dumping or countervailing measures, the procedure provided for in this Article shall apply. The Commission shall adopt such measures after consulting or, in cases of extreme urgency, after informing the Member States. In the latter case, consultations shall take place 10 days at the latest after notification to the Member States of the measures adopted by the Commission."

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

on expert advice. Therefore the Government decision to seek a derogation is merely a step in the process, not a final and binding legal act. On the basis of settled caselaw (see *e.g.* per Costello J. in *Spencer Place Development Ltd. v. Dublin City Council* [2020] IECA 268, [2020] 10 JIC 0212) an applicant is entitled and indeed required to await the final legally effective act before challenging the process. In challenging a final act it is unnecessary and inappropriate to also challenge every intermediate step expressly. So the applicant hasn't done anything wrong here by not challenging the Government decision merely to seek the derogation.

Issue 31

190. Issue 31 is:

> "Is the applicant precluded from relying on any ultimate site-specific impacts because there is a failure by the Applicant to adduce any evidence or identify any specific project, on any given protected site, by reference to evidence relevant to the conservation objectives of any particular site, in respect of which it might be contended that the 5th NAP has unlawfully authorised an intervention to a protected site and because the EPA reports exhibited by the Applicant cannot be relied upon because in no manner can they be considered or construed as evidencing the authorisation of any project-specific intervention capable of having a significant adverse impact on a European Site? PLEADING-TYPE ISSUE"

191. The applicant submitted:

> "The Applicant repeats its response to Issue 19. There is no need to adduce such evidence. The need for AA is not in dispute. The EPA reports demonstrate the importance of the issue and the need for a valid AA."

192. The State submitted:

> "The Respondents submit that the Applicant is precluded from relying on any ultimate site-specific impacts because of its failure to situate its claim by reference to a particular site or particular sites. In the context of the Habitats Directive specifically, this Court made clear in *Friends of the Irish Environment CLG v the Government of Ireland & Ors* [2023] IEHC 562 that an Applicant seeking to impugn a measure by reference to the Habitats Directive is required to situate that claim by reference to particular sites. The Applicant has failed to do so here. Rather, it alleges a breach of and/or inconsistency with the Habitats Directive entirely in the abstract."

193. My decision on this issue is that the first part of this objection doesn't add anything to matters already dealt with and has a negative answer for similar reasons. As to whether the EPA reports cannot be relied on, the complaint confuses the concept of impermissible reliance with the question of the meaning and import of material before the court. The State hasn't proposed in this Issue that the EPA reports are evidentially inadmissible, merely that they don't identify specific unassessed farm-level activities, on foot of derogations, that impermissibly impact on specific European sites. Even assuming that to be correct for the sake of argument, that doesn't have the consequence that the EPA reports "cannot be relied upon" for any purpose. That is a matter to be considered in analysing the totality of evidence and submissions, not a legitimate preliminary objection.

Issue 32

194. Issue 32 is :

> "Is the applicant precluded from relying on any ultimate site-specific impacts because an allegation that the 5th NAP has authorised or is unlawfully authorising interventions into any and/or all protected European Sites is not pleaded with necessary specificity and particularity? PLEADING-TYPE ISSUE"

195. The applicant submitted:

> "The Applicant repeats its answer to Issue 19. The Applicant relied and was entitled to rely on the State's identification in its NIS that the implementation of the NAP would have potentially significant impacts on Natura 2000 sites. The legal issue raised by the Applicant is whether the AA precluded the acknowledged potential impacts to the requisite degree of certainty."

196. The State submitted:

> "The Respondents submit that the Applicant is so precluded, for the reasons already set out above."

197. My decision on this issue is that this complaint has not been made out. Thus far at any rate the applicant's pleaded complaint is acceptably clear. The vagueness of the State's "elaboration" of this issue lends the cry of preclusion a contrived energy.

Issue 34

198. Issue 34 is:

> "Is the applicant's challenge precluded by the principle that environmental protection and economic activity are incommensurable values and the choice of by how much one might be limited to advance the other cannot be assessed by reference to legal standards and

accordingly, it is an inherently political question, not a justiciable one? PLEADING-TYPE ISSUE"

199. The applicant submitted:

"The Applicant has raised a justiciable issue regarding the adequacy of the AA. That does not require consideration of non-justiciable issues.

Without prejudice to that, if a validly conducted AA precluded adoption of the NAP under Article 6(3) Habitats Directive, Article 6(4) does specify an appropriate legal standard. The State has not established any principle that environmental protection and economic activity are incommensurable values"

200. The State submitted:

"The Respondents position is that Applicant is precluded from bringing this claim where it amounts to a non-justiciable merits-based challenge to the level of ambition of the NAP with respect to environmental protection. This has already been addressed in reply to Question 6."

201. My decision on this issue is that while the State's formula sounds reasonable enough, in context it is just a reformulation of the point that the level of ambition of the NAP is not up for judicial investigation. That in turn is a reformulation of the basic point, already amply covered in the issues still to be dealt with, that art. 6(3) of the habitats directive does not require an examination of the effects of the underlying activities. I don't see the "political question" issue as adding anything of substance to that question of interpretation. A related political question issue arises in relation to the SEA grounds but that can also be addressed in that separate context.

Conclusion on Core Ground 1

202. The implications of the foregoing for Core Ground 1 are essentially that it can proceed as pleaded, subject to the comments above.

Core ground 2 – alleged breach of art. 4(1) of the water framework directive

203. Core ground 2 provides:

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

204. This claims a breach of art. 4(1) of the water framework directive and consequentially a breach of art. 5 of the SEA directive. The SEA argument under this heading is based on the same logic.

Issues arising under CG2 (Issues 35-48)

Issue 35

205. Issue 35 is:

"Is the applicant precluded from obtaining relief in relation to the WFD by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)? PLEADING-TYPE ISSUE"

206. The applicant submitted:

"The objection is misplaced. The relief sought in respect of the WFD is *certiorari* and the standard declaratory relief prescribed in the Practice Direction.

The State is not making this plea and leaves it to the 2nd – 6th Notice Parties to address. While the IFA have identified this issue in its response, the issue is not actually addressed in the purported response."

207. The State submitted:

"The Respondents did not plead that the Applicant is precluded from obtaining relief in relation to the WFD by reason of the lack of any pleaded relief in that regard. This issue was raised by the Second to Sixth Notice Parties and would more appropriately be addressed by those Notice Parties.

For the avoidance of doubt, the Respondents reiterate that the Applicant's claim based on Article 4(1) of the WFD is misconceived on *inter alia* the same basis as its claim under Article

6(3) of the Habitats Directive, and the Respondents will rely on the pleading points made with respect to the Habitats Directive in this context also.

The Respondents' further submit that the Applicant's claim with respect to the WFD is also misconceived, and not properly pleaded, on the basis set out in response to Questions 38 to 41 below."

208. The IFA submitted:

"The Respondents and Notice Parties have each already made extensive submissions on the failure by the Applicant to plead adequately, or at all, the points that it later sought to ventilate in written and/or oral submissions.

Notwithstanding the specific, targeted criticisms of the parties in written submissions, the Applicant failed to satisfactorily address how it might legitimately seek to advance issues not pleaded, or inadequately pleaded, in the teeth of the extensive, settled law which runs against it. The Applicant assumes that pleadings deficiencies can be overcome as a matter of course, as if absolution for clear failure is simply there for the asking – although absolution is not sought: rather, it is appears to be assumed. The approach of the Applicant appears to the effect that its pleadings failures are either not failures at all (which runs entirely contrary to law), or are of a *de minimis* / misunderstood variety (such as to fall within the 'acceptably clear' line of permissible consideration). These positions are unavailable to the Applicant here.

The IFA Parties further note and adopt the response of the ICSMA Notice Party at paragraphs 7 – 11 of its response to the Issues Paper."

209. My decision on this issue is that the applicant's response is essentially correct. The relevant complaint is that the NAP is invalid by reason of non-compliance with the WFD. The remedy sought is *certiorari* and appropriate declarations, as envisaged by Practice Direction HC124. That is standard stuff and is not a problem. No further relief needs to be specifically sought for such a pleaded challenge. In any event O. 84 makes clear that the court has jurisdiction to grant an unpleaded relief – provided of course that it comes within the pleaded grounds. In any event the IFA provided no sufficient elaboration of this objection so it must be dismissed.

Issue 36

210. Issue 36 is:

"Does Article 4(1) of the WFD have the effect that Member States are required – unless a derogation is granted – to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive – as laid down in the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, ECLI:EU:C:2015:433 ? APPEARS AGREED"

211. The State submitted:

"The Respondents agree with the *dicta* of the Court of Justice of the European Union in Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland* EU:C:2015:433 ('*Weser*') that (§51):

> '… Article 4(1)(a)(i) to (iii) of Directive 2000/60 must be interpreted as meaning that the Member States are required — unless a derogation is granted — to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.' (Emphasis added).

However, for completeness, the Respondents reiterate that the Applicant's submission that there is an obligation to assess the compliance *of the NAP* with Article 4(1) of the WFD is misconceived, as detailed in §§136 to 142 of the Respondents' Written Submissions, and in reply to Question 38 below."

212. My decision, if that's the correct term, on this issue is that as the State's response makes clear, the proposition set out in the Issue is indeed agreed. The relevance of that proposition to the case remains up for debate.

Issue 38

213. Issue 38 is:

"Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance a merits-based challenge to the compliance of Ireland's programme of measures with Article 11 WFD? PLEADING-TYPE ISSUE"

214. The applicant submitted:

"The Applicant's challenge on WFD grounds is that the NAP was required to be assessed under Article 4 WFD for compliance with the environmental objectives – but was not. This is based on the terms of Article 4 itself (Ground 28-35); and alternatively on the terms of the

SEA Directive (Ground 36 et seq). The consequences are set out in Ground 42 – 'In light of the lack of a lawful assessment of the effects of the NAP on the status of water bodies concerned, the Minister is precluded from authorising the NAP.' (A further ground is raised regarding unclassified water bodies, to the effect that in the absence of classification (which did not happen until April 2022) the First Respondent could not have been satisfied that the NAP would not jeopardise the attainment of good status of these water bodies or cause a deterioration of status of these water bodies.)

The challenge is about the assessment of the NAP by reference to the WFD.

The Court should address the argument actually made; it should not be dissuaded from addressing a validly pleaded argument on the basis that a different argument could have been made, even if the State thinks it would be better placed to defend the alternative argument."

215. The State submitted:

"The Applicant is precluded from challenging the NAP based on Article 4(1) WFD, where *inter alia* that challenge is in substance a merits-based challenge to the compliance of Ireland's programme of measures with Article 11 WFD.

The premise of the Applicant's argument is that the Respondents were required to assess the NAP under the Article 4(1) WFD assessment obligation.

Typically, an Article 4(1) assessment is of a specific intervention, such as the construction of an individual project, that might *cause* a deterioration in the status of a water body [See, e.g., *Weser*, which involved a scheme to deepen various parts of the river Weser; Case C-301/22 *Sweetman* EU:C:2023:697, which involved a scheme to abstract a maximum of 4 680 m^3 of freshwater per week from a lake *via* a pipeline, for up to 22 weeks annually from May to September, with the abstracted freshwater being used to bathe diseased salmon to rid them of amoebic gill disease and sea lice; Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias* EU:C:2012:560, which involved a project for the partial diversion of the upper waters of the river Acheloos to Thessaly; Case C-346/14 *European Commission v Republic of Austria* EU:C:2016:322, which involved the construction of a hydropower plant on the Schwarze Sulm; C-664/15 *Protect Natur* EU:C:2017:987, which involved an application for the extension of a permit for a snow-production facility belonging to a ski resort that includes a reservoir fed by water from the Einsiedlbach, a river located in Austria; Case C-535/18 *IL* EU:C:2020:391, which involved an administrative decision granting permission for a major road project.]. Here, the Applicant argues that the NAP required an assessment under Article 4(1) WFD, as to whether the measures put in place by the NAP are *sufficient to protect* against water pollution caused by nitrates from agricultural sources, so as to ensure that there will be no deterioration in the status of any water body [See, e.g., Applicant's Written Submissions, §118. See also §§106, 119, 122–127.].

The Applicant appears to envisage this as being a *separate* assessment, from the assessment by Member States as to the measures required to comply with the objectives of the Nitrates Directive (which assessment is not challenged in these proceedings), and from the assessment by Member States under Article 11 WFD of the programme of measures required to achieve the objectives of the WFD (which assessment is also not challenged in these proceedings).

This is fundamentally misconceived, as detailed below, and in reply to Questions 39, 40 and 41.

First, the Applicant's argument assumes that Article 4(1) WFD requires an assessment of the sufficiency of *individual* protective measures adopted as part of the programme of measures to meet the objectives of Article 4(1), in addition to the *global* assessment of the sufficiency of those measures to meet those objectives that is required under Article 11 WFD. This is entirely contrary to the framework established by the WFD, and has no textual support in the Directive.

Article 4(1) WFD and Article 11 WFD have clear and distinct functions under the WFD. Article 4(1) WFD sets out the objectives of the WFD that must be met by Member States. It is entitled 'Environmental objectives', and it provides*: '*In making operational the programmes of measures specified in the river basin management plans' Member States 'shall … implement the necessary measures to prevent deterioration of the status of' water bodies.

Article 4(1) therefore identifies the objectives of the WFD. It further places an obligation on Member States to operationalise the programme of measures, and to ensure that the programme of measures will achieve the objectives of the WFD. That obligation applies at every stage of implementation, and where it becomes clear, at any stage, that those objectives will *not* be achieved by the programme of measures, additional action will be required.

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

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

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

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

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

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

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

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

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

> '5. Where monitoring or other data indicate that the objectives set under Article 4 for the body of water are unlikely to be achieved, the Member State shall ensure that:
>
> - the causes of the possible failure are investigated,
> - relevant permits and authorisations are examined and reviewed as appropriate,
> - the monitoring programmes are reviewed and adjusted as appropriate, and
> - additional measures as may be necessary in order to achieve those objectives are established, including, as appropriate, the establishment of stricter environmental quality standards following the procedures laid down in Annex V.
>
> Where those causes are the result of circumstances of natural cause or force majeure which are exceptional and could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, the Member State may determine that additional measures are not practicable, subject to Article 4(6)'.

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

It should be emphasised that the Applicant has *not* pleaded any failure to put in place *a programme of measures* sufficient to achieve the objectives of the WFD, as required by Article 11(1) to (4) WFD. It has not argued that further supplementary measures in additional to the basic measures are required to meet those objectives under Article 11(5) WFD. All that is alleged is a failure to carry out a separate assessment of the NAP *individually* under Article 4(1) WFD.

Equally, the Applicant has *not* identified any water body for which it alleges the objectives set under Article 4 are unlikely to be achieved, so as to trigger an obligation under Article 11(5). Nor has the Applicant alleged any failure by the Respondents under Article 11(5) to take action where there is such evidence.

Instead, the Applicant has brought a technical, and wholly misconceived, claim that a separate assessment obligation arises under Article 4(1), whereby it must be established, prior to adopting the NAP, that the NAP *individually* will be sufficient to meet the objectives of Article 4(1).

There is no basis for that claim. Article 4 and Article 11 when read together make clear that the WFD does not require any separate assessment process to determine whether each *individual* protective measure is sufficient to meet the Article 4(1) objectives; that assessment is carried out under Article 11 at a programmatic level, having regard to the suite of measures globally.

Further, and fundamentally, the WFD does not impose any obligation that an individual basic measure, alone, must be sufficient to meet the objectives in Article 4(1).

All that is required *by the WFD* with respect to the adoption *of the NAP*, therefore, is that the State adopt the measures necessary to implement the Nitrates Directive, which means adopting an action programme compliant with the Nitrates Directive.

That is not to say there is no obligation on Member States to assess the sufficiency of the measures put in place by the NAP on an individual basis. However, as addressed below, that obligation arises under the Nitrates Directive (and in particular Article 5(5) of the Nitrates Directive), and it is to ensure that the objectives of the Nitrates Directive are met. The Applicant has not pleaded any infringement by the State of that obligation.

There is no basis for an assumption that *two* obligations arise under the WFD with respect to the assessment of the sufficiency of protective measures – one in Article 11 and one in Article 4 – or that any obligation to assess those measures *individually* arises for the purposes of the WFD.

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

Second, the Applicant seeks to evade that fundamental difficulty by arguing that the State could have regard to other measures when carrying out an assessment of the NAP under Article 4(1). At paragraph 121 of the Applicant's Written Submissions, it submits:

> '§121 The other point the State makes is that there is allegedly no obligation for a 'separate assessment' for the purposes of the WFD as it is simply one of many measures relied upon by the State to achieve the objectives of the WFD (§§78-79). Leaving aside the fact that the State's own RBMP identifies the NAP as the 'Principal Action', <u>there is nothing to prevent the State conducting an assessment of the implementation of the NAP in tandem with any other additional measures and schemes in order to assess whether the implementation of the NAP is consistent with Article 4(1) of the WFD</u>. The WFD does not provide for a format in which an Article 4(1) assessment should take place but such assessment are completed as a matter of routine in, for example, many planning cases. The Applicant is agnostic as to what form the assessment should take - but there must nevertheless be an assessment, to ensure that the NAP will not lead to a deterioration of the status of a water body for the purposes of Article 4(1) WFD. ….'

This is misconceived, and ignores the point that the relevant obligation to ensure the global sufficiency of measures to meet the objectives of the WFD *is* expressly addressed, in Article 11. The Applicant in effect argues that an assessment under Article 11 of the sufficiency of the measures in place must take place *every time any individual basic measure is adopted as part of the programme of measures.* There is no basis for that submission in the Directive, which sets out a clear and comprehensive framework for the assessment of the adequacy of protective measures put in place under Article 11, and includes no such requirements.

Third, the <u>*Weser*</u> jurisprudence does not alter that conclusion.

The obligation that arises under <u>*Weser*</u> relates to *individual interventions* with the capacity to *cause* a deterioration in the status of a water body and thereby result in a failure to achieve the objectives of Article 4(1), which are not otherwise addressed in the WFD. It does not relate to the assessment of the *sufficiency* of measures to achieve the objectives of Article 4(1) – either individually or collectively – that is addressed comprehensively in Article 11.

The Applicant has identified no *dicta* in *Weser* or any other case that would justify implying – from the obligation to assess the potential harmful effects of individual projects with respect to which the WFD is silent – an obligation of assessment of the sufficiency of individual protective measures adopted as part of the programme of measures, with respect to which the WFD sets out a clear and detailed framework.

It is clear, having regard to the above, that the purported obligation under Article 4(1) relied on by the Applicant does not arise. Rather, the claim pleaded by the Applicant is a misconceived merit-based challenge to the Respondents compliance with Article 11 WFD, and must be rejected on that basis."

216. My decision on this issue is as follows. First and foremost, it is not totally correct to claim that the applicant did not plead reliance on art. 11 of the WFD. Sub-ground 35 provides:

"It is clear that no lawful assessment has been undertaken for the purposes of Article 4 of the WFD to establish that the implementation of the NAP required under Article 11 of the Directive and the associated Derogation under the Nitrates Directive which it facilitates, (which the Respondents elected to apply for and implement and thus forms a Measure subject to Article 11 of the Directive) will not result in deterioration of the status of the body or bodies of water concerned or to jeopardise the attainment of good surface water status or good ground water status. Accordingly, the First Respondent was acting *ultra vires* in adopting SI 113 of 2022 and the NAP."

217. Relatedly, the applicant also pleaded that art. 4 was relevant to SEA assessment, which is an alternative route to consideration even if not being more elaborate in referring to art. 11 is somehow preclusive. Sub-ground 36 reads:

"36. Further and in the alternative where a plan or programme is adopted using the SEA procedure, the assessment of whether or not the plan or programme may cause such deterioration or otherwise jeopardise the attainment of the requirements of Article 4 of the WFD must be included in the environmental assessment required by the SEA Directive."

218. This is then elaborated upon:

"38. The Environmental Report must therefore contain the data that is necessary in order to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, *inter alia*, Article 4(1) of the WFD. The documents in the file that are made available to the relevant public must make it possible for the public to obtain an accurate impression of the impact that the NAP will have on the status of the bodies of water concerned in order for the public to be able to verify compliance with the obligations arising from, *inter alia*, Article 4 of Directive 2000/60. In particular, the data provided must be such as to show whether, having regard to the criteria established by the WFD, the NAP is liable to result in a deterioration of a body of water. This includes Protected Areas which includes Natura 2000 sites vulnerable to nitrates pollution, and all water bodies in the State which have been designated as a Nitrate Vulnerable Zone under the Nitrates Directive.

39. In the present case it is the Applicant's case that the First Respondent has failed to satisfy this requirement since the documents that have been made available to the public do not contain the necessary information for members of the public to verify compliance with the obligations arising from Article 4 of the WFD.

40. For the same reasons as identified in Core Ground 1, none of the measures identified in the SEA Statement meet the standard of scientific certainty either individually or collectively as required for the purposes of Article 4 of the WFD. Furthermore, there is no evaluation or assessment of the efficacy of these measures individually or at all in order to allow the Minister to be able to verify compliance with the obligations arising from, *inter alia*, Article 4 of the WFD.

41. In this case the Minister has breached Article 5 of the SEA Directive by compiling an inadequate environmental report that fails to provide the necessary data to assess the effects of the NAP on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, *inter alia*, Article 4(1) of the WFD. In particular the reliance on unidentified or yet to be defined mitigation measures or scientific analysis makes this assessment impossible."

219. There is a third leg to the art. 4 argument as follows:

"43. Further and in the further alternative, the Respondents are precluded from granting permission for the NAP which has the potential to affect all, or at the very least a significant number of, waterbodies in the jurisdiction, including all the unclassified water bodies at the time of the adoption or approval of the decision. In the absence of those water bodies being classified prior to the mass designation of unclassified water bodies by the EPA on 22nd April 2022, the First Respondent could not have been satisfied that the project will not jeopardise the attainment of good status of these water bodies or cause a deterioration of status of

these water bodies. In this regard the Applicant relies on the finding of fact that the NAP has the potential to potentially affect all Natura 2000 sites, which are protected under Article 4(1)(c) of the WFD."

220. This overlaps with the current reference to the CJEU in C-301/22 *Sweetman*.

221. Separately, calling the challenge "merits-based" doesn't necessarily determine the issue. The obligation to prevent deterioration of water quality is set out in art. 4(1)(a)(i) and (b)(i):

"Article 4

Environmental objectives

1. In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iv) Member States shall implement the necessary measures in accordance with Article 16(1) and (8), with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances without prejudice to the relevant international agreements referred to in Article 1 for the parties concerned;

(b) for groundwater

(i) Member States shall implement the measures necessary to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

(ii) Member States shall protect, enhance and restore all bodies of groundwater, ensure a balance between abstraction and recharge of groundwater, with the aim of achieving good groundwater status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

(iii) Member States shall implement the measures necessary to reverse any significant and sustained upward trend in the concentration of any pollutant resulting from the impact of human activity in order progressively to reduce pollution of groundwater.

Measures to achieve trend reversal shall be implemented in accordance with paragraphs 2, 4 and 5 of Article 17, taking into account the applicable standards set out in relevant Community legislation, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(c) for protected areas

Member States shall achieve compliance with any standards and objectives at the latest 15 years after the date of entry into force of this Directive, unless otherwise specified in the Community legislation under which the individual protected areas have been established.

As regards Mayotte as an outermost region within the meaning of Article 349 of the Treaty on the Functioning of the European Union (hereinafter 'Mayotte'), the time limit referred to in points (a)(ii), (a)(iii), (b)(ii) and (c) shall be 22 December 2021."

222. Yes in one sense the question of whether a step causes a deterioration in water quality is a merits issue. But the question of whether the step has been lawfully assessed in that regard is a procedural issue and thus the proper subject of judicial review.

223. So what is the actual issue here? Insofar as one can make sense of it (which in my case at the moment may not be very far – but fortunately the parties are going to come back in a later

module with further submissions), the applicant seems to be making the following independent points:

(i) art. 4 requires assessment of each proposed measure to be adopted for the purposes of art. 11 to ensure individual compliance with art. 4 as it impacts on each and every potential water body affected, and this didn't happen;

(ii) the SEA directive also requires assessment of compliance with art. 4 in a similar manner; and

(iii) in any event, compliance with art. 4 could not have been established until the status of all water bodies was assessed, which wasn't the case at the material time.

224. The State seems to be saying primarily that:

(i) art. 4 does not require an assessment of the impact of art. 11 measures at the level of their impact on each individual project;

(ii) rather art. 11 requires an overall assessment of the package of measures to be adopted for the purpose of the WFD to ensure that the total package complies with art. 4;

(iii) SEA works similarly; and

(iv) assessment does not depend on the status of every water body being established.

225. This all seems a substantive EU law issue which can be addressed in a future Module rather than an issue to be decided as a preliminary objection. To assist this process I have reformulated issue 37 in order to add the various substance-related issues so that they can all be addressed and replied to in detail. The point about unassigned water bodies is already covered in Issue 46. I am also proposing to concentrate SEA issues under the heading of core ground 3 so have slightly re-ordered the issues accordingly.

Issue 39

226. Issue 39 is:

"Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of Ireland's programme of measures with Article 11 WFD? PLEADING-TYPE ISSUE"

227. The applicant submitted:

"The Applicant relies on its response for Issue 38."

228. The State submitted:

"The Respondents' primary objection to the Applicant's claim based on the WFD is that the Applicant's challenge under Article 4(1) is misconceived, for the reasons set out in reply to Question 38.

However, in the alternative, the Respondent also maintains that the Applicant is precluded from challenging the NAP under the WFD, where that challenge is in substance an unpleaded challenge to the compliance of Ireland's programme of measures with Article 11 WFD.

The Applicant has failed to plead any challenge to the compliance of Ireland's programme of measures with Article 11 WFD, and it cannot mount a collateral challenge in that respect, by way of a challenge to the NAP alone, and based on a misconception with respect to the effect of Article 4(1) WFD.

The Respondents rely, in this context, on the same jurisprudence with respect to the importance of pleading judicial review proceedings with particularity, as in their reply to Question 6."

229. My decision on this issue is that any point under this heading will be addressed in dealing with the merits of the reformulated issue 37, so no preclusion arises at this point.

Issue 40

230. Issue 40 is:

"Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of the NAP with Article 5(5) of the Nitrates Directive? PLEADING-TYPE ISSUE"

231. The applicant submitted:

"The Applicant relies on its response for Issue 38."

232. The State submitted:

"The Applicant is precluded from challenging the NAP under Article 4(1) WFD, where that challenge is in substance an unpleaded challenge to the compliance of the NAP with Article 5(5) of the Nitrates Directive.

Adopting an action programme under Article 5(1), that includes the measures specified in Article 5(4), is not all that is required under the Nitrates Directive. Rather, Article 5(5) places an obligation on Member States to include in action programmes such measures as are 'sufficient for achieving the objectives specified in Article 1'.

Article 1 of the Nitrates Directive sets out the following objectives:

'This Directive has the objective of:

— reducing water pollution caused or induced by nitrates from agricultural sources and

— preventing further such pollution.'

To comply with the Nitrates Directive, the measures in the NAP must therefore be sufficient to ensure that Ireland will achieve the objectives of reducing existing water pollution caused by nitrates and preventing further water pollution caused by nitrates. If at any stage it becomes clear that the measures in the NAP are not sufficient to achieve those objectives, Member States are required to adopt additional measures as part of their action plan. This is confirmed in Case C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others* EU:C:2019:824, at §§54–56; 70–72.

The Applicant has not challenged the compliance of the NAP (or the Derogation) with Ireland's obligations under the Nitrates Directive generally, or with the requirements of Article 5(5) of the Nitrates Directive or Annex II(b) of the Nitrates Directive specifically. It cannot, in those circumstances, now seek to cast doubt on those matters for the purposes of these proceedings.

This case must therefore be decided on the assumption that:

i. The measures introduced by the NAP (including the derogation) are sufficient to reduce water pollution already caused or induced by nitrates from agricultural sources; and,

ii. The measures introduced by the NAP (including the derogation) are sufficient to prevent further water pollution caused or induced by nitrates from agricultural sources.

It is useful, in that context, to consider the precise breach alleged in Core Ground 2. The Applicant alleges a breach of article 4(1) WFD where:

'the Respondents did not ensure that the NAP would not cause a deterioration of the status of a body of [] water or that it would not jeopardise the attainment of good [] water status….'.

The Applicant has not pleaded any basis on which it could be alleged that the NAP could cause a deterioration of the status of a body of water, or jeopardise the attainment of good water status, without casting doubt on the NAP's compliance with the obligation under Article 5(5) to include sufficient measures in the NAP to ensure compliance with the objectives of the Nitrates Directive.

In that context, it is clear that the Applicant's challenge based on Article 4(1) WFD (in addition to being wholly misconceived and amounting to a collateral challenge to the compliance of Ireland's programme of measures with Article 11 WFD) amounts to a collateral challenge to Ireland's compliance with Article 5 of the Nitrates Directive, and in particular Article 5(5), when adopting the NAP.

The Applicant is not entitled to cast doubt on Ireland's compliance with Article 5 of the Nitrates Directive when adopting the NAP, where it has not pleaded any such challenge, and the NAP is entitled to a presumption of legality in that respect.

Core Ground 2 therefore amounts to a collateral challenge to the compliance of the NAP with the requirements of the Nitrates Directive – and in particular Article 5(5) – which challenge has not been pleaded. It must be rejected on that basis also."

233. My decision on this issue is as follows. First of all let's attempt a simplified version of the State's argument:

(i) an NAP must comply with art. 5(1) of the nitrates directive including the requirement in art. 5(4) to take measures in Annex III and the requirement in art. 5(5) to take additional measures if necessary;

(ii) art. 5(1) in turn refers back to the objectives in art. 1(1) of the directive which include the prevention of pollution;

(iii) the applicant hasn't challenged the compliance of the NAP with art. 5(1);

(iv) therefore it can't challenge the compliance of the plan with art 1(1);

(v) therefore it can't make the point that the NAP fails to take all necessary measures to prevent pollution; and

(vi) therefore it can't make the same argument by pleading breach of art. 4(1) of the WFD.

234. Sounds good. But the fundamental fallacy in the State's argument is that merely because act or omission X has the consequence of contravening two legal requirements, A and B, an applicant is not precluded from pursuing a pleaded challenge in respect of requirement A merely because she has not also pleaded point B. An applicant is not legally prohibited from advancing its pleaded case merely because there were other legal consequences it could have argued for based on the same contentions. Sure, the case proceeds on the basis that the NAP is not contrary to the nitrates directive, but not as an absolute proposition - only insofar as that concerns distinct issues not already

covered in the actual pleaded case. The fact that any pleaded breach could also have been pleaded as a breach of the nitrates directive doesn't mean that it can't be pursued.

235. The State's submission is ultimately as unfounded as saying that a prisoner cannot apply under Article 40.4 of the Constitution if she doesn't also apply under the Habeas Corpus Act 1781, and that failure to apply under the latter legislation must be taken as a concession that the detention is lawful. Considering that analogous argument could illustrate a number of the permeating misconceptions across the State's submissions. One can only imagine the thundering rhetoric by a respondent to a *habeas corpus* application: "The applicant is precluded from challenging the legality of detention for the purposes of Article 40.4 because the challenge is in substance an unpleaded challenge under the 1781 Act; such a challenge constitutes an impermissible merits-based challenge to the compliance by the respondent with the requirements of the 1781 Act and an impermissible unpleaded challenge to the latter ... " and so on.

Issue 41

236. Issue 41 is:

"Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded argument that farm-level activities require assessment under Article 4(1)? PLEADING-TYPE ISSUE"

237. The applicant submitted:

"The Applicant relies on its response for Issue 38."

238. The State submitted:

"The Respondents submit that the Applicant is so precluded.

It appears that the Applicant may be seeking to avoid the fundamental difficulties with its case under Article 4(1) WFD, by relying, again, on an alleged necessity to assess individual farm-level activities.

The premise of the Applicant's argument in that respect is that farm-level agricultural activities require assessment under Article 4(1) WFD, and therefore that the NAP requires individual assessment under Article 4(1). Insofar as this is the intent, it is not pleaded, and is misconceived, and the Respondents submit that it must be rejected by this Court."

239. My decision on this issue is that this complaint is really consequential on the State's basic point that an individual measure under art. 11 WFD does not need to be assessed for compliance with art. 4, only the collective bundle. Either that is correct or not – if correct, this objection doesn't really provide an answer to that. We will deal with that point's correctness or otherwise as a matter of substantivate EU law in due course if and when we get to Module III.

Issue 42

240. Issue 42 is:

"Should it be presumed in the absence of any challenge to the compliance of the NAP with the nitrates directive that the NAP complies with that directive? PLEADING-TYPE ISSUE"

241. The applicant submitted:

"In the Applicant's submission, issue 42 is not relevant to the case made on WFD grounds. Compliance (presumed or otherwise) with the Nitrates Directive does not address the absence of the necessary assessments under the WFD or the difficulties posed the absence of classification."

242. The State submitted:

"It is the Respondent's position that in the absence of any challenge to the compliance of the NAP with the Nitrates Directive, it should be presumed that the NAP complies with the Nitrates Directive on the basis of the presumption of legality.

The Respondents rely on the *dicta* of Humphreys J in *N.P.B.K. (D.R.C.) v The International Protection Appeals Tribunal & M.G. I. (D.R.C.) v The International Protection Appeals Tribunal* [2020] IEHC 450, in which the Court referred (§7(i)) approvingly of the *dicta* of Finlay P (as he then was) in *In re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 5th December, 1977) and per Keane J. (as he then was), in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88, p. 102 and stated that 'there is a presumption of validity for administrative decisions'.

This must apply here also. Where the Applicant has not challenged the compliance of the NAP with the Nitrates Directive, the legality of the NAP in that respect must be assumed, and the Applicant is not entitled to cast doubt on that compliance absent a pleaded case in that respect."

243. The ICMSA submission was:

"The ICMSA also expressly notes, and endorses, the State Respondents reference under Issue 42, on page 43 to case law on the presumption of validity, including Humphreys J's reference in N.P.B.K. (D.R.C.) v International Protection Appeals Tribunal and M.G. I. (D.R.C.) v International Protection Appeals Tribunal [2020] IEHC 450, to the dicta of Finlay P (as he then was) in Re Comhaltas Ceoltóirí Éireann (unreported, High Court, 5th December,

1977) and per Keane J. (as he then was), in Campus Oil v. Minister for Industry and Energy (No. 2) [1983] I.R. 88, at p.102 to the effect that 'there is a presumption of validity for administrative decisions'.

To these, the ICMSA would merely add reference to the dicta of O'Donnell J. (as he then was), in Cullen v Wicklow County Manager [2011] 1 IR 152 at §19 as follows: 'The difficulty is that invalidity is a relative and not an absolute concept, and is furthermore dependent upon court determination - something which is by definition not available to a county manager when he or she receives a s. 4 resolution. As Lord Radcliffe perceptively observed, in Smith v. East Elloe Rural District Council [1956] A.C. 736 at pp. 769 to 770 an act 'bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders'. Similarly Craig, Administrative Law (1983) at p. 390 observes, 'it is difficult to see how, if there was no challenge … it would be possible to say that the decision was *ultra vires* and a nullity at all'. The position has now been reached where it may be said that an invalid act is an act which a court will declare to be invalid. As Professor Wade observed (see Lewis, Judicial 5 Remedies in Public Law (3rd ed., Sweet & Maxwell, 2004) at p. 187), '… the truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances' and, it might be added, at the right time. Thus it has been observed by Lewis in Judicial Remedies in Public Law at p. 187, 'Nullifying is a description of what the courts do when invalidity is properly established and the courts consider it appropriate to intervene'.".

244. My decision on this issue is that this is essentially a reformulation of a point already addressed, and the previous answer applies. The ICMSA is absolutely correct that nullity is not an absolute concept, but that can be addressed at the remedy stage if we ever get there.

Issue 43

245. Issue 43 is:

"Is the applicant precluded from challenging an NAP that (on the foregoing hypothesis) complies with the requirements of the Nitrates Directive on the basis that such an NAP could never cause a deterioration in the status of a water body? PLEADING-TYPE ISSUE"

246. The applicant submitted:

"No - compliance (presumed or otherwise) with the Nitrates Directive does not address the absence of the necessary assessments under the WFD directive or the difficulties posed the absence of classification."

247. The State submitted:

"The Respondents submit that the Applicant is precluded from challenging an NAP that complies with the requirements of the Nitrates Directive, on any basis that would call into question its compliance with the Nitrates Directive.

A properly pleaded case with respect to compliance with a justiciable benchmark other than the Nitrates Directive, and that did not constitute a collateral challenge to its compliance with the Nitrates Directive, would not be precluded.

However, the Applicant's case as pleaded under the Habitats Directive and the WFD does constitute a collateral challenge to the compliance of the NAP with the Nitrates Directive, and therefore must be rejected."

248. My decision on this issue is that the issue is a roundabout way of raising the argument that any consideration of art. 4 in the context of an NAP (if such be required) should only relate to the allegedly protective measures in the NAP rather than to the underlying agricultural activities thereby regulated. That is going to be separately covered in the reworded issue paper for the substantive EU law module, subject to Module II.

Conclusion on Core Ground 2

249. The implications of the foregoing for Core Ground 2 are that that ground can proceed subject to the foregoing comments.

Core ground 3 - alleged breach of arts. 3, 5 and 10 of the SEA directive

250. Core ground 3 claims various inadequacies in the assessment for the purpose of the SEA directive:

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

Issues arising under CG3 (Issues 49-68)

Issue 49

251. Issue 49 is:

"Is the applicant precluded from obtaining relief in relation to SEA by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)? PLEADING-TYPE ISSUE"

252. The applicant submitted:

"The objection is misplaced. The relief sought in respect of SEA is *certiorari* and the standard declaratory relief prescribed in the Practice Direction.

The State is not making this plea and leaves it to the 2nd – 6th Notice Parties to address. While the IFA have identified this issue in its response, the issue is not actually addressed in the purported response."

253. The State submitted:

"The Respondents did not plead that the Applicant is precluded from obtaining relief in relation to SEA by reason of the lack of any pleaded relief in that regard. This issue was raised by the Second to Sixth Notice Parties and would more appropriately be addressed by those Notice Parties.

For the avoidance of doubt, the Respondents do not accept that the claim based on the SEA Directive is adequately pleaded, as addressed further below."

254. The IFA submitted:

"The IFA Notice Parties repeat and rely on the submission above *mutatis mutandis*." This seems to be a reference primarily to the submission under issue 35.

255. My decision on this issue is that the same reasons apply as set out earlier in relation to a corresponding objection – the answer is also No.

Issue 50

256. Issue 50 is:

"Is the NAP a plan or programme for the purposes of the SEA directive? APPEARS AGREED"

257. The State submitted:

"The Respondents have not put the application of the SEA Directive to the NAP at issue in these proceedings, and do not seek to do so now."

258. My decision, if that's the word, on this issue is that it is clear that the case must proceed on the basis set out in the Issue.

Issue 51

259. Issue 51 is:

"Does the NAP therefore require SEA? APPEARS AGREED"

260. The State submitted:

"The Respondents have not pleaded that the NAP did not require SEA, and do not seek to make that argument now."

261. My decision on this issue is that again the case proceeds on the basis that SEA was required.

Issue 54

262. Issue 54 is:

"Is the applicant precluded from advancing the overall complaint under the SEA Directive because it is inadequately pleaded? PLEADING-TYPE ISSUE"

263. The applicant submitted:

"The Grounds are pleaded to the requisite standard. The State response to this issue does not contain anything specific to address."

264. The State submitted:

"The Respondents submit that the Applicant is so precluded, where each of the pleas raised under the SEA Core Grounds fails to meet the standard required by Order 84 Rule 20(3) of the RSC, as applied by the consistent case-law of this Court, where those pleas fail to 'state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground'.

The Respondents will rely on the same jurisprudence, with respect to the importance of properly pleading judicial review proceedings, as it relies on for the purposes of its reply to Question 6.

The basis on which each of the pleas raised by the Applicant with respect to the SEA Directive does not meet the requirements of that jurisprudence has already been set out in the Respondents' legal submissions. The Respondents continue to rely on those submissions."

265. My decision on this issue is that while the next issue is at least a bit more specific, this particular objection is vague and unparticularised, and like other passages in the State's submissions is a sort of single transferrable grumble that could be comfortably launched by any respondent in any case regardless of the pleadings (that isn't a to-do suggestion for opposing parties, by the way). Under the present heading, and without prejudice to more specific objections dealt with elsewhere, the State has not made out a case that the applicant's point is unacceptably clear. One could perhaps conceivably be forgiven for thinking that if vagueness by applicants is unhelpful, vagueness

by opposing parties in their objections is equally unhelpful if not at times more so, depending on the amount of unnecessary work thereby created for the court.

Issue 55

266. Issue 55 is:

"Is the applicant precluded from challenging the particular complaint regarding the assessment of alternatives by the SEA because that claim is inadequately pleaded? PLEADING-TYPE ISSUE"

267. The applicant submitted:

"The Grounds are pleaded to the requisite standard. The Applicant is not obliged to explain in the grounds the meaning of the word 'comparable'. The applicant identifies the Commission Guidance as supporting the need for a 'comparable' assessment. The shortfall identified is the absence of detailed description or evaluation of the likely significant environmental effect of the alternative strategies in the Environmental Report. (While not decisive, 'alternatives' arose in *FIE v Government of Ireland* (2018 No 391 JR) in similar terms and in those proceedings the High Court, the Court of Appeal and the Supreme Court appear to have been able to proceed without any difficulty in understanding the case raised.)"

268. The State submitted:

"The Respondents submit that the Applicant is so precluded.

The complaint based on the assessment of alternatives is inadequately pleaded, where the Applicant has not specified with the necessary particularity *inter alia:* (i) what level of assessment is required to be considered 'comparable', or (ii) which provision in the SEA Directive substantiates the content of the requirement, or (iii) how the assessment undertaken in the SEA Environmental Report and the consideration of reasonable alternatives is alleged to have fallen short of any obligation that is alleged to arise."

269. My decision on this issue is that in fairness to the State at least there is a little bit more meat on the bone here. Let's look at the objection in more detail.

270. The first complaint is lack of specification of "what level of assessment is required to be considered 'comparable'".

271. Sub-ground 57 provides:

"57. Fourthly, the SEA Statement failed to consider, adequately or at all, the alternatives to the strategic alternative option selected and to subject each of the alternatives to a commensurate level of analysis. There is no detailed description or evaluation of the likely significant environmental effects of the alternative strategies in the Environmental Report. As identified by the Commission Guidance [https://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf] (2003) (at §5.12) the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives and the alternatives must be identified, described and evaluated in a comparable way."

272. So the State complains that the applicant hasn't explained what "in a comparable way" means. To which the answer can only be - is that your best point?

273. The applicant responds generally to this kind of attitude in its submission:

"'Particularise that' – In *Mount Salus Residents v An Bord Pleanála* [2023] IEHC 691 Holland J referred at §94 to a number of decisions of Humphreys J and observed 'The Court will, of course, expect that State bodies exercise proper judgment in pleading a want of particulars – as opposed to pleading it as a knee-jerk reaction to every case and as to all grounds of challenge. A certain impatience in this regard is perhaps to be detected in the refrain of Humphreys J that 'The game of 'particularise that' can be played forever', '… the cry of 'particularise that' can echo indefinitely' and 'the opposing cry of 'particularise that' has to stop when it is acceptably clear what the point being made.' However, I need not consider here how a proper restraint by respondents can be ensured while vindicating the obligation on applicants to provide particulars."

274. For those who want the matter phrased in formal terms, the position is that the requirement of the rules to state the grounds precisely does not oblige an applicant to particularise indefinitely, or to give details of matters that have been made acceptably clear. As one example of a situation where matters are acceptably clear, there is no requirement to explain the normal meaning of words and phrases in English or Irish, or any other relevant language for that matter, if the normal meaning is what is intended. Applying that here, the phrase "in a comparable way" attracts its normal meaning and doesn't need to be particularised, explained or glossed further in order to constitute a valid pleading.

275. In any event, if that wasn't enough, as the applicant points out and as we shall see further in a moment, it is clear from the pleadings that the phrase "in a comparable way" is not the

applicant's term - it is the European Commission's term and is its interpretation of what EU law requires. So the State's attempt to take aim at the applicant backfires on that count as well.

276. The State is on slightly firmer ground (that wouldn't be difficult) with its next complaint, which is the lack of specification of "which provision in the SEA Directive substantiates the content of the requirement". In principle an applicant shouldn't just quote legal measures generally but should specify what provisions are relied on. Living dangerously, the applicant doesn't consistently do that here. But it is acceptably clear that the alleged requirement to engage in a comparable consideration is inherent in the obligation of assessment of reasonable alternatives. While not spelled out in every relevant sub-ground, there isn't any doubt that any such obligation derives from art. 5(1) and is reflected in art. 9(1)(b). Article 5(1) is expressly referenced in core ground 3, even though, in fairness to the State, things could have been a fair bit more explicit. But there isn't really any ambiguity when one looks at the pleadings in their totality and at this point in that context.

277. The State's third complaint is that the applicant hasn't pleaded "how the assessment undertaken in the SEA Environmental Report and the consideration of reasonable alternatives is alleged to have fallen short of any obligation that is alleged to arise."

278. Let's look at the pleadings. Sub-ground 57 is as follows:

> "57. Fourthly, the SEA Statement failed to consider, adequately or at all, the alternatives to the strategic alternative option selected and to subject each of the alternatives to a commensurate level of analysis. There is no detailed description or evaluation of the likely significant environmental effects of the alternative strategies in the Environmental Report. As identified by the Commission Guidance [https://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf] (2003) (at §5.12) the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives and the alternatives must be identified, described and evaluated in a comparable way."

279. The specific paragraph of the guidance referred to states:

> "5.12. In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives.[14] The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they not are considered to be the best option. The information referred to in Annex I should thus be provided for the alternatives chosen. This includes for example the information for Annex I (b) on the likely evolution of the current state of the environment without the implementation of the alternative. That evolution could be another one than that related to the plan or programme in cases when it concerns different areas or aspects."

280. Footnote 14 states:

> "Compare Article 5(3) and Annex IV of the EIA Directive which require the developer to provide an outline of the main alternatives studied and an indication of the main reasons for his choice taking into account the environmental effects"

281. Thus the pleading identifies the issue as being the lack of detailed description or evaluation of the likely significant environmental effects, and refers expressly to a specific paragraph of the Commission Guidance and to the Commission's analysis of the Directive. The Commission thinks it is "essential" that the effects of the plan and the alternatives are identified, described and evaluated in a comparable way. All that needs to be said for present purposes is that the applicant has given at least an acceptably minimum indication of how the assessment undertaken in the SEA Environmental Report and the consideration of reasonable alternatives is alleged to have fallen short of the requirements of the SEA directive. What is missing in the SEA environmental report is alleged, by necessary implication, to be detail of environmental effects equivalent to the detail given for the chosen alternative. That is acceptably clear and indeed fairly obvious.

Issue 56

282. Issue 56 is:

> "Is the applicant precluded from challenging the particular complaint regarding the monitoring provision of the SEA because that claim is inadequately pleaded? PLEADING-TYPE ISSUE"

283. The applicant submitted:

> "The Grounds are pleaded to the requisite standard. Ground 59 includes 'No details of how this monitoring will occur, who will do it, when it will be done, how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed.'

(While not decisive, monitoring arose in *FIE v Government of Ireland* (2018 No 391 JR) in similar terms and in those proceedings the High Court, the Court of Appeal and the Supreme Court appear to have been able to proceed without any difficulty in understanding the case raised.)"

284. The State submitted:

"The alleged failure to consider monitoring for the purposes of the SEA Directive is also inadequately pleaded. The Applicant has failed to identify how it is alleged any obligation arises to include monitoring obligations within the programme itself and/or to identify the scope and content of such monitoring obligations as and where they do arise. It has failed to properly engage with the monitoring obligations that are in place, or to particularise how those monitoring obligations are alleged to be inadequate.

Notwithstanding the above objection, the Respondents maintain that detailed and prescriptive monitoring measures are prescribed by the NAP, as particularised in detail in the Statement of Opposition (§§160–170)."

285. My decision on this issue is as follows. Here we must again give the State credit for providing at least some details of the objection.

286. The first complaint is that "the Applicant has failed to identify how it is alleged any obligation arises to include monitoring obligations within the programme itself". That is true. But despite that, is the point acceptably clear? Annex I para. (i) says that the environmental report under art. 5(1) should include "a description of the measures envisaged concerning monitoring in accordance with Article 10". Sub-ground 59 concludes with the following:

"The monitoring program set out in Chapter 7 of the SEA statement does not discharge the Respondent's obligations under section 13J of the Regulations and Article 10 of the SEA Directive."

287. Is this sufficient? Very borderline. Again the applicant is living dangerously and like the second sub-point within Issue 55, one can't say that the State's pleading compliant is wholly unmeritorious here either. But given the relationship between the various provisions of the directive, reference to art. 10 must be taken as impliedly including art. 10 as referenced in Annex I. It seems on balance excessively formalistic to rule out the point merely because the applicant didn't add reference to the ancillary provisions of Annex I and art. 5(1) – the substantive obligations are in art. 10, which *is* pleaded.

288. The second complaint is that there is a failure "to identify the scope and content of such monitoring obligations as and where they do arise". That may literally correct so depending on one's point of view but essentially the applicant is complaining about a negative because the complaint is about provisions that are missing, not ones that are included. Sub-ground 59 again:

"This issue is addressed at Chapter 7 of the SEA Statement. No details of how this monitoring will occur, who will do it, when it will be done, how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed."

289. It is one thing to require particulars of some positive illegality that an applicant is saying *is* there. It would be a new adventure in metaphysics for an applicant to be thrown out for failure to particularise in extensive detail what is *not* there. Here the applicant has done enough to make the point acceptably clear.

290. The third complaint is that the applicant "has failed to properly engage with the monitoring obligations that are in place, or to particularise how those monitoring obligations are alleged to be inadequate."

291. The complaint of failing to "engage" is misconceived as a pleading objection. Save to the extent that a party is meant to draw attention to legal norms that are contrary to its position and directly in point (something the State can rest assured that we will come to), a party is not required to anticipate the other side's potential arguments and deal with them in depth and in advance. Mind you, it may sometimes be shrewd to do so as a pre-emptive strike, blunting the impact of any inevitable reply and depriving the other side of an energetic counter-punch. The risk may be giving a point to the other side that they might not have thought of - here we are in the realm of advocacy and lawyering as art rather than science.

292. As regards failing to particularise the detail of what is lacking, that is another version of the issue just discussed. There is a limit to the extent to which it is meaningful to discuss the detail of what is not there. One is reminded of the fictional story of Sartre's disappointment, having asked for coffee without cream, on being told that the café was out of cream so it would have to be coffee without milk. The State's disappointment here plumbs similar existential depths.

Issue 57

293. Issue 57 is:

"Is a claim about inadequate monitoring provision premature and not a basis to challenge an SEA process itself? PLEADING-TYPE ISSUE"

294. The applicant submitted:

"By Article 9(1) SEA Directive 'Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed…(c) the measures decided concerning monitoring in accordance with Article 10.' Further Annex 1 SEA Directive specifies what should be in the Environmental Report envisaged by Article 5, including '(i) a description of the measures envisaged concerning monitoring in accordance with Article 10'. Thus the Directive envisages that monitoring be addressed and provided for in the SEA process leading to the adoption of the plan or programme.

Here the SEA Statement says p10 'An environmental monitoring programme to track progress towards achieving Strategic Environmental Objectives (SEOs) and reaching targets was presented in the SEA Environmental Report. This programme will facilitate the ongoing monitoring of the implementation of the NAP and is presented in Section 7.'

The fact that monitoring may be revisited does not preclude, as a matter of principle, any challenge to the monitoring as presented in the SEA."

295. The State submitted:

"The Respondents submit that the Applicant's claim with respect to monitoring is premature. Article 10 of the SEA Directive and section 13J of the SEA Regulations make plain that monitoring is a future obligation and an on-going process, which applies to the 'implementation of plans and programmes'. Reviewing for monitoring is only something that can be undertaken after the passage of time. Accordingly, this plea is premature and unstateable.

Notwithstanding the above objection, there are detailed and prescriptive monitoring measures prescribed by the NAP, as particularised in detail in the Statement of Opposition (§§160–170)."

296. My decision on this issue is that ultimately this is a substance issue as to the meaning of EU law, not properly a pleading-type objection. The extent to which the SEA directive envisages express provision for monitoring at the time of the plan itself can be dealt with in a later module. That doesn't mean that the State is wrong of course, just that there is no "preliminary" issue that can be separated from the meaning of the provisions of the SEA directive.

Issue 58

297. Issue 58 is:

"Is the applicant precluded from advancing the SEA complaint because on a proper analysis what the Applicant is in effect inviting the Court to engage in a merits-based review of the decision challenged and a review of matters of policy and policy implementation and because the Court cannot review the impugned decision in the manner sought by the Applicant and because to do so would offend again the core principle of the separation of powers and settled case-law? PLEADING-TYPE ISSUE"

298. The applicant submitted:

"No - the adequacy of the SEA process is not to be confused with the exercise of discretion or the formulation of policy at the end. The idea of the SEA process is that such matters be informed by an adequate SEA.

As identified in the introduction to the Commission Guidance on SEA **-**

'The Strategic Environmental Assessment (SEA) Directive is an important step forward in European environmental law. At the moment, major projects likely to have an impact on the environment must be assessed under Directive 85/337/EEC. However, this assessment takes place at a stage when options for significant change are often limited. Decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector or geographical area. The SEA Directive - 2001/42/EC – plugs this gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they can be taken into account while plans are actually being developed, and in due course adopted. The public must also be consulted on the draft plans and on the environmental assessment and their views must be taken into account. Whilst the concept of strategic environmental assessment is relatively straightforward, implementation of the Directive sets Member States a considerable challenge. It goes to the heart of much public-sector decision-making. In many cases it will require more structured planning and consultation procedures. Proposals will have to be more systematically assessed against environmental criteria to determine their likely effects, and those of viable alternatives. There will be difficult questions of interpretation, but when properly applied, these assessments will help produce decisions that are better informed. This in turn will result in a better quality of life and a more sustainable environment, now and for generations to come.'"

299. The State submitted:

"The Applicant is so precluded. This objection arises, in particular, with respect to pleas (1) and (4).

In plea (1), the Applicant alleged a failure to assess the likely significant effects on the environment of the preferred option.

This is quintessentially a merits-based argument, that goes to the merits of the evaluation contained in the Environmental Report. This is within the discretion of the Respondents and is subject to challenge on limited irrationality grounds only [*Friends of the Irish Environment v the Government of Ireland* [2021] IECA 317, §213, and the judgments cited therein.].

The breadth of discretion given to a competent authority by Article 5 of the SEA Directive, to decide what information might be 'reasonably required' in the Environmental Report, emphasises the 'wide range of autonomous judgment on the adequacy of the information provided' [As regards authorities from England and Wales, see *Regina (Plan B Earth) v Secretary of State for Transport (WWF-UK intervening)* [2020] EWCA Civ 214, §§ 136, 144. See also the *dicta* of the Court at first instance, in *Spurrier v The Secretary of State for Transport* [2019] EWHC 1070, §§391, 434.] afforded to the authority and the limited role of the Court on review. Regard must also be had under Article 5(2) to the high-level nature of the NAP, when considering the level of information required.

In plea (4), the Applicant imports a legal requirement to select the most 'environmentally friendly' programme, where no such legal requirement exists under the SEA Directive. There is no basis for this contention that the Court should review the policy decision of the Respondents with respect to the selection of the preferred alternative for the NAP. The Respondents must logically be entitled to have regard to policy or economic considerations when selecting the preferred alternative, and in weighing up the factors in determining whether reasonable alternatives were realistic and viable, and which option ought to be preferred. Those issues are non-justiciable, and the Applicant identifies no basis in the SEA Directive – which involves procedural obligations only – that would render those obligations justiciable.

The Respondents continue to rely on paragraphs 173 and 174 of their Written Submissions in that respect."

300. My decision on this issue is that the applicant's complaints can't be dismissed on a preliminary basis. The applicant's main point is correct - the adequacy of the SEA process is not to be confused with the exercise of discretion or the formulation of policy at the end.

301. Insofar as a failure of assessment is pleaded, that must be construed as a legal objection as to the adoption of the correct process, and thus subject to normal judicial review principles such as legality and reasonableness.

302. Insofar as the alleged failure to adopt the "most environmentally friendly option" is concerned, if that arises it should be construed as a contested legal proposition as to the interpretation of the SEA directive and can be addressed on the substance in a later module.

Conclusion on Core Ground 3

303. The implications of the foregoing for Core Ground 3 are essentially that the ground proceeds subject to the foregoing comments.

Remedies - Appropriate order in the event of upholding core grounds 1 to 3

304. The question of remedies has two aspects - the interim remedy following some hypothetical finding of an illegality somewhere in the process, and the ultimate remedy in the form of a final order. The two situations are closely related but slightly different.

305. Assuming purely for the sake of argument that we were to get to a hypothetical finding of some illegality in some step in the process, the court has options as to how to proceed. Of course, an immediate order of *certiorari* (with no further agonising about interim and final remedies) would be the obvious default in most cases, but there are other options, most notably adjourning the matter (with or without some directions in the meantime) to allow the respondents to take rectifying steps to be specified by order.

306. Once any such steps, if ordered, were allowed for, one then returns to the question of the final order, which could be anything from some form of *certiorari* (again, normally the default order following illegality) to a declaration to no order at all.

307. As regards any interim order, numerous arguments are advanced by the opposing parties as to why, in the event of an infirmity being demonstrated in the NAP or GAP regulations, no immediate order affecting their validity should be made. These submissions included the arguments that:

(i) the environment would be best protected by an order maintaining the NAP in force until such time as a replacement is adopted (e.g., a suspended order of *certiorari*). The State submits: "This would lead to a lower level of protection of water against pollution caused by nitrates from agricultural sources, which would run specifically counter to the fundamental objective of the Nitrates Directive. The environmental damage caused by quashing the NAP and the

GAP Regulations would therefore be more harmful to the environment than maintaining their effects pending any remedial measures coming into effect." The State submits that this would be "entirely consistent with well-established principles of EU law" citing the judgment of 26 July 2017, *Comune di Corridonia*, C-196/16 and C-197/16, ECLI:EU:C:2017:589 (§§34-38) and the judgment of 25 June 2020, *A and Others*, C-24/19, ECLI:EU:C:2020:503 (§§80-95, in particular §90); and

(ii) a straightforward order of *certiorari* would create "a legal vacuum that is incompatible with Ireland's obligations to adopt measures to transpose the Nitrates Directive".

308. The applicant accepts that the interests to be take in into account include environmental protection, animal welfare and the interest of individual farmers. Accordingly the applicant would not object in principle to a stay on an order of *certiorari*, but the duration and terms of such stay would need to be discussed.

309. As regards the final order, the notice parties in particular are keen to argue that *certiorari* should be refused as a matter of discretion having regard *inter alia* to economic impact on farmers. That debate is sufficiently far into the future as not to require much further consideration at this stage.

Issues arising in relation to the Remedy (Issues 69-70)

Issue 70

310. Issue 70 is:

"If the Court determines that an order of *certiorari* or a declaration of invalidity is required, should a stayed or suspensive order be made pending remedial measures to address the Court's findings having regard to the risks of reduced environmental protection in the short term, or a breach of EU law, or adverse consequences to other stakeholders? APPEARS AGREED"

311. The applicant submitted:

"As identified Transcript, Day 2, the aim for An Taisce in the proceedings is the correct interpretation and implementation of the law. An Taisce accepts, in principle, that if *certiorari* or a declaration of invalidity is found to be the appropriate remedy, that there can be a stay on the grounds of environmental prejudice or environmental protection on matters such as animal welfare. An Taisce also accept that the interests of the individual farmers are something that can be taken into account in the context of a stay. As the Court put it – 'you're not objecting to a stay on any order if the Court gets to that point – it's only a hypothesis, obviously - but we would want to debate the Ts and Cs at that stage…'.

If the Court finds *certiorari* or declaratory relief is warranted but a stay is appropriate that should not preclude the reference sought. As per the CJEU'S 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings' (2019) 'It follows, moreover, from settled case-law that although national courts and tribunals may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court has exclusive jurisdiction to declare such acts invalid. When it has doubts about the validity of such an act, a court or tribunal of a Member State must therefore refer the matter to the Court, stating the reasons why it has such doubts.' If the Court has 'doubts' as to the validity of the derogation, those doubts would be based on the findings warranting *certiorari* or declaratory relief, and would not be displaced by a stay."

312. The State submitted:

"If, without prejudice to the Respondents' opposition, the Court considers the NAP and/or the GAP Regulations are contrary to law and/or *ultra vires* and/or invalid (which is denied), it is invited to exercise its discretion to maintain the effects of the NAP and the GAP Regulations until any necessary measures to remedy any irregularity identified by the Court take effect.

The NAP and the GAP Regulations correctly transpose and implement the Nitrates Directive. In that respect, the Applicant has not challenged the compatibility of either the NAP or the GAP Regulations with the Nitrates Directive, and the Commission Decision demonstrates that the derogation in the context of the NAP is consistent with Ireland's obligations under the Nitrates Directive.

Quashing the NAP and/or the GAP Regulations would result in a legal vacuum that is incompatible with Ireland's obligations to adopt measures to transpose the Nitrates Directive. This would lead to a lower level of protection of water against pollution caused by nitrates from agricultural sources, which would run specifically counter to the fundamental objective of the Nitrates Directive. The environmental damage caused by quashing the NAP and the GAP Regulations would therefore be more harmful to the environment than maintaining their effects pending any remedial measures coming into effect.

In those circumstances, were the Court to consider that the NAP is invalid (which is denied), the Court would be permitted to, and the Respondents plead that it should, exercise its

discretion to maintain exceptionally the effects of the NAP and/or the GAP Regulations, pending the implementation of remedial measures. This is entirely consistent with well-established principles of EU law in Cases C-196/16 and C-197/16 *Comune di Corridonia* EU:C:2017:589, §§34–38 and Case C-24/19 *A and Others* EU:C:2020:503, §§80–95, in particular §90)."

313. The IFA submitted:

"18. In relation to the issues raised at 69 to 70 of the Issue Paper in respect of the proper approach to the grant of a remedy if any, the IFA Parties refer to its previous submissions on this matter, to the effect that the Court should exercise its inherent discretion to either (a) decline to make the orders sought or (b) suspend or place a stay on any such orders.

19. The IFA also notes and supports the position of the State Respondent on this issue. Without prejudice to the foregoing, the IFA parties respectfully submit that the Court should refrain from making any concluded legal finding in respect of remedies and submits that the question of a remedy should be the subject of a further hearing when the Court has determined all other issues in the proceedings.

20. The IFA Parties would request that a further hearing would be convened to hear submissions on the nature of any such remedy, and to make submissions arising from any findings of fact, or ruling, that the Court might make on any particular issue.

21. It is respectfully submitted that this approach is appropriate in the particular circumstances which pertain in these proceedings having regard to the following:

(a) The wide range of options in terms of remedies identified by the Court as available to it and that the appropriate remedy or remedies may well depend on the Courts legal findings.

(b) The impact that the Courts decision on remedies will have particularly on the Notice Parties and the wider farming community, having regard to the evidence placed before the Court in that regard.

(c) The fact that quashing the NAP Regulations would result in a lacuna in legal regulation and possible risk to the environment.

(d) The fact that in the course of the hearing Counsel for the Applicant has for the first time indicated to the Court that it appears it open to consider some form of deferred or suspended remedy albeit the Applicants position on this matter is somewhat unclear."

314. The ICMSA submitted:

"ICMSA also agrees with the Respondents' points on Issue 70 regarding a stay or suspensive order in the event that the Court were minded to grant any relief."

315. My decision on this issue is that there appears to be broad agreement on the situation that would arise under this heading. In the hypothetical event of an illegality of some kind being established (obviously we are still some distance from that contested outcome), and in the event of the court being minded in principle to grant relief in that regard, the impugned measures would remain in force in the short term at any rate, albeit possibly subject to hypothetical directions, while an appropriate and ideally agreed course of action was taken. That might involve providing a sufficient period of time for any hypothetical remedial assessments, to take what is purely one possible example. So nothing needs to be decided under this heading in the immediate future. Issue 69 remains on the table for the hypothetical Module IV on remedies if it arises.

Conclusion on Remedy

316. The implications of the foregoing for the remedy issue are that in effect the whole issue can be parked for now. There will be a reasonably leisurely opportunity to discuss it if that becomes necessary.

Core ground 4 – alleged invalidity of Commission decision

317. A further dispute exists as to whether the Commission decision could be invalid as a result of any invalidity in the NAP, and if so what the procedural mechanism to determine this is. Core ground 4 provides:

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

318. Core ground 4 is essentially derivative on the applicant succeeding on one or more of the first three core grounds.

Issues arising under CG4 (Issues 71-78)

Issue 71

319. Issue 71 is:

"Is the Commission derogation decision unchallengeable in these proceedings and therefore does it follow that the applicant is precluded from challenging the findings therein and the

court must proceed on the basis that such findings are valid and correct? PLEADING-TYPE ISSUE"

320. The applicant submitted:

"The Commission derogation decision is not 'unchallengeable' in these proceedings – but the only way it can be challenged is by way of a reference. Article 14 of the Commission Implementing Decision states that the Decision: 'This Decision shall apply in the context of the Irish Action Programme as implemented in the Statutory Instrument No 113 of 2022, European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022.' If the *'Irish Action Programme as implemented in the Statutory Instrument No 113 of 2022'* is unlawful, the 'context' for the continued application of the Commission Decision no longer applies.

In *FIE v Minister for Communications* [2022] IECA 298, relied on by the State, the Court of Appeal considered the effects of the division of jurisdiction between EU courts and courts of the Member States that result from the involvement of national authorities in the course of a procedure which leads to the adoption of an EU act. This is a complex area of law and the procedure leading to the adoption of the European Act here is different from that under consideration in *FIE*. In *FIE* Noonan J identified §77 '…there is no genuine dispute here in which the validity of the delegated regulation is raised indirectly.' Here the argument is that the validity of the European act is premised on the validity of the domestic act.

Regarding the State's quote from Lenaerts et al, it is clear from the portion quoted that the relevance of the recitals is in the interpretation of the operative part. Further, the footnote quoted in part by the State continues 'Whether the operative part has adverse effect consequently extends to the recitals, which constitute the necessary support for the operative part. The assessments made in the recitals to an act are not in themselves capable of forming the subject of an action for annulment and can be subject to judicial review by the union courts to the extent that, as grounds of an act adversely affecting the applicant's interests, they constitute the essential basis for the operative part of that act …Thus an action for annulment cannot be validly brought exclusively against a recital in the preamble to a union act see e.g. – *657/21 Chessani and Others v Parliament and Council (order*) 2021 paras 20 to 21'.

Regarding the suggestion that An Taisce should have proceeded by way of Article 263 (which in fact arises under Issue 74), that article cannot be relied on to prevent a reference under Article 267 'unless those persons unquestionably had the right to bring an action against those provisions on the basis of Article 263 TFEU and failed to exercise that right within the period prescribed' – Case C-72/15 *Rosneft*, paragraphs 66 and 67. It cannot be said that An Taisce 'unquestionably' had standing under Article 263 – no ENGO has ever had standing under that Article. Further, even if An Taisce had proceeded under Article 263, the CJEU could not have ruled on the domestic measure.

Regarding Case C-344/98 *Masterfoods*, paras 51-52 of which are quoted by the State, it should be noted that para 54 says 'Moreover, if a national court has doubts as to the validity or interpretation of an act of a Community institution it may, or must, in accordance with the second and third paragraphs of Article 177 of the Treaty, refer a question to the Court of Justice for a preliminary ruling.'"

321. The State submitted:

"The Court has no jurisdiction to declare that the Commission Decision is invalid; only the CJEU may do so. In *Digital Rights Ireland v. Minister for Communications, Marine and Natural Resources* [2010] 3 I.R. 251, p. 300 (McKechnie J.), the Court was very clear that 'the reference is required because [the Court is] unable to rule on the validity of [EU] law.' This is also clear from *JTI Ireland Ltd. v. Minister for Health & Ors.* [2015] IEHC 481, §20.

The Applicant has, rightly, not sought such a declaration of invalidity because it cannot. This stand-alone relief can only be obtained from the General Court in Luxembourg. Accordingly, there are no grounds for any preliminary reference from this Court to the CJEU on that basis, where the Applicant ought to have sought this relief directly from the General Court. This is precisely the situation that the Irish Courts in *Friends of the Irish Environment* [2022] IECA 298 addressed when they dismissed the relevant application for judicial review and refused to make a reference regarding the alleged invalidity of an EU act in circumstances where the proper procedural route was a direct action before the General Court.

It also follows from the foregoing that the Applicant is precluded from challenging the findings in the Commission Decision in this Court. Moreover, if this Court were to entertain a challenge to the findings of the Commission Decision, this would not be consistent with the principle of legal certainty.

In this regard, the CJEU in C-314/85 *Foto-Frost* EU:C:1987:452 stated that (§§14–15) while a national court may consider the validity of a Community act and, if the national court

considers the grounds put forward by the parties in support of invalidity are unfounded, the national court may reject them and conclude 'that the measure is completely valid', on the other hand, 'those courts do not have the power to declare acts of the Community institutions invalid'. (Emphasis added).

Additionally, in a competition law context, the CJEU in Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* EU:C:2000:689 stated that (§§51–52) it is '… important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance.' (Emphasis added)

Further, and insofar as the Applicant considers that the Court is not bound by the Recitals in the Commission Decision, the Respondents contend that this is manifestly incorrect. This is a well-established principle of EU law 'because the operative part of an act is indissociably linked to the statement of reasons for it, so that when it has to be interpreted, account must be taken of the reasons which led to its adoption': see Lenaerts et al, 'Procedural Law' (OUP, 2nd Edn) at §7.18 fn 51, citing C-355/95 P *TWD Textilwerke Deggendorf v Commission* EU:C:1997:241, §21; T-213/95 and T-18/96 *SCK and FNK v Commission* EU:T:1997:157, §104; and T-747/17 *UPF v Commission* EU:T:2019:271, §50.

In this regard, on Day 2 of the hearing, Counsel for the Respondents referred to Recital 16 of the Commission Decision and stated that this represents a determination by the Commission 'that the amount of manure proposed by Ireland in the derogation will not prejudice the achievements of the objectives in the Nitrates Directive.' [Day 2 Transcript, p. 77.] In response, on Day 4 of the hearing, Counsel for the Applicant stated that:

> 'Now, if I could just touch, now, on an argument that was made several times … that the Commission had said the derogation is okay. It's important to recall that the Commission's assessment there is contained in the recitals of the Commission Decision, it doesn't actually form part of the binding decision itself.' [Day 4 Transcript, p. 33.]

This is misconceived, and should be rejected."

322. The IFA submitted:

"22. In relation to the issues raised at 71-78 in respect of a reference to the Court of Justice of the European Union, the IFA Parties refer to its previous submission on the matter to the effect that:

(a) That the question of whether a preliminary reference to the CJEU should be granted should be postponed pending the final determination of the domestic law issues arising in the within proceedings; and

(b) There is no necessity for a reference to the CJEU; the law in this regard is *acte clair* and does not need a referral to the CJEU.

23. Furthermore, and without prejudice to the generality of the foregoing the IFA Parties submit that in respect of the issue raised at 71 -74 in the Issue Paper the decision of the Commission to grant the derogation is clearly not amenable to challenge in the within proceedings for the simple reason that (a) it is clearly not within the scope of the reliefs pleaded by the Applicant and (b) the Court clearly has no jurisdiction to grant such relief or in any manner challenge or question the validity of decision of the Commission in circumstances where only the CJEU has jurisdiction to declare the decision invalid. [*JTI Ireland Ltd. v. Minister for Health & Ors*. [2015] IEHC 481, §20.]

24. By its own assertion, the Applicant is a legal person that is directly affected by the Commission Implementing Decision 2022/696. Having met the article 263 criteria, and having failed to bring an annulment action under articles 256(1) / 263 TFEU within the limitation period of two months, the Applicant is precluded from seeking the same remedy via the alternative mechanism of article 267 TFEU. Accordingly, the relief at D(5) of the Amended Statement of Grounds is sought impermissibly and ought be refused without further consideration.

25. The IFA Parties also notes and supports the position of the State Respondent on this issue.

26. By way of further assistance to the Court, the context for the relief sought, and the IFA parties position, is as follows. At paragraph D (5) of the Amended Statement of Grounds, the Applicant seeks to challenge the validity of Commission Implementing Decision 2022/696 by way of a preliminary reference from this Court. The precise relief sought is:

> 5. A Reference to the Court of Justice of the European Union pursuant to Article 267 TFEU to determine the validity of Commission Implementing Decision (EU) 2022/696 granting a derogation requested by Ireland pursuant to Council Directive

91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 129, 3.5.2022, p. 37–45).

27. At Core Ground 4 of the Amended Statement of Grounds, the Applicant provides the following basis for that relief:

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

28. See also the pleas in the Respondents' Statement of Opposition, paras. 173 -181.

29. In the particulars of Legal Grounds for Core Ground 4, the Applicant elaborates on the precise basis for the alleged invalidity:

> 64. This Core Ground is consequential on the Applicant succeeding in having the NAP quashed.
>
> 65. The consequence of the Court quashing the NAP is that the Commission Implementing Decision (EU) 2022/696 is invalid since it depends on the validity of the NAP.

30. At paragraph 69 of the Statement of Grounds, the applicant acknowledges that the Court does not have jurisdiction to grant precisely that which the Applicant seeks at relief D(4):

> 69. While the High Court does not have jurisdiction to determine whether the Commission Implementing Decision is valid in that eventuality, if it shares the Applicant's doubts in that regard it is required to make a preliminary reference to the Court of Justice pursuant to Article 267 TFEU asking the Court of Justice to determine whether the Commission Implementing Decision is valid in light of the quashing of the NAP.

31. As can be seen from the underlined passage above, the Applicant dictates to the Court that it is 'required' to make a preliminary reference 'if it shares the Applicant's doubts'. Drafting infelicities aside, the premise of this approach is fatally flawed. The Applicant seeks impermissibly to circumvent the procedural means by which an affected party can challenge an act of the Commission. The architecture of the TFEU expressly provides, in article 263, a mechanism by which an affected party can seek annulment of an act of the Commission within two months of enactment. For the purposes of article 263, the Applicant is a legal person, directly concerned, and no implementing measures were required to give effect to the Commission Implementing Decision at issue. The High Court has addressed precisely this issue in *Friends of the Irish Environment v. Minister for Communications, Climate Action and the Environment & Ors*. [2020] IEHC 383 (at paras. 106-111). See also (subsequent to the latter judgment) the judgment of the CJEU in Case C–352/19 *P Région de Bruxelles-Capitale v Commission* (ECLI:EU:C:2020:978), paras. 30, 64.

32. A key distinction in the instant case is that the act of the Commission is a Decision, and not a Directive, where the latter would require implementing measures which would, in turn, open the door to a possible action seeking annulment under via article 267 TFEU. As stated, that does not arise on the facts of this case and the Applicant cannot seek to avail of a wider standing requirement under article 267. Applying ... *Friends of the Irish Environment v. Minister for Communications, Climate Action and the Environment & Ors.* the issue is *res judicata* and the relief ought to be refused."

323. I should note here for clarity that the ICMSA submissions were too shrewd and focused to try to foist this particular canard on the court, save perhaps to the trivially relevant extent of boilerplate adoption of the State's submissions, which is harmless in this context.

324. My decision on this issue is that I accept the applicant's position - the correct and appropriate route is a reference where there is a genuine domestic dispute, as here. The exception is that a direct action is the correct route only in the very limited situation where it is unquestionably clear that the applicant could have done that. Here, it is not only not unquestionably clear that a direct action would have been appropriate, but it is effectively certain that any direct action brought by this applicant under art. 263 would have been peremptorily dismissed as inadmissible, because it is obvious that the NAP is neither addressed to the applicant nor of direct concern to it, as that term has been restrictively interpreted by the CJEU.

325. The problem, unfortunately, with the State and IFA position is two-fold.

326. Firstly, insofar as they rely on brief references to caselaw, the critical references are either irrelevant or taken out of context. When properly situated in context, a contrary picture emerges. To crudely summarise, the State and IFA have just been a little bit over-selective in their cherry-picking of snippets of material that they thought were helpful to the project of blocking a reference.

327. Secondly and more fundamentally, the relevant opposing parties have overlooked caselaw that is pre-existing, binding, directly in point, and determinative of the opposite conclusion:

(i) judgment of 15 July 1963, Plaumann, C-25/62, ECLI:EU:C:1963:17;
(ii) judgment of 22 October 1987, *Foto-Frost*, C-314/85, ECLI:EU:C:1987:452, para. 16;
(iii) judgment of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C-143/88 and C-92/89, ECLI:EU:C:1991:65, paras. 14-21;
(iv) judgment of 7 April 1998, *Stichting Greenpeace Council (Greenpeace International),* C-321/95, EU:C:1998:153
(v) judgment of 15 February 2001, *Nachi Europe*, C-239/99, ECLI:EU:C:2001:101, paragraphs 35 and 36;
(vi) judgment of 25 July 2002, *Unión de Pequeños Agricultores*, C-50/00, EU:C:2002:462;
(vii) judgment of 10 December 2002, *British American Tobacco (Investments) Ltd,* C-491/01;
(viii) judgment of 1 April 2004, *Jégo-Quéré & Cie SA*, C-263/02, EU:C:2004:210;
(ix) judgment of 29 June 2004, *Front national v European Parliament,* C-486/01, ECLI:EU:C:2004:394;
(x) judgment of 6 December 2005, *ABNA and Others*, C-453/03, C-11/04, C-12/04 and C-194/04, ECLI:EU:C:2005:741, paragraph 103;
(xi) judgment of 3 June 2008, *Intertanko and Others*, C-308/06, ECLI:EU:C:2008:312, paragraph 31;
(xii) judgment of 29 June 2010*, E and F*, C-550/09, ECLI:EU:C:2010:382, paragraphs 45 and 46;
(xiii) judgment of 3 October 2013*, Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11, ECLI:EU:C:2013:625, paragraph 95;
(xiv) judgment of 28 March 2017, *Rosneft*, C-72/15, ECLI:EU:C:2017:236, paras. 66 and 67 in particular);
(xv) judgment of 3 July 2019, *Eurobolt BV,* C-644/17, ECLI:EU:C:2019:555; and
(xvi) judgment of 3 December 2020, *Région de Bruxelles-Capitale*, C-352/19, ECLI:EU:C:2020:978.

328. The State's citation of paras. 14 and 15 of *Foto-Frost* (irrelevant to this issue) is particularly unfortunate. Those paragraphs deal with the domestic court confining itself to upholding the EU measure (para. 14), or impermissibly trying to decide invalidity itself (para. 15). We are not talking about either situation here. It's perhaps a pity that the State didn't keep reading to the next paragraph (para. 16), which is not only relevant but supportive of the applicant's analysis:

> "The same conclusion is dictated by consideration of the necessary coherence of the system of judicial protection established by the Treaty. In that regard it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. As the Court pointed out in its judgment of 23 April 1986 in Case 294/83 *Parti écologiste 'les Verts' v European Parliament* [1986] ECR 1339), 'in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'."

329. The caselaw on the "complete" system of legal remedies for all acts of EU institutions also demolishes the attempt to argue that somehow it takes a challenge to a directive in order to "open the door" for a reference. The door is open already for a challenge to any EU institutional act, subject to there being a basis for a reference in the first place. That includes in relation to a decision. The exception where a direct action is possible doesn't apply here. Implementing measures are not necessary, only that there is a genuine domestic dispute (as we shall see from the caselaw). The fact that the impugned measure in a given case is a decision doesn't, in any event, mean that there are no implementing measures. In fact here, as we know, there is the implementing measure of the GAP amending regulations of 2022 which expressly quote the Commission decision, plus all of the administrative law steps to be taken "under" the Commission decision, as the regulations put it.

330. Article 263 TFEU is as follows:

> "Article 263
> (ex Article 230 TEC)
> The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.
> It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement

of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.
The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.
Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.
Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.
The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

331. The provision for direct action by non-privileged persons is therefore that they can:

(i) institute proceedings against an act addressed to that person or which is of direct and individual concern to them; and

(ii) institute proceedings against a regulatory act (which means a measure of general application not including a legislative act - *Inuit Tapiriit Kanatami,* C-583/11) which is of direct concern to them and does not entail implementing measures.

332. Article 267 TFEU is broader in its terms:
"Article 267
(ex Article 234 TEC)
The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

333. *Plaumann*, C-25/62, was an early case where the ECJ took a very restrictive approach from the outset to the criterion of a direct action being of "individual concern". The court said:
"Under the second paragraph of Article 173 of the Treaty private individuals may institute proceedings for annulment against decisions which, although addressed to another person, are of direct and individual concern to them, but in the present case the defendant denies that the contested decision is of direct and individual concern to the applicant.
It is appropriate in the first place to examine whether the second requirement of admissibility is fulfilled because, if the applicant is not individually concerned by the decision, it becomes unnecessary to enquire whether he is directly concerned.
Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from ail other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.
For these reasons the present action for annulment must be declared inadmissible."

334. In *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C-143/88 and C-92/89, the court, dealing with interim suspension of domestic measures based on EU law, said:
"14 The Finanzgericht Hamburg first seeks, in substance, to ascertain whether the second paragraph of Article 189 of the EEC Treaty must be interpreted as meaning that it denies to national courts the power to suspend enforcement of a national administrative measure adopted on the basis of a Community regulation.

15 In support of the existence of the power to grant such a suspension, the Finanzgericht Hamburg states that such a measure merely defers any implementation of a national decision and does not call in question the validity of the Community regulation. However, by way of explanation of the reason for its question, it points out, as a ground for denying that national courts have such jurisdiction, that the granting of interim relief, which may have far-reaching effects, may constitute an obstacle to the full effectiveness of regulations in all the Member States, in breach of the second paragraph of Article 189 of the Treaty.

16 It should first be emphasized that the provisions of the second paragraph of Article 189 of the Treaty cannot constitute an obstacle to the legal protection which Community law confers on individuals. In cases where national authorities are responsible for the administrative implementation of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to induce those courts to refer questions to the Court of Justice for a preliminary ruling.

17 That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare that a Community regulation is invalid (see judgment in Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, at paragraph 20), individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them.

18 As the Court pointed out in its judgment in *Foto-Frost*, cited above, (at paragraph 16), requests for preliminary rulings which seek to ascertain the validity of a measure, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. In the context of actions for annulment, Article 185 of the EEC Treaty enables applicants to request suspension of the enforcement of the contested act and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested.

19 Furthermore, in its judgment in Case C-213/89 (*The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] ECR I-2433), delivered in a case concerning the compatibility of national legislation with Community law, the Court, referring to the effectiveness of Article 177, took the view that the national court which had referred to it questions of interpretation for a preliminary ruling in order to enable it to decide that issue of compatibility, had to be able to grant interim relief and to suspend the application of the disputed national legislation until such time as it could deliver its judgment on the basis of the interpretation given in accordance with Article 177.

20 The interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself.

21 It follows from the foregoing considerations that the reply to the first part of the first question must be that Article 189 of the Treaty has to be interpreted as meaning that it does not preclude the power of national courts to suspend enforcement of a national administrative measure adopted on the basis of a Community regulation."

335. *Stichting Greenpeace Council (Greenpeace International),* C-321/95, was a case where a direct challenge under art. 263 by an environmental NGO was rejected as inadmissible by the Court of Justice, upholding the Court of First Instance. The court made short work of the appellant's claim:

"27. The interpretation of the fourth paragraph of Article 173 of the Treaty that the Court of First Instance applied in concluding that the appellants did not have locus standi is consonant with the settled case-law of the Court of Justice.

28. As far as natural persons are concerned, it follows from the case-law, cited at both paragraph 48 of the contested order and at paragraph 7 of this judgment, that where, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act.

29. The same applies to associations which claim to have *locus standi* on the basis of the fact that the persons whom they represent are individually concerned by the contested decision. For the reasons given in the preceding paragraph, that is not the case.

30. In appraising the appellants' arguments purporting to demonstrate that the case-law of the Court of Justice, as applied by the Court of First Instance, takes no account of the nature and specific characteristics of the environmental interests underpinning their action, it should

be emphasised that it is the decision to build the two power stations in question which is liable to affect the environmental rights arising under Directive 85/337 that the appellants seek to invoke.

31. In those circumstances, the contested decision, which concerns the Community financing of those power stations, can affect those rights only indirectly.

32. As regards the appellants' argument that application of the Court's case-law would mean that, in the present case, the rights which they derive from Directive 85/337 would have no effective judicial protection at all, it must be noted that, as is clear from the file, Greenpeace brought proceedings before the national courts challenging the administrative authorisations issued to Unelco concerning the construction of those power stations. TEA and CIC also lodged appeals against CUMAC's declaration of environmental impact relating to the two construction projects (see paragraphs 6 and 7 of the contested order, reproduced at paragraph 2 of this judgment).

33. Although the subject-matter of those proceedings and of the action brought before the Court of First Instance is different, both actions are based on the same rights afforded to individuals by Directive 85/337, so that in the circumstances of the present case those rights are fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling under Article 177 of the Treaty.

34. The Court of First Instance did not therefore err in law in determining the question of the appellants' *locus standi* in the light of the criteria developed by the Court of Justice in the case-law set out at paragraph 7 of this judgment.

35. In those circumstances the appeal must be dismissed."

336. In *Nachi Europe*, C-239/99, the court dealt with a situation where an undertaking could "undoubtedly" have brought a direct action for annulment. Failure to do so was disqualifying in terms of seeking an equivalent order on foot of a reference:

"28. Irrespective of the effects of the partial annulment delivered by the Court of First Instance in its judgment in NTN Corporation and *Koyo Seiko v Council*, it is necessary to examine whether Nachi Europe has *locus standi* to plead the invalidity of the anti-dumping duty applicable to ball bearings manufactured by Nachi Fujikoshi in a dispute before a national court.

29. First, it is settled case-law that a decision adopted by a Community institution which has not been challenged by its addressee within the time-limit laid down by the fifth paragraph of Article 230 EC becomes definitive as against that person (see, *inter alia*, Case 156/77 *Commission v Belgium* [1978] ECR 1881, paragraphs 20 to 24, Case C-183/91 *Commission v Greece* [1993] ECR I-3131, paragraphs 9 and 10, and Case C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833, paragraph 13). Such a rule is based in particular on the consideration that the periods within which legal proceedings must be brought are intended to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely (Case C-178/95 *Wiljo v Belgian State* [1997] ECR I-585, paragraph 19).

30. The Court has also ruled that it follows from the same requirements of legal certainty that it is not possible for a recipient of State aid, forming the subject-matter of a Commission decision addressed directly solely to the Member State from which that beneficiary came, who could undoubtedly have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the fifth paragraph of Article 230 EC to pass, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities in implementation of that decision (*TWD Textilwerke Deggendorf*, paragraphs 17 and 24, and *Wiljo,* paragraphs 20 and 21, both cited above). The Court has taken the view that to find otherwise would enable the recipient of the aid to overcome the definitive nature which a decision necessarily assumed, by virtue of the principle of legal certainty, once the time-limit laid down for bringing proceedings had passed (*TWD Textilwerke Deggendorf*, paragraph 18, and *Wiljo,* paragraph 21).

31. It is necessary to examine whether, as the Council and Commission submit, the solution arrived at in *TWD Textilwerke Deggendorf* may be extended to a case, such as that here in the main proceedings, in which it is the invalidity of an anti-dumping regulation that is being invoked in a dispute before a national court by an undertaking in a position such as that of Nachi Europe.

32. On this point, Nachi Europe submitted during the hearing that the solution arrived at in *TWD Textilwerke Deggendorf* could not be applied where the invalidity of a regulation is pleaded incidentally, since Article 241 EC allows any party to plead the inapplicability of a regulation as an incidental issue, notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230 EC.

33. It should first of all be noted in this regard that, according to settled case-law, the possibility provided by Article 241 EC of pleading the inapplicability of a regulation does not constitute an independent right of action and may only be exercised incidentally in proceedings brought before the Court of Justice itself pursuant to a separate provision of the Treaty (judgments in Joined Cases 31/62 and 33/62 *Wöhrmann* and *Lütticke v Commission* [1962] ECR 501, at 507, Case 33/80 *Albini v Council and Commission* [1981] ECR 2141, paragraph 17, and Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others v Commission and Council [*1985] ECR 2523, paragraph 36; order in Case C-64/*93 Donatab and Others v Commission* [1993] ECR I-3595, paragraph 19).
34. Since Article 241 EC cannot be invoked before the Court in the absence of a main action brought before it, that provision cannot as such be applied in the context of the preliminary ruling procedure provided for in Article 234 EC. As the Advocate General has pointed out in paragraph 62 of his Opinion, Article 234 EC itself provides for a procedure for resolution of a question which arises with regard to the validity of a Community measure, where such a question arises incidentally in a dispute before a national court.
35. It is true, however, that Article 241 EC expresses a general principle of law under which an applicant must, in proceedings brought under national law against the rejection of his application, be able to plead the illegality of a Community measure on which the national decision adopted in his regard is based, and the question of the validity of that Community measure may thus be referred to the Court in proceedings for a preliminary ruling (Case 216/82 *Universität Hamburg* [1983] ECR 2771, paragraphs 10 and 12).
36. The Court has also pointed out that this general principle confers on any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 230 EC to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (Case 92/78 *Simmenthal v Commission* [1979] ECR 777, paragraph 39, and *TWD Textilwerke Deggendorf,* paragraph 23).
37. However, this general principle, which has the effect of ensuring that every person has or will have had the opportunity to challenge a Community measure which forms the basis of a decision adversely affecting him, does not in any way preclude a regulation from becoming definitive as against an individual in regard to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under Article 230 EC, a fact which prevents that individual from pleading the illegality of that regulation before the national court (see, in regard to a Commission decision, *TWD Textilwerke Deggendorf,* paragraphs 24 and 25). Such a conclusion applies to regulations imposing anti-dumping duties by virtue of their dual nature, noted by the Court in the case-law cited in paragraph 21 of the present judgment, as acts of a legislative nature and acts liable to be of direct and individual concern to certain traders.
38. In the present case, Nachi Europe, the plaintiff in the main proceedings, could undoubtedly have sought the annulment of Article 1(2) of Regulation No 2849/92 inasmuch as it fixed an anti-dumping duty applicable to ball bearings manufactured by Nachi Fujikoshi.
39. As the Advocate General has noted in paragraphs 32 to 34 of his Opinion, Nachi Europe is an importer which is associated with Nachi Fujikoshi and whose resale prices for the goods in question were used to construct the export price applied by Regulation No 2849/92 in order to establish the dumping margins in respect of Nachi Fujikoshi. Pursuant to the case-law cited in paragraphs 21 and 22 of the present judgment, that fact allowed Nachi Europe to be regarded as being directly and individually concerned by the provisions of that regulation which imposed a specific anti-dumping duty on goods manufactured by Nachi Fujikoshi.
40. It follows from all of the foregoing considerations that the answer to the first question must be that neither the judgment of the Court of First Instance in *NTN Corporation and Koyo Seiko v Council* nor that of the Court of Justice in *Commission v NTN and Koyo Seiko* affected the validity of Article 1(2) of Regulation No 2849/92 in so far as it fixes an anti-dumping duty applicable to ball bearings manufactured by Nachi Fujikoshi.
An importer of those products, such as Nachi Europe, which undoubtedly had a right of action before the Court of First Instance to seek the annulment of the anti-dumping duty imposed on those goods, but which did not exercise that right, cannot subsequently plead the invalidity of that anti-dumping duty before a national court. In such a case, the national court is bound by the definitive nature of the anti-dumping duty applicable under Article 1(2) of Regulation No 2849/92 to ball bearings manufactured by Nachi Fujikoshi and imported by Nachi Europe."

337. *Unión de Pequeños Agricultores*, C-50/00, was another failed direct challenge in the Court of First Instance, with the appeal to the Court of Justice also being dismissed. The court however emphasised the "complete system" of judicial protection, which had the effect that an applicant falling outside the direct action provision had to be able to challenge an EU institutional act "indirectly" by seeking a reference:

> "32. As a preliminary point, it should be noted that the appellant has not challenged the finding of the Court of First Instance, in paragraph 44 of the contested order, to the effect that the contested regulation is of general application. Nor has it challenged the finding, in paragraph 56 of that order, that the specific interests of the appellant were not affected by the contested regulation or the finding, in paragraph 50 of that order, that its members are not affected by the contested regulation by reason of certain attributes which are peculiar to them or by reason of factual circumstances in which they are differentiated from all other persons.
>
> 33. In those circumstances, it is necessary to examine whether the appellant, as representative of the interests of its members, can none the less have standing, in conformity with the fourth paragraph of Article 173 of the Treaty, to bring an action for annulment of the contested regulation on the sole ground that, in the alleged absence of any legal remedy before the national courts, the right to effective judicial protection requires it.
>
> 34. It should be recalled that, according to the second and third paragraphs of Article 173 of the Treaty, the Court is to have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers or, when it is for the purpose of protecting their prerogatives, by the European Parliament, by the Court of Auditors and by the European Central Bank. Under the fourth paragraph of Article 173, '[a]ny natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.'
>
> 35. Thus, under Article 173 of the Treaty, a regulation, as a measure of general application, cannot be challenged by natural or legal persons other than the institutions, the European Central Bank and the Member States (see, to that effect, Case 92/78 *Simmenthal v Commission* [1979] ECR 777, paragraph 40).
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> 36. However, a measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain natural or legal persons and is thus in the nature of a decision in their regard (see, in particular, Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, paragraph 13; Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, paragraph 19, and Case C-41/*99 P Sadam Zuccherifici and Others v Council* [2001] ECR I-4239, paragraph 27). That is so where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee (see, in particular, Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107, and Case C-452/98 *Nederlandse Antillen v Council* [2001] ECR I-8973, paragraph 60).
>
> 37. If that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation (see, in that regard, the order in *CNPAAP v Council*, cited above, paragraph 38).
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> 38. The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.
>
> 39. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see, in particular, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-424/99 *Commission v Austria* [2001] ECR I-9285, paragraph 45).
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> 40. By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, *Les Verts v Parliament*, paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of

the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity.

41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.

42. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.

43. As the Advocate General has pointed out in paragraphs 50 to 53 of his Opinion, it is not acceptable to adopt an interpretation of the system of remedies, such as that favoured by the appellant, to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.

44. Finally, it should be added that, according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually (see, for example, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy v Commission* [1988] ECR 219, paragraph 14; *Extramet Industrie v Council*, paragraph 13, and *Codorniu v Council*, paragraph 19), such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.

45. While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.

46. In the light of the foregoing, the Court finds that the Court of First Instance did not err in law when it declared the appellant's application inadmissible without examining whether, in the particular case, there was a remedy before a national court enabling the validity of the contested regulation to be examined.

47. The appeal must therefore be dismissed."

338. In *British American Tobacco (Investments) Ltd,* C-491/01, the ECJ held that a domestic implementing measure was not essential to enable a reference on the validity of an EU institutional act:

"32. Under Article 234 EC the Court has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the Community institutions, regardless of whether they are directly applicable (see, to that effect, Case 111/75 *Mazzalai* [1976] ECR 657, paragraph 7, and Case C-373/95 *Maso and Others* [1997] ECR I-4051, paragraph 28).

33. A directive therefore constitutes an act covered by Article 234 EC even though the period for its implementation has not yet expired, and a question concerning it may validly be referred to the Court provided that that reference also satisfies the conditions for admissibility laid down in the Court's case-law.

34. In that regard, it is to be remembered that when a question on the validity of a measure adopted by the Community institutions is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and consequently whether it should request the Court to rule on that question. Accordingly, where the national court's questions relate to the validity of a provision of Community law, the Court is obliged in principle to give a ruling (Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 19).

35. Nevertheless, the Court has held that it cannot give a preliminary ruling on a question submitted by a national court where, *inter alia*, it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual

facts of the main action or its purpose or where the problem is hypothetical (see, in particular, Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraph 46).

36. With regard, first of all, to the actual facts of the dispute in the main proceedings, it is clear from the order for reference that, pursuant to the permission granted to them for that purpose by the High Court, the claimants in the main proceedings may make an application for judicial review of the legality of 'the intention and/or obligation' of the United Kingdom Government to implement the Directive even though, when that application was made, the period prescribed for implementation of the Directive had not yet expired and that Government had adopted no national implementation measures. There is, moreover, some disagreement between the claimants and the Secretary of State for Health as to whether or not the abovementioned application is well founded.

37. With regard, next, to the relevance of the questions referred to the outcome of the dispute in the main proceedings, it is first to be observed that, should the Directive be held to be invalid, that would indeed influence the outcome. The claimants in the main proceedings maintain that implementation by the United Kingdom Government of a directive by means of regulations adopted on the basis of Article 2(2) of the European Communities Act 1972 is subject to the condition that the directive should be valid, with the result that its invalidity would prevent its being implemented by means of regulations under that legislation. Second, it must be stated that interpretation of the provisions of the Directive may also influence the outcome of the dispute in the main proceedings.

38. It is therefore not obvious that the assessment of the Directive's validity or its interpretation, requested by the national court, bear no relation to the actual facts of the main action or its purpose or raise a purely hypothetical question.

39. As for the argument that to accept the admissibility of the order for reference seeking a decision on validity in a situation such as that in the main proceedings could be tantamount to circumventing the requirements of Article 230 EC, it must be stated that, in the complete system of legal remedies and procedures established by the EC Treaty with a view to ensuring judicial review of the legality of acts of the institutions, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of that article, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community judicature under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity (Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 40).

40. The opportunity open to individuals to plead the invalidity of a Community act of general application before national courts is not conditional upon that act's actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly. That condition is amply fulfilled in the circumstances of the case in the main proceedings, as is apparent from paragraphs 36 and 37 above.

41. It follows from all the foregoing considerations that the questions referred by the national court are admissible."

339. *Jégo-Quéré & Cie SA*, C-263/02 was a case where the Court of Justice overturned a broader interpretation of the "individual concern" rule that had been adopted by the Court of First Instance. The court said:

"29 It should be noted that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the ECHR (see, in particular, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 39).

30 By Articles 230 EC and Article 241 EC, on the one hand, and by Article 234, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions, and has entrusted such review to the Community Courts. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court

of Justice for a preliminary ruling on validity (see *Unión de Pequeños Agricultores v Council*, paragraph 40).

31 Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection (*see Unión de Pequeños Agricultores v Council*, paragraph 41).

32 In that context, in accordance with the principle of sincere cooperation laid down in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act (see *Unión de Pequeños Agricultores v Council,* paragraph 42).

33 However, it is not appropriate for an action for annulment before the Community Court to be available to an individual who contests the validity of a measure of general application, such as a regulation, which does not distinguish him individually in the same way as an addressee, even if it could be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures (see *Unión de Pequeños Agricultores v Council*, paragraphs 37 and 43).

34 Accordingly, an action for annulment before the Community Court should not on any view be available, even where it is apparent that the national procedural rules do not allow the individual to contest the validity of the Community measure at issue unless he has first contravened it.

35 In the present case, it should be pointed out that the fact that Regulation No 1162/2001 applies directly, without intervention by the national authorities, does not mean that a party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by Regulation No 1162/2001 may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly.

36 Although the condition that a natural or legal person can bring an action challenging a regulation only if he is concerned both directly and individually must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty (see *Unión de Pequeños Agricultores v Council*, paragraph 44).

37 That applies to the interpretation of the condition in question set out at paragraph 51 of the contested judgment, to the effect that a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.

38 Such an interpretation has the effect of removing all meaning from the requirement of individual concern set out in the fourth paragraph of Article 230 EC.

39 It follows from the above that the Court of First Instance erred in law. Accordingly, the second plea in law must be declared to be well founded.

...

43 As the Court of First Instance rightly held at paragraphs 23 and 24 of the contested judgment, Articles 3(d) and 5 of Regulation No 1162/2001, which Jégo-Quéré seeks to have annulled, are addressed in abstract terms to undefined classes of persons and apply to objectively determined situations. Accordingly, those articles are, by their nature, of general application.

44 However, the Court has consistently held that the fact that a measure is of general application does not mean that it cannot be of direct and individual concern to certain economic operators (see, *inter alia*, Case C-142/00 P *Commission v Netherlands Antilles* [2003] ECR I-3484, paragraph 64).

45 In particular, natural or legal persons cannot be individually concerned by such a measure unless they are affected by it by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as an addressee (see, *inter alia*, Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107, and *Commission v Netherlands Antilles*, paragraph 65).

46 The fact that Jégo-Quéré is the only operator fishing for whiting in the waters south of Ireland with vessels of over 30 metres in length does not, as the Court of First Instance points out at paragraph 30 of the contested judgment, differentiate it, as Articles 3(d) and 5 of Regulation No 1162/2001 are of concern to it only in its objective capacity as an entity which fishes for whiting using a certain fishing technique in a specific area, in the same way as any other economic operator actually or potentially in the same situation.

47 Furthermore, no provision of Community law required the Commission, when adopting Regulation No 1162/2001, to follow a procedure under which Jégo-Quére would be entitled to claim rights that might be available to it, including the right to be heard. Community law has accordingly not conferred any particular legal status on an operator such as Jégo-Quéré with regard to the adoption of Regulation No 1162/2001 (see, to that effect, Case 191/82 *FEDIOL v Commission* [1983] ECR 2913, paragraph 31).

48 In those circumstances, the fact that Jégo-Quéré was the only fishing company to propose to the Commission, before Regulation No 1162/2001 was adopted, a particular solution for the renewal of hake stocks does not make it individually concerned for the purposes of the fourth paragraph of Article 230 EC.

49 The cross-appeal should accordingly be dismissed.

50 In the light of the foregoing, the contested judgment should be set aside, and, having regard to the first paragraph of Article 61 of the Statute of the Court of Justice, the application for annulment of Articles 3(d) and 5 of Regulation No 1162/2001 must be declared to be inadmissible."

340. Thus the traditional, strict, interpretation of the concept of direct and individual concern remained in place. A wide interpretation was not necessary to create a complete system of legal protection because a litigant before a domestic court had a number of procedural options available to enable her to litigate. The question that troubled the Court of First Instance was essentially, what if there is no national implementing measure to enable an applicant to litigate? But the Court of Justice didn't see that as a problem - it was up to the legal system of the member state to ensure that there would be a remedy. Some creative options are mentioned in the judgment.

341. *Front national v European Parliament,* C-486/01 was a case where the Grand Chamber held that a rule in the European Parliament that prevented members of the Front national from forming a group of their choice was not of "direct concern" to the Front national party.

342. The Grand Chamber said:

"34 In that regard, it is appropriate to bear in mind that, by virtue of settled case-law, the condition that the decision forming the subject-matter of the proceedings must be of 'direct concern' to a natural or legal person, as it is stated in the fourth paragraph of Article 230 EC, requires the Community measure complained of to affect directly the legal situation of the individual and leave no discretion to the addressees of that measure, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (see, *inter alia*, Case C-404/96 P *Glencore Grain v Commission* [1998] ECR I-2435, paragraph 41, and the case-law cited).

35 In this instance there is no question that the contested act – to the extent to which it deprived the Members having declared the formation of the TDI Group, and in particular the Members from the Front National's list, of the opportunity of forming by means of the TDI Group a political group within the meaning of Rule 29 – affected those Members directly. As the Court of First Instance rightly pointed out in paragraphs 59 and 65 of the judgment under appeal, those Members were in fact prevented, solely because of the contested act, from forming themselves into a political group and were henceforth deemed to be non-attached Members for the purposes of Rule 30; as a result, they were afforded more limited parliamentary rights and lesser material and financial advantages than those they would have enjoyed had they been members of a political group within the meaning of Rule 29.

36 Such a conclusion cannot be drawn, however, in relation to a national political party such as the Front National. As the Advocate General has noted in point 40 of his Opinion, although it is natural for a national political party which puts up candidates in the European elections to want its candidates, once elected, to exercise their mandate under the same conditions as the other Members of the Parliament, that aspiration does not confer on it any right for

its elected representatives to form their own group or to become members of one of the groups being formed within the Parliament.

37 It must be observed that under Rule 29(2) the formation of a political group within the Parliament requires a minimum number of Members from various Member States and that, in any event, Rule 29(1) mentions only the possibility of Members forming themselves into groups according to their political affinities. The rule assigns no specific function in the process of forming political groups to the national political parties to which those Members belong.

38 In those circumstances, it cannot be maintained that a national political party is directly affected by the contested act, which applies, and which in fact, by virtue of the actual wording of Rule 29, could apply, only to the Members of the Parliament who had declared the formation of the TDI Group."

343. Some might say commonsensically, the Court of First Instance had said, as recorded by the Grand Chamber:

"39 In paragraph 66 of the judgment under appeal, the Court of First Instance admittedly found that, since the contested act deprived the Members concerned, particularly those elected from the Front National's list, of the opportunity to organise themselves into a political group, it directly impinged on the promotion of the ideas and projects of the party which they represented in the European Parliament and, hence, on the attainment of that political party's stipulated object at European level, the reason why the Front National was directly affected by the act."

344. The Grand Chamber rejected that:

"40 Such effects, however, cannot be regarded as directly caused by the contested act. Even on the assumption that such consequences ensue, they result from the fact that Members who do not belong to a political group are deemed to be non-attached Members under Rule 30 and from the fact that non-attached Members are afforded a less favourable status by Rule 30. The Front National is liable to be affected only indirectly by the contested act, by virtue of the consequences which the act entails for the status of the Members who adhere to that party.

41 The Court must also reject the argument which the Front National derives from the Court's recognition, in its judgment in *Les Verts v Parliament*, of the principle of equal treatment for parties in an electoral campaign, which remains effective once the ballot is over. That judgment concerned a quite different situation from the one at issue in this instance.

42 Thus, the decisions of the Parliament at issue in *Les Verts v Parliament* were of direct concern to the applicant in that case, since they provided, in the period preceding the European elections in 1984, for the allocation of appropriations between the political groupings – which included that party – without any further measure being necessary, given that the calculation of the proportion of the appropriations to be awarded to each of the political groupings concerned was automatic and left no room for any discretion, as the Court stated in paragraph 31 of its judgment.

43 In the present case, however, the Front National is not directly concerned by the contested act. Although it cannot be denied that no implementing measure is necessary for the act to produce effects, there is also no question that, pursuant to the actual wording of Rule 29, the act can produce effects only on the legal situation of Members of the Parliament and not on that of national political parties from whose lists those Members were elected and which, in some cases, have played a part in securing the election of those Members. Contrary to the requirements laid down by the case-law referred to in paragraph 34 of this judgment, such an act therefore does not directly produce effects on the legal situation of the Front National.

44 In view of all the foregoing considerations, it must therefore be concluded that the Court of First Instance erred in law in holding, in paragraph 67 of the judgment under appeal, that the contested act directly affected the Front National, and the judgment must be set aside in so far as it declared the Front National's action admissible."

345. One can only pause here to say that if a rule preventing a party's members from joining a political group isn't of direct concern to the party, as that phrase is restrictively interpreted by the CJEU, this applicant wouldn't have had a roasted snowball's chance of getting a ruling that a Commission decision addressed to Ireland was of "direct concern", as so interpreted, to it as an NGO with a general environmental brief.

346. In *ABNA and Others*, C-453/03, C-11/04, C-12/04 and C-194/04, the court returned to the problem of interim remedies, confirming that national courts, though not administrative authorities, had power in effect to suspend the application of EU acts in certain circumstances. The discussion

confirms the relevance of the preliminary ruling procedure as a vehicle for the issue of validity to be ultimately determined by the CJEU.

> "103 As the Court has held in its judgment in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 18 *('Zuckerfabrik')*, references for preliminary rulings on the validity of a measure, like actions for annulment, allow the legality of acts of the Community institutions to be reviewed. In the context of actions for annulment, Article 242 EC enables applicants to request enforcement of the contested act to be suspended and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested (see also Case C-465/93 *Atlanta Fruchthandelsgesellschaft and Others* (I) [1995] ECR I-3761, paragraph 22, and Case C-68/95 T. *Port* [1996] ECR I-6065, paragraph 49; on the Court's lack of jurisdiction to order interim measures in the context of preliminary-ruling proceedings, see the order of the President of the Court in Case C-186/01 *R Dory* [2001] ECR I-7823, paragraph 13).
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> 104 The Court has, however, ruled that the uniform application of Community law, which is a fundamental requirement of the Community legal order, means that the suspension of enforcement of administrative measures based on a Community regulation, whilst it is governed by national procedural law, in particular as regards the making and examination of the application, must in all the Member States be subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned and which it has defined as being the same conditions as those of the application for interim relief brought before the Court (*Zuckerfabrik*, cited above, paragraphs 26 and 27).
>
> 105 The Court has pointed out in particular that, in order to determine whether the conditions relating to urgency and the risk of serious and irreparable damage have been satisfied, the national court dealing with the application for interim relief must examine the circumstances particular to the case before it and consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid (*Zuckerfabrik*, paragraph 29; *Atlanta Fruchthandelsgesellschaft and Others* (I), cited above, paragraph 41).
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> 106 As the court responsible for applying, within the framework of its jurisdiction, the provisions of Community law and consequently under an obligation to ensure that Community law is fully effective, the national court, when dealing with an application for interim relief, must take account of the damage which the interim measure may cause to the legal regime established by a Community measure for the Community as a whole. It must consider, on the one hand, the cumulative effect which would arise if a large number of courts were also to adopt interim measures for similar reasons and, on the other, those special features of the applicant's situation which distinguish it from the other operators concerned (*Atlanta Fruchthandelsgesellschaft and Others* (I), paragraph 44).
>
> 107 In particular, if the grant of interim relief may represent a financial risk for the Community, the national court must also be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security (*Zuckerfabrik*, paragraph 32; *Atlanta Fruchthandelsgesellschaft and Others* (I), paragraph 45).
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> 108 The unavoidable conclusion in this regard is that national administrative authorities, such as those in issue in Case C-194/04, are not in a position to adopt interim measures while complying with the conditions for granting such measures as defined by the Court.
>
> 109 In this context, it is in particular appropriate to point out that the actual status of those authorities is not in general such as to guarantee that they have the same degree of independence and impartiality as that which national courts are recognised as having. Likewise, it is not certain that such authorities would benefit from the exercise of the adversarial principle inherent to judicial proceedings, which allows account to be taken of the arguments put forward by the different parties before the interests in issue are weighed one against the other at the time when a decision is being taken.
>
> 110 So far as concerns the argument that considerations of expedition or cost may justify the need to recognise the national administrative authorities as having competence, it must be emphasised that national courts ruling in applications for interim relief may in general adopt decisions within very short periods of time. In any event, an argument relating to expedition or cost cannot be conclusive in regard to the guarantees offered by the systems of judicial protection established by the respective legal systems of the Member States.
>
> 111 The answer to the question referred must therefore be that, even in the case in which a court of a Member State forms the view that the conditions have been satisfied under

which it may suspend application of a Community measure, in particular where the question of the validity of that measure has already been referred to the Court, the competent national administrative authorities of the other Member States cannot suspend application of that measure until such time as the Court of Justice has ruled on its validity. National courts alone are entitled to verify, taking into consideration the specific circumstances of the cases brought before them, whether the conditions governing the grant of interim relief have been satisfied."

347. In *Intertanko*, C-308/06, the court considered that the power to refer a question as to validity of an EU act included the power to refer it even before the expiry of the time for transposition and in the absence of any transposing measures (so much for the State's complaint here about the lack of a transposition challenge). Only if it was "obvious" that the reference was unnecessary would the ECJ decline to rule on the validity of the EU measure:

"Admissibility

30 The French Government questions whether the reference for a preliminary ruling is admissible, the national court having, in its view, failed to set out the circumstances in which the case has been brought before it. The French Government submits that, in contrast to cases such as that giving rise to the judgment in Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, the order for reference does not state that the claimants in the main proceedings have sought to bring an action contesting the transposition of Directive 2005/35 by the United Kingdom of Great Britain and Northern Ireland.

31 In that regard, it is to be remembered that, when a question on the validity of a measure adopted by the institutions of the European Community is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and, consequently, whether it should request the Court to rule on that question. Accordingly, where the national court's questions relate to the validity of a provision of Community law, the Court is obliged in principle to give a ruling (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 34 and the case-law cited).

32 It is possible for the Court to refuse to give a preliminary ruling on a question submitted by a national court only where, *inter alia*, it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (*British American Tobacco (Investments) and Imperial Tobacco,* paragraph 35 and the case-law cited).

33 In the present case, it is clear from the order for reference that the claimants in the main proceedings have made an application to the High Court for judicial review of implementation of Directive 2005/35 in the United Kingdom and that they may make such an application even though, when the application was made, the period prescribed for implementation of the directive had not yet expired and no national implementing measures had been adopted.

34 Nor is it disputed before the Court of Justice that the questions submitted are relevant to the outcome of the main proceedings, as the adoption of national measures designed to transpose a directive into domestic law in the United Kingdom may be subject to the condition that the directive be valid (see *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 37).

35 It is therefore not obvious that the ruling sought by the national court on the validity of Directive 2005/35 bears no relation to the actual facts of the main action or its purpose or concerns a hypothetical problem."

348. In *E and F*, C-550/09, another case of a validity challenge to EU law by way of a reference, the court again emphasised the complete system of remedies, and that proceeding by reference is only ruled out if a direct action was available without question, and that a challenge to a "legislative act" in a domestic court envisaged there was a decision or act to challenge at domestic level:

"43 At the outset, it should be emphasised that, by contrast with the case which gave rise to the judgment in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, which concerned a measure freezing the applicants' assets, the provisions whose legality is under consideration in this reference for a preliminary ruling are relied upon in support of accusations relating to an infringement of Regulation No 2580/2001, which is punishable under the applicable national law by criminal penalties entailing custodial sentences.

44 Against that background, it should be noted that the European Union is based on the rule of law and the acts of its institutions are subject to review by the Court of their compatibility with EU law and, in particular, with the Treaty on the Functioning of the European Union and the general principles of law. The Treaty on the Functioning of the

European Union has established a complete system of legal remedies and procedures designed to confer on the judicature of the European Union jurisdiction to review the legality of acts of the institutions of the European Union (see, to that effect, Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraphs 38 and 40, and *Kadi and Al Barakaat International Foundation v Council and Commission*, paragraph 281).

45 It follows that, in proceedings before the national courts, every party has the right to plead before the court hearing the case the illegality of the provisions contained in legislative acts of the European Union which serve as the basis for a decision or act of national law relied upon against him and to prompt that court, which does not have jurisdiction itself to make a finding of such illegality, to put that question to the Court by means of a reference for a preliminary ruling (see, to that effect, Cases C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 35, and *Unión de Pequeños Agricultores v Council*, paragraph 40).

46 The recognition of that right presupposes, however, that the party in question had no right of direct action under Article 263 TFEU by which it could challenge provisions, the consequences of which it is suffering without having been able to seek their annulment (see, to that effect, Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 23, and *Nachi Europe*, paragraph 36).

47 Pursuant to Paragraph 34(4) of the AWG, in the case before the referring court, the inclusion of DHKP-C on the list during the period prior to 29 June 2007 serves, together with Regulation No 2580/2001, as the basis for the indictment of the defendants in respect of that period.

48 Accordingly, it is necessary to determine whether, if the defendants had brought an action for annulment of that listing, the admissibility of their action would have been beyond doubt (see, to that effect, Case C-343/07 *Bavaria and Bavaria Italia* [2009] ECR I-0000, paragraph 40).

49 In that regard, it should be pointed out that the defendants themselves were not placed on that list: the entry on the list relates only to DHKP-C. Moreover, the order for reference does not give any information on the basis of which it could be established that the position occupied by the defendants within DHKP-C would have conferred on them the power to represent that organisation in an action for annulment brought before the judicature of the European Union.

50 In addition, it cannot be held that the defendants were indisputably 'directly and individually concerned' by the listing at issue for the purposes of the fourth paragraph of Article 230 EC, which was applicable at the material time.

51 The reason for this is that, like Regulation No 2580/2001, that inclusion on the list is of general application. It serves, together with that regulation, to impose on an indeterminate number of persons an obligation to comply with specific restrictive measures against DHKP-C (see, by analogy, *Kadi and Al Barakaat International Foundation v Council and Commission,* paragraphs 241 to 244).

52 It follows that, as the national court pointed out, the defendants – unlike DHKP-C – did not have an indisputable right to bring an action under Article 230 EC for the annulment of that listing."

349. *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11, was another chimerical direct action before the General Court. That court said that a direct action was unavailable, and the Grand Chamber agreed. The Grand Chamber set out the findings of the General Court:

"10 First, the General Court held that, although the contested regulation was adopted on the basis of the EC Treaty, the conditions of admissibility of the action, which was brought after the entry into force of the FEU Treaty, have to be examined on the basis of Article 263 TFEU.

11 The General Court then examined the admissibility of the action before it. In that context, it first assessed the concept of 'regulatory act' within the meaning of the fourth paragraph of Article 263 TFEU. In that regard, the General Court undertook a literal, historical and teleological interpretation of that provision and made the following findings in paragraphs 41 to 51 of the order under appeal:

'41 In the first place and as a reminder, the fourth paragraph of Article 230 EC allowed natural and legal persons to institute proceedings against decisions as acts of individual application and against acts of general application such as a regulation which is of direct concern to those persons and affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision (see, to that effect, Case 25/62 Plaumann v Commission [1963] ECR 95, 107,

and Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, paragraph 36).

42 The fourth paragraph of Article 263 TFEU, even though it omits the word 'decision' reproduces those two possibilities and adds a third. It permits the institution of proceedings against individual acts, against acts of general application which are of direct and individual concern to a natural or legal person and against a regulatory act which is of direct concern to them and does not entail implementing measures. It is apparent from the ordinary meaning of the word 'regulatory' that the acts covered by that third possibility are also of general application.

43 Against that background, it is clear that that possibility does not relate to all acts of general application, but to a more restricted category, namely regulatory acts.

44 The first paragraph of Article 263 TFEU sets out a number of categories of acts of the European Union which may be subject to a review of legality, namely, first, legislative acts and, secondly, other binding acts intended to produce legal effects *vis-à-vis* third parties, which may be individual acts or acts of general application.

45 It must be concluded that the fourth paragraph of Article 263 TFEU, read in conjunction with its first paragraph, permits a natural or legal person to institute proceedings against an act addressed to that person and also (i) against a legislative or regulatory act of general application which is of direct and individual concern to them and (ii) against certain acts of general application, namely regulatory acts which are of direct concern to them and do not entail implementing measures.

46 Furthermore, such an interpretation of the word 'regulatory', and of the equivalent word in the different language versions of the FEU Treaty, as opposed to the word 'legislative', is also apparent from a number of other provisions of the FEU Treaty, in particular Article 114 TFEU, concerning the approximation of the "provisions laid down by law, regulation or administrative action in Member States".

47 In that regard, it is necessary to reject the … argument [of the appellants and Mr Agathos] that the distinction between legislative and regulatory acts, as proposed by the Parliament and the Council and upheld in paragraphs 42 to 45 above, consists of adding the qualifier 'legislative' to the word 'act' with reference to the first two possibilities covered by the fourth paragraph of Article 263 TFEU. As is apparent from the conclusion drawn in paragraph 45 above, the word 'act' with reference to those first two possibilities covers not only an act addressed to the natural or legal person, but also any act, legislative or regulatory, which is of direct and individual concern to them. In particular, legislative acts and regulatory acts entailing implementing measures are covered by that latter possibility.

48 Furthermore, it must be stated that, contrary to the … claim [of the appellants and Mr Agathos], it is apparent from the wording of the final part of the fourth paragraph of Article 263 TFEU that the objective of the Member States was not to limit the scope of that provision solely to delegated acts within the meaning of Article 290 TFEU, but more generally, to regulatory acts.

49 In the second place, the interpretation of the fourth paragraph of Article 263 TFEU upheld in paragraphs 42 to 45 above is borne out by the history of the process which led to the adoption of that provision, which had initially been proposed as [Article III-365(4) of the proposed] treaty establishing a Constitution for Europe. It is apparent, *inter alia* from the cover note of the Praesidium of the Convention (Secretariat of the European Convention, CONV 734/03) of 12 May 2003, that, in spite of the proposal for an amendment to the fourth paragraph of Article 230 EC mentioning 'an act of general application', the Praesidium adopted another option, that mentioning 'a regulatory act'. As is apparent from the cover note referred to above, that wording enabled 'a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts (for which the 'of direct and individual concern' condition remains applicable)'.

50 In the third place, on account of the choice of such wording in the fourth paragraph of Article 263 TFEU, it must be observed that the purpose of that provision is to allow a natural or legal person to institute proceedings against an act of general application which is not a legislative act, which is of direct concern to them and does not entail implementing measures, thereby avoiding the situation in which such a person would have to infringe the law to have access to the court (see cover note of the Praesidium of the Convention, referred to above). As is apparent from the analysis in the preceding paragraphs, the wording of the fourth paragraph of Article 263 TFEU does not allow proceedings to be instituted against all acts which satisfy the criteria of direct concern and which are not implementing measures or against all acts of general application

which satisfy those criteria, but only against a specific category of acts of general application, namely regulatory acts. Consequently, the conditions of admissibility of an action for annulment of a legislative act are still more restrictive than in the case of proceedings instituted against a regulatory act.

51 That finding cannot be called into question by the … argument [of the appellants and Mr Agathos] relating to the right to effective judicial protection, *inter alia* having regard to Article 47 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1 ['the Charter']). According to settled case-law, the Courts of the European Union may not, without exceeding their jurisdiction, interpret the conditions under which an individual may institute proceedings against a regulation in a way which has the effect of setting aside those conditions, expressly laid down in the Treaty, even in the light of the principle of effective judicial protection (see, to that effect, Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425, paragraph 36, and order of 9 January 2007 in Case T-127/05 *Lootus Teine Osaühing v Council*, not published in the ECR, paragraph 50).'

12 The General Court concluded, in paragraph 56 of the order under appeal, that 'the meaning of 'regulatory act' for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts'. Consequently, a legislative act may form the subject matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them."

350. The Grand Chamber went on to say:

"Findings of the Court

89 By the third ground of appeal, the appellants claim, in essence, that the interpretation adopted by the General Court of the fourth paragraph of Article 263 TFEU is in breach of Article 47 of the Charter in that it enables natural and legal persons to bring actions for annulment of European Union legislative acts solely where those acts are of direct and individual concern to them, within the meaning of the fourth paragraph of Article 263 TFEU.

90 First, it must be recalled that judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, by the Court of Justice and the courts and tribunals of the Member States (see, to that effect, Opinion of the Court 1/09 [2011] ECR I-1137, paragraph 66).

91 Further, the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights (see, to that effect, Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 44).

92 To that end, the FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union (see Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23; *Unión de Pequeños Agricultores v Council,* paragraph 40; *Reynolds Tobacco and Others v Commission*, paragraph 80; and Case C-59/11 *Association Kokopelli* [2012] ECR, paragraph 34).

93 Accordingly, natural or legal persons who cannot, by reason of the conditions of admissibility stated in the fourth paragraph of Article 263 TFEU, challenge directly European Union acts of general application do have protection against the application to them of those acts. Where responsibility for the implementation of those acts lies with the European Union institutions, those persons are entitled to bring a direct action before the Courts of the European Union against the implementing measures under the conditions stated in the fourth paragraph of Article 263 TFEU, and to plead, pursuant to Article 277 TFEU, in support of that action, the illegality of the general act at issue. Where that implementation is a matter for the Member States, such persons may plead the invalidity of the European Union act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU (see, to that effect, *Les Verts v Parliament,* paragraph 23).

94 In that context, it must be emphasised that, in proceedings before the national courts, individual parties have the right to challenge before the courts the legality of any decision or other national measure relative to the application to them of a European Union act of general application, by pleading the invalidity of such an act (see, to that effect, *Unión de Pequeños Agricultores v Council,* paragraph 42, and *E and F*, paragraph 45).

95 It follows that requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, means for reviewing the legality of European Union acts (see Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soes*t [1991] ECR I-415, paragraph 18, and Joined

Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 103).

96 In that regard, it must be borne in mind that where a national court or tribunal considers that one or more arguments for invalidity of a European Union act, put forward by the parties or, as the case may be, raised by it of its own motion, are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity, the Court alone having jurisdiction to declare a European Union act invalid (Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraphs 27 and 30 and the case-law cited).

97 Having regard to the protection conferred by Article 47 of the Charter, it must be observed that that article is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union, as is apparent also from the Explanation on Article 47 of the Charter, which must, in accordance with the third subparagraph of Articles 6(1) TEU and Article 52(7) of the Charter, be taken into consideration for the interpretation of the Charter (see the judgment of 22 January 2013 in Case C-283/11 *Sky Österreich* [2013] ECR, paragraph 42, and the judgment of 18 July 2013 in Case C-426/11 *Alemo-Herron and Others* [2013] ECR, paragraph 32).

98 Accordingly, the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside the conditions expressly laid down in that Treaty (see, to that effect, *Unión de Pequeños Agricultores v Council*, paragraph 44, and *Commission v Jégo-Quéré*, paragraph 36).

99 As regards the role of the national courts and tribunals, referred to in paragraph 90 of this judgment, it must be recalled that the national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (Opinion of the Court 1/09, paragraph 69).

100 It is therefore for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection (*Unión de Pequeños Agricultores v Council*, paragraph 41, and *Commission v Jégo-Quéré,* paragraph 31).

101 That obligation on the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States 'shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law'.

102 In that regard, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate, with due observance of the requirements stemming from paragraphs 100 and 101 of this judgment and the principles of effectiveness and equivalence, the courts and tribunals with jurisdiction and to lay down the detailed procedural rules governing actions brought to safeguard rights which individuals derive from European Union law (see, to that effect, *inter alia*, Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 44 and the case-law cited; Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 31; and Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraphs 47 and 61).

103 As regards the remedies which Member States must provide, while the FEU Treaty has made it possible in a number of instances for natural and legal persons to bring a direct action, where appropriate, before the Courts of the European Union, neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law (Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 40).

104 The position would be otherwise only if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully (see, to that effect, Unibet, paragraphs 41 and 64 and the case-law cited).

105 As regards the appellants' argument that the interpretation adopted by the General Court of the concept of 'regulatory act', provided for in the fourth paragraph of Article 263 TFEU, creates a gap in judicial protection, and is incompatible with Article 47 of the Charter in that its effect is that any legislative act is virtually immune to judicial review, it must be stated that the protection conferred by Article 47 of the Charter does not require that an individual should have an unconditional entitlement to bring an action for annulment of European Union legislative acts directly before the Courts of the European Union.

106 Last, neither that fundamental right nor the second subparagraph of Article 19(1) TEU require that an individual should be entitled to bring actions against such acts, as their primary subject matter, before the national courts or tribunals.

107 In those circumstances, the third ground of appeal must be rejected as being unfounded."

351. Those final comments regarding the lack of any requirement that an applicant has an unconditional entitlement to seek to annul legislative acts directly before national courts, as the primary subject matter of proceedings (that is, in the absence of any existing, proposed, or possible implementing measures) may be relevant to a limited category of cases. *Friends of the Irish Environment v. Minister for Communications* [2020] IEHC 383, [2020] 9 JIC 1405 (Simons J.), upheld in *Friends of the Irish Environment v. Minister for Communications* [2022] IECA 298 (Noonan J.), was one of those limited cases. But that is a totally different situation where the decision challenged didn't involve domestic transposition. The reliance on that case by the State and the IFA is totally misconceived. The present case isn't in that category - here, it is implementing measures all the way down. That difference isn't incidental – it is absolutely fundamental and jurisdictional.

352. The cornerstone of the *Friends* decision was that the invalidity of the Commission decision at issue there was in effect the sole relief (or at least that's how Simons J. characterised it - see in particular para. 71). Thus there was no basis for a reference, which could only arise if it is necessary for the domestic court itself to give judgment. It was on that basis that he convincingly distinguished the judgment of 6 October 2015, *Schrems*, C-362/14, ECLI:EU:C:2015:650, because in that case there was at least *some* dispute between the applicant and the national regulatory authorities capable of being litigated domestically (para. 89). That's the distinction between there being *little* left over after a reference (not all that unusual, one might argue) and there being *nothing at all* left over - which would mean that a reference isn't suitable in the first place.

353. In the present case there is plenty left over, specifically any domestic administrative or legislative actions that are predicated on the derogation having been approved by the Commission. The general claim for declaratory relief is there for such contingencies should the appropriate relief not otherwise commend itself. Relief 3 seeks a declaration about the validity of the GAP regulations of 2022, which were amended textually in the amending Regulations of 2022 so as to specifically quote the Commission decision. Reference in any legal document to an enactment is presumptively to the enactment as amended (this is reflected in s. 14(2) of the Interpretation Act 2005, which is closely related to s. 14(1) which applies not just to citations in enactments but to "any ... other document"), and that applies here. So the applicant here has a ready-made domestic platform from which it can launch a potential reference.

354. Various strands are brought together in *Rosneft*, C-72/15:

"Admissibility

48 The Estonian and Polish Governments and the Council consider that Question 1 is inadmissible. They contend that the referring court has not explained the connection between that question and the legal proceedings at the national level, and are sceptical as to whether an answer to that question is necessary. Further, the Council argues that questions raised in the dispute in the main proceedings can be resolved in the light of Regulation No 833/2014 alone, there being no need to give a ruling on the validity of Decision 2014/512.

49 In that regard, it must be borne in mind that when a question on the validity of a measure adopted by the institutions of the European Union is raised before a national court or tribunal, it is for that court or tribunal to decide whether a preliminary ruling on the matter is necessary to enable it to give judgment and consequently whether it should ask the Court to rule on that question. Consequently, where the questions referred by the national court or tribunal concern the validity of a provision of EU law, the Court is, as a general rule, obliged to give a ruling (judgment of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraph 31 and the case-law cited).

50 The Court may refuse to give a ruling on a question referred by a national court for a preliminary ruling, under Article 267 TFEU, only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure, are not satisfied or where it is quite obvious that the interpretation of a provision of European Union law, or the assessment of its validity, which is sought by the national court bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (see, to that effect, judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 35; of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 19, and of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 54).

51 In this case, it is clear from the order for reference that the validity of certain provisions of Decision 2014/512 is challenged by Rosneft in the procedure at issue in the main

proceedings. According to the referring court, the arguments made before it related, *inter alia*, to the proposition that, if the Court does not have jurisdiction to give a ruling on the validity of that decision, it is for the national court to ensure that there exist legal remedies sufficient to ensure effective judicial protection in the field of the CFSP, in accordance with the second subparagraph of Article 19(1) TEU.

52 Since the referring court considers that the analysis of its own jurisdiction must depend on that of the Court, the first question, which concerns the jurisdiction of the Court, has a direct connection to the subject matter of the main proceedings.

53 Further, it is clear that, if the Court were to examine solely the questions raised in the main proceedings in the light of Regulation No 833/2014, that would be likely to provide an inadequate answer to the concerns of the referring court with respect to the validity of the relevant restrictive measures.

54 The referring court considers that were decisions of the Council adopted within the framework of the CFSP not to be open to challenge, that could undermine the fundamental right of access to justice, and states that it is a requirement of Article 19 TEU that effective judicial protection be ensured in the fields covered by EU law.

55 Accordingly, since a prerequisite for the validity of a regulation adopted on the basis of Article 215 TFEU is the prior adoption of a valid decision in accordance with the provisions relating to the CFSP, the question of the validity of Decision 2014/512 is clearly relevant in the context of the present case.

56 It should be recalled, further, that the Member States must, pursuant to Article 29 TEU, ensure that their national policies conform to the Union position adopted under the CFSP. It follows that were Regulation No 833/2014 to be declared invalid, that would, as a matter of principle, have no effect on the obligation of Member States to ensure that their national policies conform to the restrictive measures established pursuant to Decision 2014/512. Accordingly, to the extent that the Court has jurisdiction to examine the validity of Decision 2014/512, such an examination is required in order to determine the scope of the obligations resulting from that decision, irrespective of whether Regulation No 833/2014 is valid.

57 It follows from all the foregoing that the first question submitted by the referring court is admissible.

Substance

58 The United Kingdom Government, the Czech, Estonian, French and Polish Governments, and the Council consider that, pursuant to the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, the Court does not have jurisdiction to give a preliminary ruling on the validity of Decision 2014/512.

59 According to the Commission, Article 24(1) TEU and Article 275 TFEU do not preclude the Court from also having jurisdiction to rule on the validity of Decision 2014/512 in the context of a request for a preliminary ruling. However, if the Court is to have jurisdiction in such a situation, it is necessary, first, that the applicant in the main proceedings who brings an action before the national court satisfies the conditions laid down in the fourth paragraph of Article 263 TFEU and, second, that the aim of the proceedings is to examine the legality of restrictive measures against natural or legal persons. The Commission considers that, in this case, those conditions are not met.

60 As a preliminary point, while, pursuant to the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, the Court does not, as a general rule, have jurisdiction with respect to the provisions relating to the CFSP and the acts adopted on the basis of those provisions (see judgment of 19 July 2016, *H v Council and Commission*, C-455/14 P, EU:C:2016:569, paragraph 39), it must however be recalled that the Treaties explicitly establish two exceptions to that rule. First, both the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU provide that the Court has jurisdiction to monitor compliance with Article 40 TEU. Second, the last sentence of the second subparagraph of Article 24(1) TEU confers on the Court jurisdiction to review the legality of certain decisions referred to in the second paragraph of Article 275 TFEU. The latter provision confers on the Court jurisdiction to give rulings on actions, brought subject to the conditions laid down in the fourth paragraph of Article 263 TFEU, concerning the review of the legality of Council decisions, adopted on the basis of provisions relating to the CFSP, which provide for restrictive measures against natural or legal persons.

61 Accordingly, the view can be taken that Question 1 encompasses, in essence, two issues. First, the question seeks to determine whether the Court has jurisdiction to monitor, pursuant to a request for a preliminary ruling submitted by a national court or tribunal under Article 267 TFEU, compliance, by the Council, with Article 40 TEU when the Council adopted

Decision 2014/512. Second, the aim of the question is to ascertain whether the Court has jurisdiction to review the legality of restrictive measures against natural or legal persons, the adoption of those measures being prescribed by that decision, not only where those persons bring an action for the annulment of those measures before the Courts of the European Union, under Articles 256 and 263 TFEU, but also in circumstances where the Court is seised, under the preliminary ruling procedure provided for in Article 267 TFEU, of a request by a national court or tribunal which has doubts as to the validity of such measures.

62 In that regard, with respect, in the first place, to the jurisdiction of the Court to monitor compliance with Article 40 TEU, it must be observed that the Treaties do not make provision for any particular means by which such judicial monitoring is to be carried out. That being the case, that monitoring falls within the scope of the general jurisdiction that Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed. In establishing this general jurisdiction, Article 19(3)(b) TEU states, further, that the Court is to give preliminary rulings, at the request of national courts or tribunals, on, *inter alia,* the validity of acts adopted by the institutions of the European Union.

63 Consequently, the Court has jurisdiction to give a ruling on a request for a preliminary ruling concerning the compliance of Decision 2014/512 with Article 40 TEU.

64 In the second place, the issue arises whether the Court has jurisdiction to give preliminary rulings on the validity of decisions adopted in relation to the CFSP, such as Decision 2014/512, where they prescribe restrictive measures against natural or legal persons.

65 In accordance with the wording of the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU, the Treaties have conferred on the Court the jurisdiction to review the legality of Council decisions providing for the imposition of restrictive measures on natural or legal persons. Accordingly, whereas Article 24(1) TEU empowers the Court to review the legality of certain decisions as provided for in the second paragraph of Article 275 TFEU, the latter article provides that the Court has jurisdiction to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, concerning that review of legality.

66 The review of the legality of acts of the Union that the Court is to ensure under the Treaties relies, in accordance with settled case-law, on two complementary judicial procedures. The FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union (judgments of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23; of 25 July 2002, *Unión de Pequeños Agricultores v Council,* C-50/00 P, EU:C:2002:462, paragraph 40, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 92).

67 It is inherent in that complete system of legal remedies and procedures that persons bringing proceedings must, when an action is brought before a national court or tribunal, have the right to challenge the legality of provisions contained in European Union acts on which a decision or national measure adopted in respect of them is based, pleading the invalidity of that decision or measure, in order that the national court or tribunal, having itself no jurisdiction to declare such invalidity, consults the Court on that matter by means of a reference for a preliminary ruling, unless those persons unquestionably had the right to bring an action against those provisions on the basis of Article 263 TFEU and failed to exercise that right within the period prescribed (see, to that effect, judgments of 15 February 2001*, Nachi Europe*, C-239/99, EU:C:2001:101, paragraphs 35 and 36, and of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382, paragraphs 45 and 46).

68 Accordingly, requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, a means for reviewing the legality of European Union acts (see judgments of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 16; of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C-143/88 and C-92/89, EU:C:1991:65, paragraph 18; of 6 December 2005, *ABNA and Others*, C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraph 103, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council,* C-583/11 P, EU:C:2013:625, paragraph 95).

69 That essential characteristic of the system for judicial protection in the European Union extends to the review of the legality of decisions that prescribe the adoption of restrictive measures against natural or legal persons within the framework of the CFSP.

70 Neither the EU Treaty nor the FEU Treaty indicates that an action for annulment brought before the General Court, pursuant to the combined provisions of Articles 256 and

263 TFEU, constitutes the sole means for reviewing the legality of decisions providing for restrictive measures against natural or legal persons, to the exclusion, in particular, of a reference for a preliminary ruling on validity. In that regard, the last sentence of the second subparagraph of Article 24(1) TEU refers to the second paragraph of Article 275 TFEU in order to determine not the type of procedure under which the Court may review the legality of certain decisions, but rather the type of decisions whose legality may be reviewed by the Court, within any procedure that has as its aim such a review of legality.

71 However, given that the implementation of a decision providing for restrictive measures against natural or legal persons is in part the responsibility of the Member States, a reference for a preliminary ruling on the validity of a measure plays an essential part in ensuring effective judicial protection, particularly, where, as in the main proceedings, both the legality of the national implementing measures and the legality of the underlying decision adopted in the field of the CFSP itself are challenged within national legal proceedings. Having regard to the fact that the Member States must ensure that their national policies conform to the Union position enshrined in Council decisions, adopted under Article 29 TEU, access to judicial review of those decisions is indispensable where those decisions prescribe the adoption of restrictive measures against natural or legal persons.

72 As is apparent from both Article 2 TEU, which is included in the common provisions of the EU Treaty, and Article 21 TEU, concerning the European Union's external action, to which Article 23 TEU, relating to the CFSP, refers, one of the European Union's founding values is the rule of law (see, to that effect, judgment of 19 July 2016, *H v Council and Commission,* C-455/14 P, EU:C:2016:569, paragraph 41 and the case-law cited).

73 It may be added that Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. It must be recalled that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law (see judgments of 18 December 2014, *Abdida*, C-562/13, EU:C:2014:2453, paragraph 45, and of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 95).

74 While, admittedly, Article 47 of the Charter cannot confer jurisdiction on the Court, where the Treaties exclude it, the principle of effective judicial protection nonetheless implies that the exclusion of the Court's jurisdiction in the field of the CFSP should be interpreted strictly.

75 Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made by Article 24(1) TEU (see, by analogy, judgments of 27 February 2007, *Gestoras Pro Amnistía and Others v Council*, C-354/04 P, EU:C:2007:115, paragraph 53; of 27 February 2007, *Segi and Others v Council*, C-355/04 P, EU:C:2007:116, paragraph 53; of 24 June 2014, *Parliament v Council*, C-658/11, EU:C:2014:2025, paragraph 70; of 12 November 2015, *Elitaliana v Eulex Kosovo*, C-439/13 P, EU:C:2015:753, paragraph 42, and of 19 July 2016, *H v Council and Commission*, C-455/14 P, EU:C:2016:569, paragraph 40).

76 In those circumstances, provided that the Court has, under Article 24(1) TEU and the second paragraph of Article 275 TFEU, jurisdiction *ex ratione materiae* to rule on the validity of European Union acts, that is, in particular, where such acts relate to restrictive measures against natural or legal persons, it would be inconsistent with the system of effective judicial protection established by the Treaties to interpret the latter provision as excluding the possibility that the courts and tribunals of Member States may refer questions to the Court on the validity of Council decisions prescribing the adoption of such measures.

77 Last, the Court must reject the argument that it falls to national courts and tribunals alone to ensure effective judicial protection if the Court has no jurisdiction to give preliminary rulings on the validity of decisions in the field of the CFSP that prescribe the adoption of restrictive measures against natural or legal persons.

78 The necessary coherence of the system of judicial protection requires, in accordance with settled case-law, that when the validity of acts of the European Union institutions is raised before a national court or tribunal, the power to declare such acts invalid should be reserved to the Court under Article 267 TFEU (see, to that effect, judgments of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 17, and of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 62). The same conclusion is imperative with respect

to decisions in the field of the CFSP where the Treaties confer on the Court jurisdiction to review their legality.

79 Moreover, the Court is best placed to give a ruling on the validity of acts of the Union, given that it is open to the Court, within the preliminary ruling procedure, on the one hand, to obtain the observations of Member States and the institutions of the Union whose acts are challenged and, on the other, to request that Member States and the institutions, bodies or agencies of the Union which are not parties to the proceedings provide all the information that the Court considers necessary for the purposes of the case before it (see, to that effect, judgment of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 18).

80 That conclusion is confirmed by the essential objective of Article 267 TFEU, which is to ensure that EU law is applied uniformly by the national courts and tribunals, that objective being equally vital both for the review of legality of decisions prescribing the adoption of restrictive measures against natural or legal persons and for other European Union acts. With respect to such decisions, differences between courts or tribunals of the Member States as to the validity of a European Union act would be liable to jeopardise the very unity of the European Union legal order and to undermine the fundamental requirement of legal certainty (see, by analogy, judgments of 22 February 1990, *Busseni*, C-221/88, EU:C:1990:84, paragraph 15; of 6 December 2005, *Gaston Schul Douane-expediteur*, C-461/03, EU:C:2005:742, paragraph 21, and of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 47).

81 In the light of the foregoing, the answer to Question 1 is that Articles 19, 24 and 40 TEU, Article 275 TFEU, and Article 47 of the Charter must be interpreted as meaning that the Court has jurisdiction to give preliminary rulings, under Article 267 TFEU, on the validity of an act adopted on the basis of provisions relating to the CFSP, such as Decision 2014/512, provided that the request for a preliminary ruling relates either to the monitoring of that decision's compliance with Article 40 TEU, or to reviewing the legality of restrictive measures against natural or legal persons."

355. *Eurobolt BV,* C-644/17, was an interesting constitutional law reference from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) where the CJEU held that a domestic court could seek further information from EU institutions prior to referring a question as to the validity of an EU measure:

"Question 1(a) and (c)

24 By indents (a) and (c) of its first question, the referring court asks, in essence, whether Article 267 TFEU is to be interpreted as meaning that, in order to contest the validity of a piece of secondary EU legislation, an individual may rely before a national court or tribunal on complaints that could be put forward in the context of an action for annulment under Article 263 TFEU, including complaints alleging a failure to satisfy the conditions for adopting that piece of legislation.

25 As is apparent from settled case-law, the jurisdiction of the Court to give preliminary rulings under Article 267 TFEU concerning the validity of acts of the EU institutions cannot be limited by the grounds on which the validity of those measures may be contested (judgments of 12 December 1972, *International Fruit Company and Others*, 21/72 to 24/72, EU:C:1972:115, paragraph 5, and of 16 June 1998, *Racke*, C-162/96, EU:C:1998:293, paragraph 26).

26 Consequently, the answer to indents (a) and (c) of the first question is that Article 267 TFEU must be interpreted as meaning that, in order to contest the validity of a piece of secondary EU legislation, an individual may rely before a national court or tribunal on complaints that could be put forward in the context of an action for annulment under Article 263 TFEU, including complaints alleging a failure to satisfy the conditions for adopting such a piece of legislation.

Question 1(b)

27 By indent (b) of its first question, the referring court asks, in essence, whether Article 267 TFEU, read in conjunction with Article 4(3) TEU, is to be interpreted as meaning that a national court or tribunal is entitled to approach the EU institutions that have taken part in drawing up a piece of secondary EU legislation, the validity of which is being contested before that court or tribunal, in order to obtain information from those institutions regarding the factors which they took or should have taken into consideration when adopting that piece of legislation.

28 It should be borne in mind that national courts may examine the validity of an act of the Union and, if they consider that the grounds which they have raised of their own motion or which have been raised by the parties in support of invalidity are unfounded, they may reject those grounds, concluding that the act is completely valid (see, to that effect, judgments of 16 June 1981, *Salonia*, 126/80, EU:C:1981:136, paragraph 7, and of 22

October 1987, *Foto-Frost,* 314/85, EU:C:1987:452, paragraph 14). By contrast, national courts have no jurisdiction themselves to determine that acts of EU institutions are invalid (judgment of 6 December 2005, *Gaston Schul Douane-expediteur*, C-461/03, EU:C:2005:742, paragraph 17).

29 Accordingly, if the grounds put forward by the parties are sufficient to convince the national court that an act of the Union is invalid, that court should, solely on that basis, question the Court of Justice as to the validity of that act, without investigating further. As can be seen from the judgment of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452, paragraph 18), the Court of Justice is in the best position to decide on the validity of pieces of secondary EU legislation, in so far as the EU institutions whose acts are challenged are entitled, under the second paragraph of Article 23 of the Statute of the Court of Justice of the European Union, to submit written observations to the Court in order to defend the validity of the acts in question. In addition, under the second paragraph of Article 24 of that Statute, the Court may require the institutions, bodies, offices and agencies of the Union not being parties to the case to supply all information which it considers necessary for the purposes of the case before it.

30 That being said, a national court or tribunal is entitled to approach an EU institution, prior to the bringing of proceedings before the Court of Justice, in order to obtain specific information and evidence from that institution which that court or tribunal considers essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned and, thus, avoid making a reference to the Court of Justice for a preliminary ruling for the purpose of assessing validity.

31 In that regard, it is apparent from the case-law of the Court of Justice that the EU institutions are under a duty of sincere cooperation with the judicial authorities of the Member States, which are responsible for ensuring that EU law is applied and respected in the national legal system. On that basis, those institutions must, pursuant to Article 4(3) TEU, provide those authorities with the evidence and documents which have been asked of them in the exercise of their powers, unless the refusal to provide these is justified by legitimate reasons based, *inter alia*, on protecting the rights of third parties or the risk of an impediment to the functioning or the independence of the Union (see, to that effect, order of 6 December 1990, *Zwartveld and Others*, C-2/88-IMM, EU:C:1990:440, paragraphs 10 and 11).

32 Consequently, the answer to indent (b) of the first question is that Article 267 TFEU, read in conjunction with Article 4(3) TEU, must be interpreted as meaning that a national court or tribunal is entitled, prior to bringing proceedings before the Court of Justice, to approach the EU institutions that have taken part in drawing up a piece of secondary EU legislation, the validity of which is being contested before that court or tribunal, in order to obtain specific information and evidence from those institutions which it considers essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned and so that it may avoid referring a question to the Court of Justice for a preliminary ruling for the purpose of assessing the validity of that act."

356. *Région de Bruxelles-Capitale*, C-352/19, was a case where the Court of Justice upheld the General Court and rejected the opinion of the Advocate-General, in holding a direct action inadmissible. The following parts of this complex decision appear relevant (some emphasis added):

"18 It should be borne in mind that an action by a local or regional entity cannot be treated in the same way as an action by a Member State and must therefore satisfy the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU (see, to that effect, judgment of 2 May 2006, *Regione Siciliana v Commission*, C–417/04 P, EU:C:2006:282, paragraphs 21 to 24).

19 That provision makes the admissibility of an action brought by a natural or legal person against a decision which is not addressed to him or her, as is the case here for the Brussels Capital Region, subject to the condition that the decision is of direct and individual concern to that person or, if it is a regulatory act, that that act is of direct concern to that person and that the regulatory act does not entail implementing measures.

20 In the present case, the General Court, hearing an objection of inadmissibility on the basis of the Brussels Capital Region's lack of standing to seek the annulment of the act at issue, limited its examination to the question whether the Brussels Capital Region was directly concerned by that act and ruled, in the order under appeal, that that condition was not satisfied.

21 In support of its appeal against that order, the Brussels Capital Region raises two grounds of appeal, alleging, first, the failure to have regard to the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European

Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention') and, second, that the General Court erred in finding that it was not directly affected by the act at issue.

The first ground of appeal, alleging failure to have regard to the Aarhus Convention

…

25 With regard to the first part of the first ground of appeal, it should be borne in mind that, although, under the second paragraph of Article 216 TFEU, agreements concluded by the European Union bind its institutions and therefore prevail over the acts laid down by those institutions (judgments of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraph 42; of 21 December 2011, *Air Transport Association of America and Others,* C-366/10, EU:C:2011:864, paragraph 50 and the case-law cited; and of 13 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, C-404/12 P and C-405/12 P, EU:C:2015:5, paragraph 44), those international agreements cannot prevail over EU primary law.

26 It follows that Article 9 of the Aarhus Convention cannot have the effect of modifying the conditions of admissibility of actions for annulment laid down in the fourth paragraph of Article 263 TFEU.

27 In those circumstances, the first part of the first ground of appeal, alleging that the General Court assessed the admissibility of the action without taking account of the Aarhus Convention, must be dismissed.

28 In addition, since the argument based on the General Court's refusal to take account of Article 9 of the Aarhus Convention must be rejected, the criticism of the grounds on which, in paragraph 37 of the order under appeal, the General Court disregarded that argument is ineffective. Consequently, the second part of the first ground of appeal must be dismissed.

29 It follows from the foregoing that the first ground of appeal must be dismissed.

The second ground of appeal, alleging that the General Court erred in finding that the appellant was not directly concerned by the act at issue

30 At the outset, it should be borne in mind that it is settled case-law of the Court that the condition of 'direct concern' means that the measure must, first, directly affect the legal situation of the individual and, second, leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules (see, to that effect, judgments of 5 May 1998, *Glencore Grain v Commission*, C–404/96 P, EU:C:1998:196, paragraph 41, and of 5 November 2019, *ECB and Others v Trasta Komercbanka and Others,* C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 103).

...

Third part of the second ground of appeal

...

50 In the first place, it follows from the case-law cited in paragraph 30 of this judgment that one of the two cumulative conditions for establishing that a measure directly affects an individual is that it leaves no discretion to the addressees of that measure who are entrusted with the task of implementing it.

51 As the General Court pointed out in paragraph 61 of the order under appeal, where a Member State receives an application for authorisation to place on the market a plant protection product already authorised for that use by another Member State, it is not required to grant it, since, first, Article 41(1) of Regulation No 1107/2009 allows it to take account of the circumstances in its territory and, second, Article 36(3) of that regulation, to which Article 41 of that regulation refers, states (i) that it may impose risk mitigation measures relating to human or animal health or the environment and (ii) that it may even refuse to issue an authorisation where risk mitigation measures cannot meet the concerns of that Member State due to its specific environmental or agricultural circumstances. The General Court therefore rightly held that the mutual recognition procedure does not create an automatic mechanism and leaves a discretion to the Member State which receives a request for mutual recognition.

52 It follows from the foregoing that the appellant is not justified in complaining that, in that regard, the General Court erred in law and vitiated its assessment by a failure to state sufficient reasons.

53 In the second place and in any event, contrary to what the appellant maintains, the General Court rightly held that the effects of the mutual recognition procedure are not themselves the direct consequence of the act at issue. It must be observed that the approval of an active substance is only one of the requirements, listed in Article 29(1) of Regulation No 1107/2009, to which the authorisation to place on the market a plant protection product

containing that active substance is subject. Moreover, the issuance of such an authorisation in one Member State does not of itself entail authorisation in other Member States, since Article 40 of that regulation provides, subject to the conditions which it lays down, that the holder of an authorisation granted in one Member State may, under the mutual recognition procedure, apply for an authorisation for the same plant protection product in another Member State. Lastly, and as was explained in the previous paragraph, the latter Member State is not obliged to grant that authorisation in all circumstances.

54 It follows from the foregoing that the third part of the second ground of appeal must be dismissed.

The fourth part of the second ground of appeal

...

62 In the first place, the fact that, according to the appellant, the General Court misinterpreted its own case-law does not in itself constitute an error of law on which an appeal could be based. Moreover, the claim alleging a confusion between the criteria of direct concern and individual concern is not accompanied by any details making it possible to assess its merits and therefore must be rejected.

63 In the second place, it should be noted that the legality - contested in the context of an appeal before the *Conseil d'État* (Council of State) - of the Decree of 10 November 2016 cannot in any event be affected by the act at issue, since that act was adopted after the date of adoption of that decree. In addition, neither the risk of an action for a declaration of failure to fulfil obligations at the initiative of the Commission, alluded to in the appeal, nor doubts as to the validity of the scheme prohibiting the use of pesticides containing glyphosate in the light of the Belgian Constitution, whose link with the act at issue the appellant does not make clear, are such as to establish that it is directly concerned by that act. In those circumstances, the appellant does not establish that the act at issue would pose a risk to that prohibition scheme.

64 In the third place, it is apparent from the case-law of the Court referred to in paragraph 30 of this judgment that the condition of 'direct concern' means *inter alia* that the measure in question must directly affect the legal situation of the natural or legal person who intends to bring an action under the fourth paragraph of Article 263 TFEU. Thus, such a condition must be assessed only with regard to the legal effects of the measure, the possible political effects of that measure not having any bearing on that assessment. Consequently, such an argument must be rejected.

65 In the fourth place, the appellant's argument based on the judgment of 13 December 2018, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v Commission* (T-339/16, T-352/16 and T-391/16, EU:T:2018:927), does not explain how the fact, even if it were established, that the solution adopted in the order under appeal contradicts that judgment would in itself be such as to render that order unlawful. This claim must therefore also be rejected.

66 In the fifth place, although the Brussels Capital Region complains that the General Court did not examine its argument that the act at issue directly affects its legal position by maintaining the legal interest in bringing proceedings of the authors of the actions for annulment against the Decree of 10 November 2016, it should be noted that that argument was submitted by the appellant only in its response to the objection of inadmissibility raised by the Commission. Consequently, it cannot be regarded as a plea which the General Court was required to examine. Accordingly, the complaint must be rejected.

67 It follows from the foregoing that the fourth part of the second ground of appeal and the appeal in its entirety must be dismissed."

357. Overall there is precious little sign of any flexibility there as to the requirement of direct and individual concern.

358. Finally, the court's recent discussion in the judgment of 11 January 2024, *Friends of the Irish Environment,* C-330/22, ECLI:EU:C:2024:19 is also instructive:

"Admissibility

41 By its first question, the referring court asks, in essence, whether the present request for a preliminary ruling, concerning the validity of Regulation 2020/123, is necessary, when that regulation and the national measures implementing it, at issue in the main proceedings, are no longer applicable. It therefore calls on the Court, in essence, to rule on the admissibility of that request.

42 In that regard, the defendants in the main proceedings submit that the said request is inadmissible. In their view, first, having regard to the expiry of the period of application of Regulation 2020/123 and of the fisheries management opinions at issue in the main proceedings, the questions raised by that case are hypothetical, within the meaning of the case-law of the Court. Second, they submit that, in answering those questions, the Court

would be assessing the validity of Regulation 2020/123 outside the two-month period provided for in Article 263 TFEU and that it would be without the benefit of the full factual material necessary for its answer, which would have been available to it in an action based on that article.

43 It is apparent from settled case-law of the Court that, when a question on the validity of a measure adopted by the institutions of the European Union is raised before a national court or tribunal, it is for that court or tribunal to decide whether a preliminary ruling on the matter is necessary to enable it to give judgment and consequently whether it should ask the Court to rule on that question. Consequently, where the questions referred by the national court or tribunal concern the validity of a provision of EU law, the Court is, as a general rule, obliged to give a ruling (judgment of 28 March 2017, *Rosneft,* C-72/15, EU:C:2017:236, paragraph 49 and the case-law cited).

44 Thus, the Court may refuse to give a ruling on a question referred for a preliminary ruling on determination of validity only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure of the Court of Justice, are not satisfied or where it is quite obvious that the assessment of the validity of a provision of EU law which is sought by the national court bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 50 and the case-law cited).

45 In particular, in the light of the spirit of cooperation which must prevail in the operation of the preliminary reference procedure and in accordance with Article 94(c) of those rules, it is essential that the national court set out in its order for reference the precise reasons which led it to question the validity of certain provisions of EU law and the grounds of invalidity which appear to it capable of being upheld (see, to that effect, judgments of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 31, and of 4 May 2016, *Pillbox* 38, C-477/14, EU:C:2016:324, paragraphs 24 and 25 and the case-law cited).

46 In that regard, as is apparent from the grounds of the request for a preliminary ruling, the referring court considers, in the light of national case-law, that it is for it to examine the action in the main proceedings, notwithstanding the fact that Regulation 2020/123 and the fisheries management opinions being challenged in that action are no longer applicable. In particular, it considers that the temporary nature of those acts makes it impossible to challenge them during their limited period of validity.

47 In the first place, it is not for the Court to call into question the referring court's assessment of the admissibility of the action in the main proceedings, which falls, in the context of the preliminary ruling proceedings, within the jurisdiction of the national court. In the present case, the referring court rejected the objections of admissibility raised before it by the defendants in the main proceedings concerning the mootness of the said action, within the meaning of national law. In addition, the fact that the period of application of the fisheries management opinions at issue in the action in the main proceedings has expired does not prevent the Court from ruling on a question referred for a preliminary ruling, provided that such an action is permitted under national law and that the question meets an objective need for the purpose of settling the dispute properly brought before the referring court (see, to that effect, judgment of 10 December 2018*, Wightman and Others*, C-621/18, EU:C:2018:999, paragraphs 30 and 31 and the case-law cited).

48 In the second place, in terms of the expiry of the period of application of the TACs at issue, suffice it to note, first, that the fisheries management opinions being challenged in the action in the main proceedings were adopted on the basis of those TACs, second, that they were in force on the date on which those opinions were adopted and, third, that their invalidity is invoked, incidentally, in support of the said action. It follows that the expiry of the period of application of the said TACs cannot render inadmissible a question relating to their validity, since that question meets an objective need for the purpose of settling the dispute properly brought before the referring court.

49 Those considerations cannot be called into question by the line of argument of the defendants in the main proceedings according to which the Court would then be assessing the validity of Regulation 2020/123 outside the two-month period provided for in Article 263 TFEU and without the benefit of the full factual material necessary for its answer, which would have been available to it in an action for annulment.

50 It is sufficient to recall that it is inherent in the complete system of legal remedies and procedures established by the FEU Treaty in Articles 263 and 277 thereof, on the one hand, and in Article 267 thereof, on the other, that persons bringing proceedings must, when an action is brought before a national court or tribunal, have the right to challenge the legality of provisions contained in European Union acts on which a decision or national

measure adopted in respect of them is based, pleading the invalidity of that decision or measure, in order that the national court or tribunal, having itself no jurisdiction to declare such invalidity, consults the Court on that matter by means of a reference for a preliminary ruling, unless those persons unquestionably had the right to bring an action against those provisions on the basis of Article 263 TFEU and failed to exercise that right within the period prescribed (judgment of 28 March 2017*, Rosneft*, C-72/15, EU:C:2017:236, paragraphs 66 and 67 and the case-law cited). It does not appear that FIE would unquestionably have been entitled to bring an action for annulment under Article 263 TFEU against the TACs at issue, which the defendants in the main proceedings do not dispute.

51 In the third place, as paragraphs 35 to 38 of the present judgment illustrate, in the order for reference, the referring court set out, with all due precision, the reasons why it had serious doubts as to the validity of the TACs at issue, on the ground that they did not comply with the ICES advice, recommending a zero-catch level for the stocks mentioned in paragraph 28 of the present judgment. Thus, the referring court has provided the Court with the necessary information on the reasons why it considers the request for a preliminary ruling relevant for the purpose of settling the dispute brought before it.

52 In the light of all the foregoing considerations, it must be held that the request for a preliminary ruling is admissible."

359. The Court of Appeal, upholding the order dismissing the proceedings in Friends of the Irish Environment [2020] IEHC 383, effectively identified the ratio as being the lack of a "genuine" domestic dispute capable of grounding a reference to the CJEU. Insofar as the rest of Simons J.'s remarks are therefore *obiter*, perhaps a few respectful footnotes might be added.

360. Summarising a few of the foregoing cases in *Friends of the Irish Environment*, Simons J. said at para. 59 that:

> "As appears from the foregoing discussion of the case law, the limitation upon the use of the preliminary reference procedure to question the validity of EU measures has long since been recognised. The procedure will not be available in the absence of national implementing measures or decisions which are capable of forming the basis of an action before the national court. The approach adopted to any 'gap' in effective judicial protection arising has been to advocate for a less stringent application of the standing requirement under Article 263 (as opposed to a wider availability of the preliminary reference procedure under Article 267 TFEU)."

361. Summaries can be necessarily incomplete so a few points are worth noting. Firstly while it is correct to say that the limitation of art. 267 has long been recognised, the main limitation has been that it is not available to challenge a measure if an applicant could have brought a direct action. The "limitation" of not being able to make a direct, abstract, challenge to a legislative measure alone without a genuine domestic dispute has been more of a side-note in the caselaw, although latterly a part of it for sure. But rather the preponderance of caselaw emphasises the "complete" system of judicial protection. Multiple cases envisage creative ways in which an EU law measure can be challenged even in the absence of an existing implementing measure, such as in anticipation of such a measure, or by calling for a measure to be adopted. So it would be over-simplistic to say that the procedure of a reference "will not be available" in the absence of a national measure or decision. Indeed the ECJ expressly said the contrary in *British American Tobacco* - what is required is a "genuine dispute", not an implementing measure.

362. As regards a less stringent application of standing to avoid any gap, there is no evidence for this in the caselaw. The bar to launch a direct action has remained consistently high.

363. In making the suggestion about a less stringent approach to standing, Simons J. appears to have placed heavy reliance on the opinion of the Advocate-General in *Région de Bruxelles-Capitale* C-352/19. He says:

> "57. The State respondents have identified, in their supplemental written legal submissions of 20 July 2020, a very recent Advocate General's Opinion on the issue of standing, Case C-352/19 P, *Région de Bruxelles-Capitale*. The proceedings involved a challenge to a regulatory act not entailing implementing measures. As such, the less stringent requirement of "direct concern" applied. The Advocate General, in concluding that the applicant met this standing requirement, emphasised that the absence of national implementing measures had the consequence that the possibility of raising the validity of the EU act in proceedings before the national courts were limited. In effect, the applicants would have to infringe the provisions of national law, and then plead invalidity in response to proceedings taken *against* them.
>
> '168. According to settled case-law, the expression 'does not entail implementing measures' must be interpreted in the light of the objective of that provision, which, as is apparent from its drafting history, is to ensure that individuals do not have to break the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural

> or legal person without requiring implementing measures, that person could be denied effective judicial protection if he or she did not have a direct legal remedy before the EU Courts for the purpose of challenging the lawfulness of the regulatory act. In the absence of implementing measures, a natural or legal person, although directly concerned by the act in question, would be able to obtain judicial review of the act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national court.'*
>
> *Footnote omitted.
>
> 58. The Advocate General adopts the approach that the standing rules under Article 263 TFEU should be interpreted so as to fill the gap in the system of judicial remedies with regard to those cases where the indirect review of European Union acts, i.e. *via* the preliminary reference procedure; is impossible or would be artificial. Applicants should not be expected to create artificial litigation, i.e. by breaching national law, in order to challenge national acts that, if it were not for the breach of law, would have never come into existence. Rather, they should be able to invoke Article 263 TFEU."

364. Unfortunately for this argument, the Advocate-General's view which seems to have influenced Simons J. was rejected by the Court of Justice (some weeks after Simons J.'s judgment - a point obliquely acknowledged in para. 31 of the IFA's submission in the present case, quoted above, by the use of the word "subsequent"), which instead of reversing the Court of First Instance as seemingly anticipated by Simons J. and as proposed in the Advocate-General's Opinion, dismissed the appeal on the basis that the action was inadmissible because the appellant lacked standing. One can but sympathise - prediction is difficult, especially about the future (to quote an "old Danish proverb" (W. J. Moore, *Schrödinger, Life and Thought* (Cambridge University Press, Cambridge, 1989), p. 320) in turn apparently quoted by Neils Bohr (Arthur K. Ellis, *Teaching and Learning Elementary Social Studies* (Newton Mass., Allyn and Bacon, 1970), p. 431): see https://web.archive.org/web/20231225140043/http://chaosbook.blogspot.com/2010/06/lundskovdk-citater.html).

365. Simons J. went on to say at para. 74 that:

> "Whereas there has been much discussion in the case law of the limitations upon the availability of the preliminary reference procedure, and the direct action procedure, respectively, the case law does not allow for a freestanding procedure whereby an applicant can utilise the preliminary reference procedure to launch a challenge to a piece of EU legislation notwithstanding the absence of any national implementing measures or decisions."

366. As we have seen, national implementing measures are not inherently indispensable to a reference. And whether the Commission act there was technically "a piece of EU legislation" may be something for discussion. Cases like *Inuit Tapiriit Kanatami* make clear that there is not a right to bring a free-standing challenge in domestic courts to a *legislative* act, separate from any dispute capable of otherwise being litigated in domestic law, but that doctrine doesn't necessarily apply on its own terms to *non-legislative* acts. That doesn't at all mean to suggest that Simons J. was off track to say that a reference was unavailable in *Friends* due to the lack of a domestic dispute. There must still be a genuine dispute capable of being litigated domestically, as the Court of Appeal found. How the CJEU would characterise an attempted free-standing challenge to a non-legislative act may be something for a future case but doesn't arise here.

367. Even if I am wrong about any or all of those glosses to *Friends*, it doesn't matter. The present action isn't a case where the applicant brings an abstract or free-standing challenge to EU measures without reference to domestic implementation or a dispute in national law. The State and IFA have simply conveniently adverted to snippets of the *Friends* case taken utterly out of context, with no discernible regard to the actual content or to the fact that the case deals with a scenario that is totally irrelevant here. Apart from anything else, we've seen above that the ministerial amending GAP regulations of 2022 provide for extensive domestic administrative law consequences to be expressly taken "under" the Commission decision.

368. On the present facts, it is not only not unquestionably clear that the applicant could have proceeded under art. 263 TFEU, it is effectively certain that it couldn't have. The protestations of the State and IFA to the contrary are formulaic, and fail to acknowledge the obviously insuperable obstacles that the applicant would have faced in such an action. Textbook examples of "sending the fool further" don't come better than this – condemning an applicant for taking one procedure on the grounds that she didn't take a different procedure, which would have been even more problematic.

369. For all of these reasons, a reference would be the appropriate mechanism to address this issue, if that becomes necessary. A reference is not inappropriate in principle if for no other reason than that a direct action was unavailable to this applicant, and there is a genuine domestic dispute which for good measure involved relevant domestic implementing measures.

370. The State's side note to the effect that recital 16 to the Commission decision asserts that the nitrates directive will be complied with doesn't make that recital unchallengeable. Rather it reinforces the need for a reference, should that arise. Whether the recital is an overly submissive response to the government's application for a derogation would be a matter for the CJEU in the hypothetical event of a reference - the existence of the recital is not some kind of fundamental stumbling block for the applicant's case either now or later, given that that case includes a request for a determination by the CJEU of the validity of the decision.

371. That recital or any issue related to the content of an EU institutional act can't preclude a reference that would otherwise be appropriate and permissible.

372. What's odd about the State's reliance on *Masterfoods*, C-344/98, is that the submission only quotes a snippet of text - for some unexplained reason the submission attributes this to"§§51–52" but the wording occurs entirely in para. 52. The quoted part is that it is "… important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance."

373. There the State's quotation ends. But, just for curiosity, let's read on -

> "54. Moreover, if a national court has doubts as to the validity or interpretation of an act of a Community institution it may, or must, in accordance with the second and third paragraphs of Article 177 of the Treaty, refer a question to the Court of Justice for a preliminary ruling."

374. Wait, what? The "national court ... may, or must ... refer"? Isn't that the very thing the State is saying *can't* happen in such a situation?

375. The ECJ went on to reinforce this point - the reference can happen even a direct action has got underway:

> "55. If, as here in the main proceedings, the addressee of a Commission decision has, within the period prescribed in the fifth paragraph of Article 173 of the Treaty, brought an action for annulment of that decision pursuant to that article, it is for the national court to decide whether to stay proceedings until a definitive decision has been given in the action for annulment or in order to refer a question to the Court for a preliminary ruling."

376. It repeated the point that a reference is an option:

> "57. When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted."

377. And:

> "59. In this case it appears from the order for reference that the maintenance in force of the permanent injunction granted by the High Court restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB depends on the validity of Decision 98/531. It therefore follows from the obligation of sincere cooperation that the national court should stay proceedings pending final judgment in the action for annulment by the Community Courts unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.
>
> 60. The answer to Question 1 must therefore be that, where a national court is ruling on an agreement or practice the compatibility of which with Articles 85(1) and 86 of the Treaty is already the subject of a Commission decision, it cannot take a decision running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance. If the addressee of the Commission decision has, within the period prescribed in the fifth paragraph of Article 173 of the Treaty, brought an action for annulment of that decision, it is for the national court to decide whether to stay proceedings pending final judgment in that action for annulment or in order to refer a question to the Court for a preliminary ruling."

378. Leaving the State's submission there, and turning finally to the IFA's two main points, the first was that the question of a reference should be postponed until after the determination of any domestic law issues. I agree, which is why we are going to have a Module II on interpretation and facts before we get to EU law points. Their second point is that a reference is unnecessary because the EU law issues are *acte clair*. I by no means rule that out, but deciding it now is inconsistent with the first point. Let's get through the evidential phase first and then see what EU law issues, if any, remain - then we can meaningfully talk about whether they are *acte clair* or not.

Summary of the right to refer a question regarding the validity of an EU institutional act

379. To summarise the right to refer the issue of the validity of an act of an EU institution:

(i) The provisions of the treaties constitute a complete system of judicial protection and review of EU institutional acts. It is for the national courts to ensure that there exist legal remedies sufficient to ensure effective judicial protection and thus to construe national legislation and jurisdictions in a way that gives effect to this complete system insofar as possible.

(ii) A domestic court is free to uphold the validity of an EU institutional act, and may seek information from relevant EU institutions with a view to assuaging its doubts prior to deciding to do so.

(iii) It cannot however rule such an act to be invalid. Instead a domestic court can refer to the CJEU any issue as to the validity of an act of EU institutions, subject to two basic conditions:

(a). It can do so only in the context of a genuine dispute capable of being litigated in domestic law. This does not require that implementing measures have been adopted, and could include any form of action capable of being domestically litigated, for example:

1. common or garden *certiorari* of, or declarations addressed to, domestic legally binding transposing or implementing measures;
2. a situation where the EU measure is being implemented administratively rather than through legislative transposition (*certiorari* of administrative acts);
3. where implementing measures are anticipated and the applicant wishes to prohibit this from occurring (prohibition or injunctive relief); or
4. where the applicant calls on the national authorities to carry out an act or adopt a decision or measure by reference to the EU instrument, or related domestic law, thereby enabling the applicant to challenge the EU measure indirectly (*mandamus* or declaratory relief if the request for action to be taken is refused, *certiorari* or declaratory relief if it is granted).

However an applicant doesn't have an EU law right to bring a free-standing challenge independent of any genuine dispute capable of being litigated in domestic law (or at least this condition applies insofar as concerns a legislative measure).

(b). An applicant who has unquestionably met the extremely restrictive requirements for a direct action under art. 263 is precluded from seeking such a reference, but this only arises in extremely limited circumstances in practice. The highly restrictive interpretations of the requirement of direct and individual concern remain operative and any attempts at General Court or Advocate-General level to dilute these have been rejected by the Court of Justice.

380. Consequentially, most of the issues under this heading don't arise, specifically Issues 72 to 74 and Issue 76. The remaining issues can essentially be combined into a single issue.

Issue 72

381. Issue 72 is:

"Alternatively, if the Commission findings cannot be directly differed from by the court, can the court nonetheless refer a question to the CJEU as to the correctness in fact or in law of such findings? PLEADING-TYPE ISSUE"

382. The applicant submitted:

"The Applicant submits that this Court could in principle refer a question as to the correctness in fact or in law of such findings, in line with the jurisprudence set out above in response to Issue 71.

The Applicant understands this question to refer to the recitals, which is a separate issue to the question proposed by the Applicant, as to the continuing validity of the Commission decision where the 'context' for the continued application of the Commission Decision no longer applies."

383. The State submitted:

"The Court, in these proceedings, may not refer a question to the CJEU as to the correctness in fact or in law of the findings in the Commission Decision as no relevant part of the dispute currently engaging the High Court requires determination by addressing the allegation of invalidity of the Commission Decision in that respect.

The starting point is that the Commission Decision is binding. The Applicant has not pleaded any relevant grounds which put in issue the findings of fact or law in the Commission Decision. There is no obligation upon this Court, and no principle of EU law requiring this Court, to identify any such grounds for the Applicant and raise them of its own motion such that there could, potentially, be a dispute which could, potentially, raise a question of the validity of a measure of EU law warranting an Article 267 TFEU reference to the CJEU. The Respondents rely on C-721/21 *Eco Advocacy* EU:C:2023:477, §§28–29. This is not a case where there is inadequate or unparticularised pleas. There are no pleas at all directly impugning the Commission Decision.

In the present case, therefore, and where there is no relevant pleaded case as to the correctness in fact or in law of the Commission's findings, there is consequently no dispute before this Court on those findings, as regards which it is necessary to obtain a ruling from the CJEU. This Court does not have jurisdiction to refer a question to the CJEU on a matter in which there is no dispute between the parties. The Respondents rely on the *dictum* in *Dempsey v an Bord Pleanála* [2020] IEHC 462, where Simons J stated that (§22) 'EU law does not require national courts to exceed their sphere of competence to achieve the objectives of the EIA Directive (or indeed any EU legislation)…', and the case-law cited in that judgment on this issue.

In that respect, it is well established that under Article 267 TFEU, a national court may refer a question to the CJEU for a preliminary ruling only where necessary to enable the court to give judgment. The Supreme Court has described the general operation of Article 267 TFEU by national courts in the following terms:

> 'The reason why a reference might be required would be that, to a greater or lesser extent, the question of whether relief should be granted or refused (or where granted, the nature of the relief appropriate) might depend at least in part on a contested question of EU law whose resolution was necessary to the final determination of the proceedings, in circumstances where the issue of EU law concerned was not *acte clair* in the sense in which that term is used in the jurisprudence of the CJEU.' [*Data Protection Commissioner & Anor. v. Facebook Ireland Ltd. & Anor.* [2019] 3 IR 255, p. 263, per Clarke CJ.]

Moreover, the need for an answer from the CJEU 'presupposes that there is a controversy pending before the national court, the resolution of which is dependent on the response to the reference' [*Friends of the Irish Environment CLG v. Minister for Communications, Climate Action, and the Environment & Ors.* [2022] IECA 298, §29, per Noonan J referring to the judgment of the High Court, per Simons J ([2020] IEHC 383).].

The Applicant does not allege that the NAP and the GAP Regulations are invalid because the Commission Decision is invalid. Rather, it claims the opposite; that the alleged invalidity of the NAP will render the Commission Decision invalid. The Applicant rightly accepts that 'this Core Ground is consequential on the Applicant succeeding in having the NAP quashed'(§64).

The Applicant pleads no other cases regarding identified grounds of purported invalidity of the Commission Decision. That is a fundamental prerequisite to engaging the jurisdiction of this Court and, in turn, the jurisdiction of the CJEU to consider questions of the validity of an EU measure referred to it."

384. My decision on this issue is that this doesn't arise having regard to the outcome of Issue 71.

Issue 73

385. Issue 73 is:

"Even if the Commission derogation decision is binding for the purposes of the proceedings, is the statement in recitals that it is without prejudice to the habitats directive sufficient to enable the applicant to advance arguments related to that issue? PLEADING-TYPE ISSUE"

386. The applicant submitted:

"Yes. It is clear that the Commission did not proceed on the basis that Habitats issues were resolved.

Contrary to what is asserted by the State in its response, the reference sought is based on the question of the continuing validity of the Commission decision where the 'context' for the continued application of the Commission Decision no longer applies."

387. The State submitted:

"A distinction must be drawn between an argument properly advanced under the Habitats Directive with respect to the assessment of the NAP under Article 6(3), and an argument stated to be advanced under the Habitats Directive, but that in fact involves a collateral challenge to the compliance of the Derogation with Ireland's obligations under the Nitrates Directive or Article 11 WFD, and thus a collateral challenge to the Commission's Decision.

The former is permissible; the latter is not. This would be the case irrespective of the inclusion of Recital 23 of the Commission Decision.

The Applicant's pleaded case under the Habitats Directive and the WFD seeks to call into question the compliance of the Derogation with Ireland's obligations under the Nitrates Directive and Article 11 WFD, and thus the correctness of the Commission Decision, and is therefore precluded."

388. My decision on this issue is that this doesn't arise having regard to the outcome of Issue 71.

Conclusion on Core Ground 4

389. The implications of the foregoing for Core Ground 4 are that the ground can proceed subject to the above comments. I would note however that in the possibly unlikely event that the *Eurobolt*

jurisdiction arises, it might be prudent to make provision for this as a sub-issue, and have amended the issue paper accordingly.

Summary and next steps

390. Argued law is tough law (*Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16-17 *per* Megarry J.). One of the glories of academic life is that one can skip straight to the senior common room, teacup in hand, armchair chat about the substance of legal questions. In the forensic context, for an applicant to even get to that stage, let alone to overcome it, she has to first pass through at least two bruising qualifying rounds - the point must be properly pleaded, and it must properly arise on the facts.

391. Here the applicant has come through the first round essentially intact. Its pleadings have held up reasonably well, and while the State did make a couple of minor valid criticisms amidst the deluge of ineffective or premature ones, they aren't fatal because the points being made are acceptably clear. Getting through the first qualifying leg has been laborious enough (I can possibly be allowed to indiscreetly say that the present judgment has gone through a recent personal record 48 drafts at this stage), but the one consolation is that, all going well, the number of issues should be on a downward curve.

392. Having successfully played defence in the first round, roles with the opposing parties are to be reversed and the applicant must now switch to offence by demonstrating that its various legal points are properly factually grounded in uncontradicted averments (or that any purported contradiction is not properly evidential or outweighing). To say the least, discharging the burden of proof in a conflict of affidavits, without cross-examination, isn't always easy, and many a judicial review applicant has come a cropper at this stage in the past - it was a background factor in cases such as *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705 for example. No doubt we can look forward to a lively contest on this issue in the present case.

393. As mentioned above, Schedule I to this judgment records the issue paper as of 18th December, 2023.

394. I now set out in Schedule II a revised issue paper incorporating what appear to be the remaining issues, subject to any further or contrary submissions. In revising the issue paper I have classed as redundant the largely duplicative preliminary issues which have been covered in this judgment, but have also rearranged and amplified the wording of the questions in an attempt to have a more structured conversation in later modules. Insofar as the "preliminary" issues raised matters best dealt with later, these are now all covered by some other substantive question in the revised issue paper.

395. To make clear that all of the challenges are being dealt with one way or the other, I set out in Schedule III a table showing how the various grounds raised by the applicant are being addressed in the revised issue paper. Again I am open to submissions to the contrary if necessary. Some of the grounds give rise to a range of issues but I have only recorded in Schedule III the issue to which they initially relate, simply in order to make clear that they are covered somewhere in the issue paper.

396. Subject to any contrary submission, the sequence in which I would now propose to address the remaining issues would be in accordance with the following algorithm:

(i) There will need to be a Module II on interpretation and evidential-type issues (not substantive EU law issues), so I will invite the parties to make written submissions on those matters, identified in Schedule II as the issues that are both bold and underlined. However parties will have to pick up the pace considerably in relation to submissions - the 2 month gap between the agreement of the issue paper in December 2023 and the final set of submissions in February 2024 is ideally not to be repeated.

(ii) The applicant and the State will have 10 days from the date of this judgment to deliver simultaneous written submissions on such issues, with the notice parties having a further 4 days thereafter to make their submissions. All submissions should address the issues on a question-by-question basis with appropriate headings, in relation to any issues on which the relevant party wishes to make submissions. Where questions are divided into sub-parts (e.g., (a), (b) and so on), each sub-part should be given a separate and distinct heading in the written submissions. While there is no problem with parts of such submissions referring to the answers in other parts of the same document rather than setting them out *in extenso*, it would be more convenient for the court if the submission did not merely reference submissions made at earlier stages of the case but set out the full legal submission (relevant to the particular issue concerned) *in extenso* within the forthcoming submission itself. The notice parties are more than welcome to merely adopt some or all of the State's submission either summarily or on the basis of general comments, as they have done before and are not obliged to comment further, but if they wish to make issue-specific comments they might do so with appropriate headings. Insofar as evidential propositions are concerned, the applicant will need to be very precise on identifying the specific averments supporting the

proposition in question, if they exist, and the opposing parties will need to be equally clear on where they have contested the issue, if they have. It will also need to be made clear that any relevant averments are genuinely evidential and not argumentative, assertions of the ultimate issue, submissions-in-sheep's clothing, or otherwise inadmissible, vacuous, or non-determinative of the issue.

(iii) While previously the parties agreed *inter se* to an extension of the timelines for submissions, in the interests of making progress in this case any further proposals for agreed extensions must be submitted for advance approval by the court.

(iv) If the parties so request, there will be an oral hearing for Module II.

(v) The matter will be listed for mention shortly to fix a date in that regard if any party wishes to have such a hearing. While I have an open mind as to the duration of this hearing if any (it could be anything from dispensing with a further hearing altogether, to a Monday afternoon to a couple of days or something in between) and welcome proposals in this regard, it would need to be reasonably proximate - a timescale of weeks rather than months from now is what I had in mind ideally.

(vi) Depending on the extent if any to which substantive EU law issues remain after the evidential phase, one could then envisage a subsequent Module III confined to EU law issues, and analogous directions in that regard will be given when judgment on Module II is delivered if and to the extent that the necessity for a Module III arises.

(vii) Hypothetically there could be a final Module IV on remedies in the (obviously contested) event that the outcome of Modules II and III is such that the question of a remedy arises for consideration.

Order

397. The order made on 15th December, 2023, was that:

(i) the matter be listed for mention on Monday 18th December, 2023, to finalise the issue paper;

(ii) the parties be required to upload word versions of their affidavits to ShareFile in accordance with PD HC124 by Friday 19th January, 2024;

(iii) the State be directed to submit to the court and upload to ShareFile by Friday 26th January, 2024, written legal submissions on a sequential heading-by-heading basis addressing the apparently agreed and pleading issues:

(a). confirming that there is no dispute required to be determined by the court in relation to the issues marked as apparently agreed; and

(b). setting out their submissions, including specific authorities and references, as to the issues identified as pleading issues in the issue paper;

(iv) the notice parties would do likewise by Friday 2nd February, 2024;

(v) the applicant do likewise by Tuesday 13th February, 2024, at which point judgment would stand reserved; and

(vi) costs of the proceedings to date be reserved.

398. For the foregoing reasons, it is now ordered that:

(i) the pleading/evidential-type issues and ostensibly agreed issues be disposed of as set out in the judgment;

(ii) the issue paper for future modules be reworded as set out in Schedule II to this judgment, with liberty to make any contrary proposal on the mention date of 11th March, 2024;

(iii) the parties be directed to make written submissions on the Module II issues by the timelines set out in the judgment;

(iv) the parties be directed to liaise with the List Registrar to set up sub-folders within each main existing ShareFile folder, to separate Module I papers (existing papers not directly relevant now) from Module II papers (papers relevant to the next module);

(v) all affidavits relevant to Module II be made available in the relevant sub-folder in Word document format;

(vi) the matter be listed for mention on Monday 11th March, 2024, for the purpose of fixing a date for a potential oral hearing of Module II, if requested, as envisaged by the next steps algorithm (in which regard the parties are invited to suggest proximate dates and durations for consideration); and

(vii) costs of the proceedings to date be reserved, subject to liberty to apply.

SCHEDULE I – ISSUE PAPER AS OF 18TH DECEMBER, 2023

Issues that appear agreed or that constitute pleading/evidential-type objections are marked as such

CG1 – HABITATS

1. Is a nitrates action programme under article 5 of the nitrates directive a "plan" for the purposes of art. 6(3) of the habitats directive? APPEARS AGREED

2. Alternatively, is the NAP subject to art. 6(3) because of the fact that the NAP underwent AA which engages the Aarhus Convention per the judgement of 8 November 2016, *Lesoochranárske zoskupenie VLK,* C-243/15 LZ II §47? APPEARS AGREED (insofar as it may be agreed that this does not arise because of previous question)

3. Is a site-specific analysis of the NAP under art. 6(3) possible (and therefore required)?

4. If site-specific analysis of the plan under art. 6(3) is not possible, must there still be an appropriate assessment of the plan in general terms? APPEARS AGREED

5. Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an impermissible merits-based challenge to the compliance of the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE

6. Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE

7. Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the Respondents' programme of measures with Article 11 of the WFD? PLEADING-TYPE ISSUE

8. Subject to the foregoing objection, is it a requirement that such an assessment must include the question of whether the particular measures characterised by the State as protections afforded by the plan and/or measures described as mitigation measures therein either alone or together with other binding measures adopted by the member state are sufficiently rigorous to remove all scientific doubt as to adverse effects on European sites caused by the activities the subject of provisions contained in the programme?

9. Are individual derogation decisions published? APPEARS AGREED

10. If individual derogation decisions are not published, does the objection that the applicant could have pursued challenges to individual derogations arise at all for consideration? PLEADING-TYPE ISSUE

11. Even if the option of challenges to individual derogations falls for consideration, is the applicant precluded from bringing a challenge at a general systemic level by reason of the existence of the theoretical possibility of challenging individual derogations or individual agricultural activities carried on without AA on a site-by-site basis or by the possibility of calling on the Minister either on a site-by-site basis or generally to exercise powers to require AA under domestic law (art. 28(1) of the 2011 regulations)? PLEADING-TYPE ISSUE

12. Alternatively, is the applicant precluded from bringing such a claim by reason of its failure to do so by way of a transposition challenge? PLEADING-TYPE ISSUE

13. Alternatively, is the applicant precluded from bringing such a claim by reason of its failure, if the Applicant believes derogations should be published as a matter of EU law, to bring a challenge to the failure to publish those decisions? PLEADING-TYPE ISSUE

14. Is the applicant precluded from any claim of environmental consequences arising from the manner of implementation of, or a failure to properly implement, the NAP, having regard to the presumption of legality? PLEADING-TYPE ISSUE

15. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any relief seeking to quash any specific derogation decision, or agricultural activity? PLEADING-TYPE ISSUE

16. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that any specific derogation decision or agricultural activity, requires appropriate assessment? PLEADING-TYPE ISSUE

17. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that derogation decisions or agricultural activities generally, require appropriate assessment? PLEADING-TYPE ISSUE

18. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any derogation decision or agricultural activity that it alleges required appropriate assessment? PLEADING-TYPE ISSUE

19. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any protected site alleged to be affected by any derogation decision or agricultural activity? PLEADING-TYPE ISSUE

20. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any non-transposition claim? PLEADING-TYPE ISSUE

21. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not engaged, at all, with the legislative framework governing agricultural activities? PLEADING-TYPE ISSUE

22. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has therefore neither pleaded nor made out either a specific or systemic challenge with respect to the appropriate assessment of farm level agricultural activities? PLEADING-TYPE ISSUE

23. Is the applicant precluded from challenging whether the AA is sufficiently rigorous if the Applicant's conclusion that the NAP "authorises" farm-level activities is incorrect? PLEADING-TYPE ISSUE

24. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because a challenge based on an alleged failure to carry out appropriate assessment on derogation decisions or agricultural activities could never be pursued through a challenge to the NAP? PLEADING-TYPE ISSUE

25. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because any failure with respect to any farm-level activity could not go to the validity of the NAP? PLEADING-TYPE ISSUE

26. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because alternatively, and without prejudice to the foregoing objections, the measures in the NAP (including measures described as mitigation measures therein) are sufficiently rigorous in circumstances where (in particular, but not exclusively) they comply fully with the requirements of the Nitrates Directive?

27. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not challenged the compliance of the measures in the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE

28. Is the applicant precluded from maintaining the challenge in particular as to the likelihood of adverse environmental effects as a result of the impugned decisions by reason of the applicant's failure to contest the evidence of the opposing parties by means of cross-examination? PLEADING-TYPE ISSUE

29. Are the proceedings misconceived because the Applicant's real complaint is that the State is able to avail of a derogation at all and indeed has obtained such a derogation from the European Commission and because these proceedings are no more than a Trojan horse and an impermissible collateral attack on the decision to grant Ireland a derogation from the 170kg limit of livestock manure per hectare, available under Annex III2(b) of the Nitrates Directive (Directive 91/676/EEC)

as is said to be manifest from the pleadings (see Affidavit of Elaine McGoff, §§14-19)? PLEADING-TYPE ISSUE

30. Is the applicant precluded from raising issues that flow from the Government's decision to seek a derogation by reason of its failure to challenge that decision? PLEADING-TYPE ISSUE

31. Is the applicant precluded from relying on any ultimate site-specific impacts because there is a failure by the Applicant to adduce any evidence or identify any specific project, on any given protected site, by reference to evidence relevant to the conservation objectives of any particular site, in respect of which it might be contended that the 5th NAP has unlawfully authorised an intervention to a protected site and because the EPA reports exhibited by the Applicant cannot be relied upon because in no manner can they be considered or construed as evidencing the authorisation of any project-specific intervention capable of having a significant adverse impact on a European Site? PLEADING-TYPE ISSUE

32. Is the applicant precluded from relying on any ultimate site-specific impacts because an allegation that the 5th NAP has authorised or is unlawfully authorising interventions into any and/or all protected European Sites is not pleaded with necessary specificity and particularity? PLEADING-TYPE ISSUE

33. Subject to the foregoing objections, are the measures in the Irish nitrates action programme insufficiently rigorous for the purposes of AA because:
(i) the programme envisages farm-level derogations in a context that will require AA where they may affect European sites and State has made it clear that they do not intend to carry out site specific assessments in the context of a derogation application as set out in the responses in the SEA;
(ii) the individual derogations do not adequately or at all seek information from farmers as to whether the individual farms are in or near European sites or as to whether agricultural activities on such farms could affect such sites or impose requirements that would follow from such information; and
(iii) there is no general provision otherwise for site-specific assessment of impacts of farming on European sites.

34. Is the applicant's challenge precluded by the principle that environmental protection and economic activity are incommensurable values and the choice of by how much one might be limited to advance the other cannot be assessed by reference to legal standards and accordingly, it is an inherently political question, not a justiciable one? PLEADING-TYPE ISSUE

CG2 – WFD

35. Is the applicant precluded from obtaining relief in relation to the WFD by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)? PLEADING-TYPE ISSUE

36. Does Article 4(1) of the WFD have the effect that Member States are required – unless a derogation is granted – to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive – as laid down in the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, ECLI:EU:C:2015:433 ? APPEARS AGREED

37. Does such a principle have the effect that member states must also refuse to adopt a plan if the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive, either generally or in the specific case of basic measures required by art 11 of the WFD?

38. Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance a merits-based challenge to the compliance of Ireland's programme of measures with Article 11 WFD? PLEADING-TYPE ISSUE

39. Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of Ireland's programme of measures with Article 11 WFD? PLEADING-TYPE ISSUE

40. Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of the NAP with Article 5(5) of the Nitrates Directive? PLEADING-TYPE ISSUE

41. Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded argument that farm-level activities require assessment under Article 4(1)? PLEADING-TYPE ISSUE

42. Should it be presumed in the absence of any challenge to the compliance of the NAP with the nitrates directive that the NAP complies with that directive? PLEADING-TYPE ISSUE

43. Is the applicant precluded from challenging an NAP that (on the foregoing hypothesis) complies with the requirements of the Nitrates Directive on the basis that such an NAP could never cause a deterioration in the status of a water body? PLEADING-TYPE ISSUE

44. Even if in general terms the requirement to refuse to adopt a plan referred to above applies, does this requirement apply in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of the WFD and in particular a nitrates action programme under article 5 of the nitrates directive (as referred to in Annex VI part A para (ix) of the WFD as referenced in art. 11(3)(a) of the directive)?

45. If assessment by reference to art. 4 of the WFD is required, was the NAP properly assessed by reference to the WFD so as to ensure that the objectives in art. 4 of the WFD are met?

46. If an art. 4 WFD assessment is required, does that application have the consequence that either:
(i) an NAP cannot be adopted unless all water bodies in the member state concerned have been assigned a status, because in the absence of that it cannot be ascertained as to whether a deterioration in such status would be caused by the activities the subject of provisions contained in the NAP [this possibly overlaps with the preliminary reference in *Sweetman v. An Bord Pleanála* [2021] IEHC 777]; or
(ii) Alternatively, even assuming an NAP can in principle be adopted in the absence of the assignment of status to all water bodies, the NAP cannot be adopted if the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the programme will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive?

47. Are the measures in the Irish nitrates action programme insufficiently rigorous in that regard because they fail to ensure that the agricultural activities the subject of provisions in the NAP will not cause the deterioration of the status of any water body or will not jeopardise the attainment of good surface water status or good ecological potential and good surface water chemical status and the attainment of good groundwater status?

48. Are the GAP Regulations SI 113 of 2022 invalid for similar reasons as contrary to art. 4(1) WFD insofar as they contain codes of good practice that are insufficiently rigorous in this regard (ground 35)?

CG3 – SEA
49. Is the applicant precluded from obtaining relief in relation to SEA by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)? PLEADING-TYPE ISSUE

50. Is the NAP a plan or programme for the purposes of the SEA directive? APPEARS AGREED

51. Does the NAP therefore require SEA? APPEARS AGREED

52. Does the SEA directive require that such SEA must assess the environmental effects of the NAP in terms of its adequacy or efficiency in addressing the environmental effects of the activities the subject of provisions contained in the NAP (as opposed to the mitigation measures within the NAP)?

53. Does the SEA directive require that such SEA must assess the environmental effects of the NAP in terms of the adequacy or efficiency of mitigation measures within the NAP?

54. Is the applicant precluded from advancing the overall complaint under the SEA Directive because it is inadequately pleaded? PLEADING-TYPE ISSUE

55. Is the applicant precluded from challenging the particular complaint regarding the assessment of alternatives by the SEA because that claim is inadequately pleaded? PLEADING-TYPE ISSUE

56. Is the applicant precluded from challenging the particular complaint regarding the monitoring provision of the SEA because that claim is inadequately pleaded? PLEADING-TYPE ISSUE

57. Is a claim about inadequate monitoring provision premature and not a basis to challenge an SEA process itself? PLEADING-TYPE ISSUE

58. Is the applicant precluded from advancing the SEA complaint because on a proper analysis what the Applicant is in effect inviting the Court to engage in a merits-based review of the decision challenged and a review of matters of policy and policy implementation and because the Court cannot review the impugned decision in the manner sought by the Applicant and because to do so would offend again the core principle of the separation of powers and settled case-law? PLEADING-TYPE ISSUE

59. Is the SEA for the NAP inadequate in that regard because the Environmental Report does not contain an assessment of the preferred option on the "likely significant effects on the environment" including "secondary, cumulative, synergistic, short, medium and long-term, permanent and temporary, positive and negative effects" (overall sub-ground 50)? [Note: this is possibly a factual question – State response is that the Environmental Report does contain a proper assessment of the preferred option on the "likely significant effects on the environment", including as claimed above, in particular (but not limited) to the assessment at Chapter 8 of the Environmental Report]

60. If an assessment of the efficacy of proposed mitigation measures is required, is the SEA for the NAP inadequate in that regard because there is no assessment of the efficacy of the proposed mitigation measures (sub-ground 52)? [Note: possibly a factual question – State response is that there is such an assessment in the SEA Environmental Report and the SEA Statement even though such was not required in the State's submission]

61. Is the SEA for the NAP inadequate in that regard because "material assets" means as set out in the EPA "SEA Pack of resources to guide the implementation of the SEA Directive provides a definition of "material assets" as "critical infrastructure essential for the functioning of society"?

62. If so do agricultural assets or the food supply chain amount to a critical infrastructure essential for the functioning of society?

63. Is the SEA for the NAP inadequate in that regard because by analogy with C-420/11 – Leth (an EIA case) the value of assets does not form part of the assessment, this applies not just to individual assets but to the broad societal impacts of agricultural activities, the impact of the NAP on the agricultural industry, and in particular on the output and income of farmers, the sustainability of the agricultural industry in Ireland, the food supply chain and the employment of a significant portion of the population, and the SEA incorrectly considered whether the value of agricultural assets would be affected by the programme?

64. Is the SEA for the NAP inadequate in that regard because material assets were treated as a separate factor rather than as an aspect of the environment as required by Annex I (sub-grounds 54 and 55)? [Note: this is possibly a question of how the SEA is to be interpreted – State response is that the Environmental Report evidences that, at the least, "material assets" were treated as an aspect of the environmental assessment as required by Annex I of the SEA Directive]

65. Is the SEA for the NAP inadequate in that regard because material assets were treated as an outweighing factor? [Note: State response is that the Applicant confuses the obligation to assess environmental effects of reasonable alternatives with the obligation when selecting the preferred alternative? There is no obligation under the SEA Directive to select the alternative that is the most environmentally friendly. The Respondents were entitled to have regard to policy considerations when selecting the preferred alternative.]

66. Is the SEA for the NAP inadequate in that regard because assessment criteria used to select the preferred alternative are irrational and/or were applied irrationally in the decision to select the preferred alternative, especially where the assessment provides that each objective has been given equal weight? [Note: this may be a matter of interpretation of the SEA)? State response is that the reason for the selection of the preferred option is clear from *inter alia* the Environmental Report. The Respondents had an evidential basis for reaching the decision that they did. This is a merits-based challenge and the Respondents rely on the decision of the Court of Appeal in *Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317.]

67. Is the SEA for the NAP inadequate in that regard because: Subject to the pleading objection above, the SEA Statement failed to consider, adequately or at all, the alternatives to the strategic alternative option selected and to subject each of the alternatives to a commensurate level of analysis? There is no detailed description or evaluation of the likely significant environmental effects of the alternative strategies in the Environmental Report. As identified by the Commission Guidance (2003) (at §5.12) the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives and the alternatives must be identified, described and evaluated in a comparable way (sub-ground 57)? [Note: this potentially overlaps with the issue before the CJEU in *Friends of the Irish Environment v Government of Ireland*) (this may be a question of interpretation of the SEA. State response is that the alternatives were properly assessed and, so far as required under the SEA Directive, subject to a commensurate level of analysis in the iterative procedure under that Directive, including by way of detailed description and evaluation in *inter alia* Chapter 7 of the Environmental Report. The Commission Guidance is not binding. The Respondents rely on the decision of the Court of Appeal in *Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317 and submit that the Court is not required to await the decision of the CJEU in *Friends of the Irish Environment v Government* of Ireland in order to determine this issue.]

68. Is the SEA for the NAP inadequate in that regard because subject to the pleading and prematurity objection above, it is implicit in Art. 10 that monitoring provisions must be included within the decision itself? On that premise, the NAP includes no adequate provision for monitoring of the significant environmental effects of its implementation and therefore contains no or no adequate provision for the identification at an early stage of unforeseen adverse effects or when appropriate remedial action might be required. This issue is addressed at Chapter 7 of the SEA Statement. No details of how this monitoring will occur, who will do it, when it will be done, how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed. Most of what the Chapter identifies as indicators for monitoring significant environmental effects do not in fact measure environmental effects (sub-grounds 59 and 60)? [Note: this potentially overlaps with the issue to be considered by the Supreme Court following the judgment of the CJEU in *Friends of the Irish Environment v Government of Ireland*). This may be a matter of interpretation of the SEA. State response includes - the monitoring measures in the NAP, which reflect the requirements of the Nitrates Directive and the Commission Decision, are clearly adequate (see, for example but not limited to the summary at Section 9.2 and table at 9.3 of the Environmental Report). The Respondents rely on the decision of the Court of Appeal in *Friends of the Irish Environment CLG v Government of Ireland* [2021] IECA 317. On the other hand the monitoring issue is one that the Supreme Court has reserved its position on.]

REMEDY

69. If any error was committed in the decision-making process, should the court decline to grant relief at all or alternatively should it decline to make any order that affects the validity of the NAP/ GAP, for example by instead directing further reasons or assessments as opposed to impugning such measures, in the exercise of the Court's discretion on judicial review, taking into account the general principle (as a matter of EU law) of proportionality, and prejudice to third parties including by reference to any applicable rights and interests of others, including under the Charter of Fundamental Rights, in particular the right to work under art. 15, to conduct a business under art. 16, and to property under art. 17, and the corresponding constitutional right under Art. 40.3, as well as Union

policies generally including the CAP under art. 39 TFEU and Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021?

70. If the Court determines that an order of *certiorari* or a declaration of invalidity is required, should a stayed or suspensive order be made pending remedial measures to address the Court's findings having regard to the risks of reduced environmental protection in the short term, or a breach of EU law, or adverse consequences to other stakeholders? APPEARS AGREED

CG4 - REFERENCE

71. Is the Commission derogation decision unchallengeable in these proceedings and therefore does it follow that the applicant is precluded from challenging the findings therein and the court must proceed on the basis that such findings are valid and correct? PLEADING-TYPE ISSUE

72. Alternatively, if the Commission findings cannot be directly differed from by the court, can the court nonetheless refer a question to the CJEU as to the correctness in fact or in law of such findings? PLEADING-TYPE ISSUE

73. Even if the Commission derogation decision is binding for the purposes of the proceedings, is the statement in recitals that it is without prejudice to the habitats directive sufficient to enable the applicant to advance arguments related to that issue? PLEADING-TYPE ISSUE

74. Is the applicant precluded from asking the court to refer to the CJEU a question as to the validity of the Commission Decision because the appropriate legal route is an Article 263 TFEU action for annulment before the General Court of the EU under art. 256(1) TFEU?

75. If a reference to the CJEU is in principle available, is such a reference precluded here because the proceedings would have been disposed of with a decision on the validity of the NAP and/or GAP?

76. Even if such a reference is available and is in principle not precluded, is such a reference appropriate on a discretionary basis because of the absence of any direct action for annulment? [would this add anything to the discretion anyway?]

77. Even if such a reference is available and is in principle not precluded, is the applicant correct that that the postulated invalidity of the NAP would have an impact on the validity of the Commission decision?

78. Even if so, does the postulated proposal to suspend any order of *certiorari* impact on the answer to the previous question?

SCHEDULE II – ISSUE PAPER AS OF MODULE II

Issues already dealt with or that no longer arise, or that are superseded by a substantive issue, in italics
Issues to be dealt with in Module II in bold and underlined
Issues potentially for Modules III & IV – bold with no underlining

CG1 – HABITATS DIRECTIVE

1. Is a nitrates action programme under article 5 of the nitrates directive a "plan" for the purposes of art. 6(3) of the habitats directive? APPEARS AGREED

2. Alternatively, is the NAP subject to art. 6(3) because of the fact that the NAP underwent AA which engages the Aarhus Convention per the judgement of 8 November 2016, Lesoochranárske zoskupenie VLK, C-243/15 LZ II §47? APPEARS AGREED (insofar as it may be agreed that this does not arise because of previous question)

3. (a) Does art. 6(3) of the habitats directive have the effect that, if a site-specific analysis of effects of the NAP is possible for the purposes of AA of the NAP, such an analysis is required.

(b) Has the applicant established that insofar as a site-specific analysis in the AA was possible, such an analysis of the NAP was not carried out (on the assumption that the effects of the underlying agricultural activities should be considered).

(c) Has the applicant established that insofar as a site-specific analysis in the AA was possible, such an analysis of the NAP was not carried out (on the assumption that only the effects of the mitigating measures in the plan itself should be considered).

(d) Does art. 6(3) of the habitats directive (transposed by Regulation 42A(11) of the Birds and Natural Habitats Regulations) have the effect that a NAP cannot lawfully be approved unless an AA is carried out prior to such approval.

(e) Has the applicant established that in this case the AA was not carried out prior to the approval of the NAP (the applicant's case being that the Appropriate Assessment determination of 4th March 2022 post-dates the approval of the NAP which, per the SEA Statement was therein stated to have been approved on 1st March 2022).
[reworded]

4. If site-specific analysis of the plan under art. 6(3) is not possible, must there still be an appropriate assessment of the plan in general terms? APPEARS AGREED

5. *Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an impermissible merits-based challenge to the compliance of the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE*

6. Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE

7. Is the applicant precluded from mounting a challenge to the adequacy of the AA because such a challenge constitutes an unpleaded challenge to the compliance of the Respondents' programme of measures with Article 11 of the WFD? PLEADING-TYPE ISSUE

8. Does art. 6(3) of the habitats directive have the effect that it is a requirement that AA of the NAP must include the question of whether the particular measures characterised by the State as protections afforded by the plan and/or measures described as mitigation measures therein either alone or together with other binding measures adopted by the member state are sufficiently rigorous to remove all scientific doubt as to adverse effects on European sites caused by the agricultural activities the subject of provisions contained in the programme.
[reworded]

9. Are individual derogation decisions published? APPEARS AGREED

10. *If individual derogation decisions are not published, does the objection that the applicant could have pursued challenges to individual derogations arise at all for consideration? PLEADING-TYPE ISSUE*

11. Even if the option of challenges to individual derogations falls for consideration, is the applicant precluded from bringing a challenge at a general systemic level by reason of the existence of the theoretical possibility of challenging individual derogations or individual agricultural activities carried on without AA on a site-by-site basis or by the possibility of calling on the Minister either on a site-by-site basis or generally to exercise powers to require AA under domestic law (art. 28(1) of the 2011 regulations)? PLEADING-TYPE ISSUE

12. Alternatively, is the applicant precluded from bringing such a claim by reason of its failure to do so by way of a transposition challenge? PLEADING-TYPE ISSUE

13. Alternatively, is the applicant precluded from bringing such a claim by reason of its failure, if the Applicant believes derogations should be published as a matter of EU law, to bring a challenge to the failure to publish those decisions? PLEADING-TYPE ISSUE

14. Is the applicant precluded from any claim of environmental consequences arising from the manner of implementation of, or a failure to properly implement, the NAP, having regard to the presumption of legality? PLEADING-TYPE ISSUE

15. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any relief seeking to quash any specific derogation decision, or agricultural activity? PLEADING-TYPE ISSUE*

16. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that any specific derogation decision or agricultural activity, requires appropriate assessment? PLEADING-TYPE ISSUE

17. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not sought any declaratory relief to the effect that derogation decisions or agricultural activities generally, require appropriate assessment? PLEADING-TYPE ISSUE

18. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any derogation decision or agricultural activity that it alleges required appropriate assessment? PLEADING-TYPE ISSUE

19. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not identified any protected site alleged to be affected by any derogation decision or agricultural activity? PLEADING-TYPE ISSUE

20. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not pleaded any non-transposition claim? PLEADING-TYPE ISSUE

21. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not engaged, at all, with the legislative framework governing agricultural activities? PLEADING-TYPE ISSUE

22. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has therefore neither pleaded nor made out either a specific or systemic challenge with respect to the appropriate assessment of farm level agricultural activities? PLEADING-TYPE ISSUE

23. Is the applicant precluded from challenging whether the AA is sufficiently rigorous if the Applicant's conclusion that the NAP "authorises" farm-level activities is incorrect? PLEADING-TYPE ISSUE

24. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because a challenge based on an alleged failure to carry out appropriate assessment on derogation decisions or agricultural activities could never be pursued through a challenge to the NAP? PLEADING-TYPE ISSUE

25. Is the applicant precluded from challenging whether the AA is sufficiently rigorous because any failure with respect to any farm-level activity could not go to the validity of the NAP? PLEADING-TYPE ISSUE

26. Has the applicant established that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP (leaving aside the question of a site-specific analysis), on the assumption that only the effects of the mitigating measures in the plan itself should be considered, having regard in particular to the lack of a plea of breach of the nitrates directive.
[reformulated combination of 26 and 33]

27. *Is the applicant precluded from challenging whether the AA is sufficiently rigorous because the Applicant has not challenged the compliance of the measures in the NAP with the requirements of the Nitrates Directive? PLEADING-TYPE ISSUE*

28. Is the applicant precluded from maintaining the challenge in particular as to the likelihood of adverse environmental effects as a result of the impugned decisions by reason of the applicant's failure to contest the evidence of the opposing parties by means of cross-examination? PLEADING-TYPE ISSUE

29. Are the proceedings misconceived because the Applicant's real complaint is that the State is able to avail of a derogation at all and indeed has obtained such a derogation from the European Commission and because these proceedings are no more than a Trojan horse and an impermissible collateral attack on the decision to grant Ireland a derogation from the 170kg limit of livestock manure per hectare, available under Annex III2(b) of the Nitrates Directive (Directive 91/676/EEC) as is said to be manifest from the pleadings (see Affidavit of Elaine McGoff, §§14-19)? PLEADING-TYPE ISSUE

30. *Is the applicant precluded from raising issues that flow from the Government's decision to seek a derogation by reason of its failure to challenge that decision? PLEADING-TYPE ISSUE*

31. Is the applicant precluded from relying on any ultimate site-specific impacts because there is a failure by the Applicant to adduce any evidence or identify any specific project, on any given protected site, by reference to evidence relevant to the conservation objectives of any particular site, in respect of which it might be contended that the 5th NAP has unlawfully authorised an intervention to a protected site and because the EPA reports exhibited by the Applicant cannot be relied upon because in no manner can they be considered or construed as evidencing the authorisation of any project-specific intervention capable of having a significant adverse impact on a European Site? PLEADING-TYPE ISSUE

32. Is the applicant precluded from relying on any ultimate site-specific impacts because an allegation that the 5th NAP has authorised or is unlawfully authorising interventions into any and/or all protected European Sites is not pleaded with necessary specificity and particularity? PLEADING-TYPE ISSUE

33. (a) Has the applicant established that the AA determination was inadequate to remove all scientific doubt as to the effects of the NAP (leaving aside the question of the need for a site-specific analysis within the AA itself), on the assumption that the effects of the underlying agricultural activities should be considered, having regard in particular to:

(i) The lack of a plea of breach of the nitrates directive;

(ii) the fact that the NAP envisages farm-level derogations in a context that will require AA where they may affect European sites and State has made it clear that they do not intend to carry out site specific assessments in the context of a derogation application as set out in the responses in the SEA;

(iii) the fact that the individual derogations do not adequately or at all seek information from farmers as to whether the individual farms are in or near European sites or as to whether agricultural activities on such farms could affect such sites or impose requirements that would follow from such information; and

(iv) the fact that there is no general provision otherwise for site-specific assessment of impacts of farming on European sites.

(b) Has the applicant established that there is no effective system in practice for farm level AA (despite the theoretical relevance of the 2000 Act and 2011 regulations), insofar as this alleged fact may be relevant to the adequacy of the AA of the NAP.
[reformulated combination of 26 and 33]

34. Is the applicant's challenge precluded by the principle that environmental protection and economic activity are incommensurable values and the choice of by how much one might be limited to advance the other cannot be assessed by reference to legal standards and accordingly, it is an inherently political question, not a justiciable one?

CG2 – WFD

35. Is the applicant precluded from obtaining relief in relation to the WFD by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)? PLEADING-TYPE ISSUE

36. Does Article 4(1) of the WFD have the effect that Member States are required – unless a derogation is granted – to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive – as laid down in the judgment of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland, C-461/13, ECLI:EU:C:2015:433 ? APPEARS AGREED

37. **(a) Does Article 4(1) of the WFD (as interpreted in the light of the principle that Member States are required – unless a derogation is granted – to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive – as laid down in the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland,* C-461/13, ECLI:EU:C:2015:433) have the effect that member states must also refuse to adopt a plan if the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive, either generally or in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of the WFD and in particular a nitrates action programme under article 5 of the nitrates directive (as referred to in Annex VI part A para (ix) of the WFD as referenced in art. 11(3)(a) of the directive).**

(b) Does Article 4(1) of the WFD have the effect that each proposed measure to be adopted for the purposes of art. 11 of the WFD must be individually assessed to ensure individual compliance with art. 4 as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure.
[reformulated to ensure all issues addressed – see body of judgment - also SEA issues moved to under CG3 for simplicity]

38. Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance a merits-based challenge to the compliance of Ireland's programme of measures with Article 11 WFD? PLEADING-TYPE ISSUE

39. *Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of Ireland's programme of measures with Article 11 WFD? PLEADING-TYPE ISSUE*

40. Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded challenge to the compliance of the NAP with Article 5(5) of the Nitrates Directive? PLEADING-TYPE ISSUE

41. Is the applicant precluded from challenging a basic measure for the purposes of art. 11(3) of the WFD if the challenge is in substance an unpleaded argument that farm-level activities require assessment under Article 4(1)? PLEADING-TYPE ISSUE

42. Should it be presumed in the absence of any challenge to the compliance of the NAP with the nitrates directive that the NAP complies with that directive? PLEADING-TYPE ISSUE

43. Is the applicant precluded from challenging an NAP that (on the foregoing hypothesis) complies with the requirements of the Nitrates Directive on the basis that such an NAP could never cause a deterioration in the status of a water body? PLEADING-TYPE ISSUE

44. *Even if in general terms the requirement to refuse to adopt a plan referred to above applies, does this requirement apply in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of the WFD and in particular a nitrates action programme under article 5 of the nitrates directive (as referred to in Annex VI part A para (ix) of the WFD as referenced in art. 11(3)(a) of the directive)?*
[combined with Issue 37(a) and (b)]

45. (a) Has the applicant established that the particular protections afforded by the NAP either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive (on the assumption that such rigour is required).

(b) Has the applicant established that the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD was not individually assessed to ensure individual compliance with art. 4 as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure (assuming such to be required).
[reworded - SEA issues moved to under CG3 for simplicity]

46. Does art. 4 WFD have the effect that:
(i) an NAP cannot be adopted unless all water bodies in the member state concerned have been assigned a status, because in the absence of that it cannot be ascertained as to whether a deterioration in such status would be caused by the activities the subject of provisions contained in the NAP; or
(ii) in the absence of the assignment of status to all water bodies, the NAP cannot be adopted without an (*ad hoc*) determination that the plan (and if required the activities the subject of provisions contained in the plan) will not cause a deterioration of the status of any body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.
[reworded - overlaps with the preliminary reference in *C-301/22 Sweetman*]

47. *(a) Are the measures in the NAP insufficiently rigorous in that regard because they fail to ensure that the agricultural activities the subject of provisions in the NAP will not cause the deterioration of the status of any water body or will not jeopardise the attainment of good surface water status or good ecological potential and good surface water chemical status and the attainment of good groundwater status?*
(b) Is it the case that any consideration of art. 4 in the context of an NAP (if such be required) should only relate to the allegedly protective measures in the NAP rather than to the underlying agricultural activities thereby regulated.
[combined with Issue 37]

48. If art. 4(1) of the WFD has the effect contended for by the applicant and if the NAP is insufficiently rigorous in that regard as contended for by the applicant, is the validity or otherwise of the GAP Regulations SI 113 of 2022 essentially consequential on the validity or otherwise of the NAP and/or Commission decision (and hence is this a remedy issue).
[validity of GAP regulations issue moved to the remedy section as issue 69(b)]

CG3 – SEA

49. *Is the applicant precluded from obtaining relief in relation to SEA by reason of the lack of any pleaded relief in that regard (the claim being set out in the grounds only)? PLEADING-TYPE ISSUE*

50. Is the NAP a plan or programme for the purposes of the SEA directive? APPEARS AGREED

51. Does the NAP therefore require SEA? APPEARS AGREED

52. **(a) Does Article 5(1) of the SEA directive have the effect that a plan or programme must be assessed by reference to the question of whether (by reference to the standards in art. 4 WFD) the particular protections afforded by the plan either alone or together with other binding measures adopted by the member state are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the WFD, either generally or in the specific case of the proposed adoption of a basic measure as defined by art. 11(3) of the WFD and in particular a nitrates action programme under article 5 of the nitrates directive (as referred to in Annex VI part A para (ix) of the WFD as referenced in art. 11(3)(a) of the directive).**
(b) Does Article 5(1) of the SEA directive have the effect that each proposed measure to be adopted for the purposes of art. 11 of the WFD must be individually assessed to establish its effects (by reference to the standards in art. 4 WFD) as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure.
(c) Has the applicant established that the particular protections afforded by the NAP either alone or together with other binding measures adopted by the member state were not assessed in the SEA report by reference to the question as to whether they are insufficiently rigorous to ensure that the activities the subject of provisions contained in the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the WFD (on the assumption that such rigour is required).
(d) Has the applicant established that the NAP as a proposed measure to be adopted for the purposes of art. 11 of the WFD was not individually assessed in the SEA report to establish its effects (by reference to the standards in art. 4 WFD) as it impacts on each and every potential water body affected by the measure and, insofar as that is required, by the underlying activities regulated by the measure.
(e) Does the SEA directive require that such SEA must assess the environmental effects of the NAP in terms of its adequacy or efficiency in addressing the environmental effects of the activities the subject of provisions contained in the NAP (as opposed to the mitigation measures within the NAP)?
[SEA issues moved here from CG2 for simplicity, previous 52 now incorporated in Issue 37(b)]

53. *Does the SEA directive require that such SEA must assess the environmental effects of the NAP in terms of the adequacy or efficiency of mitigation measures within the NAP?*
[now incorporated in Issue 37(b)]

54. *Is the applicant precluded from advancing the overall complaint under the SEA Directive because it is inadequately pleaded? PLEADING-TYPE ISSUE*

55. Is the applicant precluded from challenging the particular complaint regarding the assessment of alternatives by the SEA because that claim is inadequately pleaded? PLEADING-TYPE ISSUE

56. Is the applicant precluded from challenging the particular complaint regarding the monitoring provision of the SEA because that claim is inadequately pleaded? PLEADING-TYPE ISSUE

57. Do art. 5(1) of and Annex I para. (i) to the SEA directive have the effect that the SEA report itself must include details of an adequate monitoring process in compliance with art. 10 of the directive.
[reworded]

58. Is the applicant precluded from advancing the SEA complaint because on a proper analysis what the Applicant is in effect inviting the Court to engage in a merits-based review of the decision challenged and a review of matters of policy and policy implementation and because the Court cannot review the impugned decision in the manner sought by the Applicant and because to do so would offend again the core principle of the separation of powers and settled case-law? PLEADING-TYPE ISSUE

59. Has the applicant established that the Environmental Report does not contain an assessment of the preferred option on the "likely significant effects on the environment" including "secondary, cumulative, synergistic, short, medium and long-term, permanent and temporary, positive and negative effects" as required by Annex I.
[reworded, this is a factual question – State response is that the Environmental Report does contain a proper assessment of the preferred option on the "likely significant effects on the environment", including as claimed above, in particular (but not limited) to the assessment at Chapter 8 of the Environmental Report]

60. Has the applicant established that the environmental report does not include an assessment of the efficacy of the proposed mitigation measures (assuming such is necessary).
[reworded– State response is that there is such an assessment in the SEA Environmental Report and the SEA Statement even though such was not required in the State's submission]

61. (a) **Does the SEA directive have the effect that "material assets" means "critical infrastructure essential for the functioning of society" (see EPA SEA Pack of resources to guide the implementation of the SEA Directive)**
(b) Assuming so, has the applicant established that the SEA for the NAP inadequate in that regard.
[reworded]

62. Does the SEA directive have the effect that agricultural assets or the food supply chain do not amount to a critical infrastructure essential for the functioning of society.
[reworded]

63. (a) Does the SEA directive have the effect that, by analogy with the judgment of 14 March 2013, *Leth*, C-420/11, ECLI:EU:C:2013:166 (an EIA case), the value of assets does not form part of the assessment, and that this applies not just to individual assets but to the broad societal impacts of agricultural activities, the impact of the NAP on the agricultural industry, and in particular on the output and income of farmers, the sustainability of the agricultural industry in Ireland, the food supply chain and the employment of a significant portion of the population.
(b) Assuming so, has the applicant established that the SEA for the NAP inadequate in that regard because it considered whether the value of agricultural assets would be affected by the programme.
[reworded]

64. (a) Does the SEA directive have the effect that material assets are not to be treated as a separate factor but as an aspect of the environment as required by Annex I.
(b) Assuming so, has the applicant established that the SEA for the NAP inadequate in that regard.
[Note: this is a question of how the SEA is to be interpreted – State response is that the Environmental Report evidences that, at the least, "material assets" were treated as an aspect of the environmental assessment as required by Annex I of the SEA Directive]

65. (a) Does the SEA directive have the effect that material assets cannot be treated as an outweighing factor and/or that the most environmentally friendly option must be selected.
(b) Has the applicant established that in the SEA for the NAP, material assets were treated as an outweighing factor and/or that the most environmentally friendly option was not selected.
[reworded]
[Note: State response is that the Applicant confuses the obligation to assess environmental effects of reasonable alternatives with the obligation when selecting the preferred alternative - There is no obligation under the SEA Directive to select the alternative that is the most environmentally friendly.

The Respondents were entitled to have regard to policy considerations when selecting the preferred alternative.]

66. **Has the applicant established that the SEA for the NAP was inadequate because assessment criteria used to select the preferred alternative are irrational and/or were applied irrationally in the decision to select the preferred alternative, especially where the assessment provides that each objective has been given equal weight.**
[Note: this may be a matter of interpretation of the SEA) State response is that the reason for the selection of the preferred option is clear from *inter alia* the Environmental Report. The Respondents had an evidential basis for reaching the decision that they did. This is a merits-based challenge and the Respondents rely on the decision of the Court of Appeal *in Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317, [2021] 11 JIC 2603 (Costello J.).]

67. (a) Does art. 5(1) of the SEA directive have the effect that alternatives must be identified, described and evaluated in a comparable way (see Commission Guidance (2003) (at §5.12) to the effect that the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives).

(b) Has the applicant established that the SEA Statement failed to consider, adequately or at all, the alternatives to the strategic alternative option selected and to subject each of the alternatives to a commensurate level of analysis and/or failed to include detailed description or evaluation of the likely significant environmental effects of the alternative strategies in the Environmental Report and/or failed to ensure that the alternatives were identified, described and evaluated in a comparable way.
[Note: reformulated. This potentially overlaps with the issue before the CJEU in *Friends of the Irish Environment v. Government of Ireland*) (this may be a question of interpretation of the SEA. State response is that the alternatives were properly assessed and, so far as required under the SEA Directive, subject to a commensurate level of analysis in the iterative procedure under that Directive, including by way of detailed description and evaluation in *inter alia* Chapter 7 of the Environmental Report. The Commission Guidance is not binding. The Respondents rely on the decision of the Court of Appeal in *Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317, [2021] 11 JIC 2603 (Costello J.) and submit that the Court is not required to await the decision of the CJEU in *Friends of the Irish Environment v. Government of Ireland* in order to determine this issue.]

68. Has the applicant established that, assuming art. 5(1) of and Annex I para. (i) to the SEA directive have the effect that the SEA report itself must include details of an adequate monitoring process in compliance with art. 10 of the directive, the SEA for the NAP fails to do this because it includes no adequate provision for monitoring of the significant environmental effects of its implementation and therefore contains no or no adequate provision for the identification at an early stage of unforeseen adverse effects or when appropriate remedial action might be required. This issue is addressed at Chapter 7 of the SEA Statement; no details of how this monitoring will occur, who will do it, when it will be done, how the monitoring will be used, and how any identified unforeseen adverse environmental effects will be addressed; and/or most of what the Chapter identifies as indicators for monitoring significant environmental effects do not in fact measure environmental effects.
[Note: reformulated - this potentially overlaps with the issue to be considered by the Supreme Court following the judgment of the CJEU in *Friends of the Irish Environment v Government of Ireland*). This may be a matter of interpretation of the SEA. State response includes - the monitoring measures in the NAP, which reflect the requirements of the Nitrates Directive and the Commission Decision, are clearly adequate (see, for example but not limited to the summary at Section 9.2 and table at 9.3 of the Environmental Report). The Respondents rely on the decision of the Court of Appeal in *Friends of the Irish Environment CLG v Government of Ireland* [2021] IECA 317, [2021] 11 JIC 2603 (Costello J.). On the other hand the monitoring issue is one that the Supreme Court has reserved its position on.]

REMEDY

69. (a) If any error was committed in the decision-making process, should the court decline to grant relief at all or alternatively should it decline to make any order that affects the validity of the NAP/ GAP, for example by instead directing further reasons or assessments as opposed to impugning such measures, in the exercise of the Court's discretion on judicial review, taking into account the general principle (as a matter of EU

law) of proportionality, and prejudice to third parties including by reference to any applicable rights and interests of others, including under the Charter of Fundamental Rights, in particular the right to work under art. 15, to conduct a business under art. 16, and to property under art. 17, and the corresponding constitutional right under Art. 40.3, as well as Union policies generally including the CAP under art. 39 TFEU and Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021?

(b) If art. 4(1) of the WFD has the effect contended for by the applicant and if the NAP is insufficiently rigorous in that regard as contended for by the applicant, is the validity or otherwise of the GAP Regulations SI 113 of 2022 essentially consequential on the validity or otherwise of the NAP and/or Commission decision (and hence is this a remedy issue).
[Note this issue in some form is not going to arise in the short term]

70. If the Court determines that an order of certiorari or a declaration of invalidity is required, should a stayed or suspensive order be made pending remedial measures to address the Court's findings having regard to the risks of reduced environmental protection in the short term, or a breach of EU law, or adverse consequences to other stakeholders? APPEARS AGREED

CG4 – REFERENCE REGARDING VALIDITY OF COMMISSION DECISION

71. Is the Commission derogation decision unchallengeable in these proceedings and therefore does it follow that the applicant is precluded from challenging the findings therein and the court must proceed on the basis that such findings are valid and correct?

72. Alternatively, if the Commission findings cannot be directly differed from by the court, can the court nonetheless refer a question to the CJEU as to the correctness in fact or in law of such findings?

73. Even if the Commission derogation decision is binding for the purposes of the proceedings, is the statement in recitals that it is without prejudice to the habitats directive sufficient to enable the applicant to advance arguments related to that issue?

74. Is the applicant precluded from asking the court to refer to the CJEU a question as to the validity of the Commission Decision because the appropriate legal route is an Article 263 TFEU action for annulment before the General Court of the EU under art. 256(1) TFEU?

75. (a) If the answers to the previous issues clearly have the consequence (or the national court in applying the answers to such questions determines) that the NAP is legally defective as a result of a breach of the habitats, WFD and/or SEA directives, is Commission decision 2022/696 also invalid (as a question for the CJEU on reference, rather than the domestic court, if it arises).

(b) Should the court seek any information from EU institutions under the *Eurobolt* jurisdiction prior to deciding on whether this issue should be referred?
[reworded]

76. Even if such a reference is available and is in principle not precluded, is such a reference appropriate on a discretionary basis because of the absence of any direct action for annulment?

77. *Even if such a reference is available and is in principle not precluded, is the applicant correct that that the postulated invalidity of the NAP would have an impact on the validity of the Commission decision.*
[incorporated into issue 75]

78. *Even if so, does the postulated proposal to suspend any order of certiorari impact on the answer to the previous question?*
[if relevant this can be addressed in issue 75 but in practice the issue of a remedy might not arise prior to the issue at issue 75, rendering this point effectively moot]

SCHEDULE III – TABLE OF CORRESPONDENCE BETWEEN GROUNDS AND ISSUES

Note – where the "ground" is merely a statement of context rather than a proper ground as such, this is noted.

Sub-ground number	Issue number to which the sub-ground initially relates	Subject
1.	-	Legal context
2.	-	Legal context
3.	-	Legal context
4.	-	Legal context
5.	-	Legal context
6.	-	Legal context
7.	-	Legal context
8.	-	Legal context
9.	-	Legal context
10.	26 & 33	Inadequate AA of NAP
11.	26 & 33	Inadequate AA of NAP
12.	26 & 33	Inadequate AA of NAP
13.	26 & 33	Inadequate AA of NAP
14.	26 & 33	Inadequate AA of NAP
15.	26 & 33	Inadequate AA of NAP
16.	26 & 33	Inadequate AA of NAP
17.	26 & 33	Inadequate AA of NAP
18.	26 & 33	Inadequate AA of NAP
19.	26 & 33	Inadequate AA of NAP
20.	26 & 33	Inadequate AA of NAP
21.	26 & 33	Inadequate AA of NAP
22.	26 & 33	Inadequate AA of NAP
23.	26 & 33	Inadequate AA of NAP
24.	26 & 33	Inadequate AA of NAP
25.	26 & 33	Inadequate AA of NAP
26.	26 & 33	Inadequate AA of NAP
27.	3(d) & (e)	Timing of AA
28.	-	Legal context
29.	-	Legal context
30.	-	Legal context
31.	-	Legal context
32.	-	Legal context
33.	-	Legal context
34.	-	Legal context
35.	37	Lack of assessment art. 4 WFD
36.	37	Art. 4 WFD within SEA
37.	-	Legal context
38.	-	Legal context
39.	37	Lack of assessment art. 4 WFD
40.	37	Art. 4 WFD within SEA
41.	37	Art. 4 WFD within SEA
42.	37	Art. 4 WFD
43.	46	Unassessed water bodies, WFD
44.	-	Legal context
45.	-	Legal context
46.	-	Legal context
47.	-	Legal context
48.	-	Legal context
49.	-	Legal context
50.	59	Inadequate SEA
51.	-	Legal context
52.	60	Efficacy of mitigation, SEA
53.	60	Efficacy of mitigation, SEA
54.	64	Material Assets, SEA

55.	64	Material Assets, SEA
56.	66	Irrational alternatives, SEA
57.	67	Comparable analysis, SEA
58.	-	Legal context
59.	68	Monitoring, SEA
60.	68	Monitoring, SEA
61.	-	Legal context
62.	68	Monitoring, SEA
63.	68	Monitoring, SEA
64.	-	Legal context
65.	75	Commission decision validity
66.	-	Legal context
67.	-	Legal context
68.	75	Commission decision validity
69.	75	Commission decision validity