AN CHÚIRT UACHTARACH
THE SUPREME COURT

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High Court Record No.: 2018 No. 391 JR

[2022] IESC 42

O'Donnell C.J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.
Baker J.
Hogan J.

BETWEEN/

FRIENDS OF THE IRISH ENVIRONMENT CLG

Applicant/Appellant

- AND –

THE GOVERNMENT OF IRELAND

MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT

IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Ms. Justice Marie Baker delivered the 9th day of November 2022

1. This is a challenge to the two strands of Project Ireland 2040 adopted by the Government of Ireland on 16 February 2018, and re-affirmed by a subsequent decision of the Government on 29 May 2018. Project Ireland comprises two plans, the National Planning Framework (where convenient "NPF") and the National Development Plan (where convenient "NDP"). Whether the Government was entitled to adopt the plan by way of reaffirmation of the decision made on 16 February 2008 is not in issue in these proceedings.

2. In broad terms, the challenge is to the validity of the adoption of both plans on account of the alleged failure to meet the requirements of Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, the Strategic Environmental Assessment Directive (the "SEA Directive", or the "Directive"). In particular, the question is whether the comparison of reasonable alternatives, as required by the Directives, was sufficient. A separate question concerns whether sufficient monitoring provisions are provided in the NPF.

3. A logically prior question which arises however, is whether the NPF and/or the NDP are required as a matter of law to be assessed under the provisions of the SEA Directive. The respondents argue that neither plan is subject to a requirement that it be so assessed as neither is a "plan or programme" within the meaning or scope of the Directive. Whilst the NPF was assessed for the purposes of the SEA Directive, the respondents submit that this was not done by reason of a legal obligation, but rather that the NDP is wholly outside the scope of the SEA Directive by reason of it being a "budgetary policy".

4. The Court of Appeal dismissed the appeal from the judgment of the High Court, Barr J. [2020] IEHC 225, although the Court of Appeal disagreed with some of his analysis and conclusions: see judgment of Costello J. delivered on 26 November 2021 ([2021] IECA 317), with which Haughton and Murray JJ. agreed. The present appeal is against this decision of the Court of Appeal.

SEA Directive

5. The SEA Directive was adopted by the European Parliament and the European Council as part of its promotion generally of sustainability and environment protection. It aims in a general sense to ensure that environmental considerations are taken into account in certain high level plans or programmes prepared or adopted by a competent public authority likely to have significant effects on the environment, but which themselves are not projects to which individual, site specific planning or development consent requirements are applicable. The plans and programmes for which specific provision is made are those prepared for specific sectors being agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and county and country planning and land use, and which themselves set a framework within which development consent for projects come to be considered.

6. Article 1 of the SEA Directive sets out its objectives:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

7. The SEA Directive also requires an environmental assessment for the purpose of the preparation of those plans and programmes for which an assessment is required under Articles 6 and 7 of the Habitats Directive. That aspect of the Directive does not fall for consideration in this appeal, although it was a factor in the decision in the High Court and the Court of Appeal.

8. Under the Directive a number of steps are to be followed, which combined comprise the environmental assessment. The first step is scoping, a concept which is found in both

the Habitats Directive, (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna), and the EIA Directive (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment) where a screening assessment is made. The second step involves the preparation of a draft plan accompanied by an environmental report, and one aspect of this appeal concerns the methodology used in the environmental report. The third stage involves public consultation and participation before the fourth stage of decision making and the adoption of a plan or programme by the relevant authority. Finally, provision is made for ongoing monitoring of a plan or programme.

9. There is an express exclusion for those plans and programmes, the sole purpose of which is to serve national defence or civil emergency or financial or budget plans and programmes. This last class of exemption comes for consideration in this judgment.

10. As can be seen from that brief summary, the purpose of the Directive, the precise parameters of which will be considered in more detail below (from para. 41), is to identify at an early stage the likely environmental impacts of development, and this arises in turn from the understandable concern that environmental considerations may in some instances fall to be assessed at too late a stage. The requirement from the Directive is to carry out an environmental assessment of high level measures which themselves constrain, define, or, to use the language of the Directive, "set the framework" for later development consent,

11. Further, as is apparent within the Irish legal system, and as I will explain more fully below (from para. 69), a local authority or An Bord Pleanála is required by statute to have regard to high level plans or programmes when considering whether to grant planning permission.

12. As will also be apparent, another element of the SEA Directive is the involvement of the public in the decision making process, both with a view to the benefit to be achieved in

decision making by reason of representations from members of the public, non-governmental organisations, and other interested parties, because it is desirable that citizens be given an opportunity to influence the decision making process, and also because of the perceived view that public participation is likely to increase broad public acceptance of a plan or programme. It is also considered that the engagement by members of the public helps to develop environmental awareness and to avoid conflicts between neighbours or between members of the public and state actors. To that extent the Directive echoes some of the principles in the Aarhus Convention which contains a clear expression of the desirability of public participation, albeit that the SEA Directive was adopted at a later stage.

13. As will become apparent in the course of this judgment, the principles in the Aarhus Convention have influenced the interpretation by the CJEU of the scope of the SEA Directive

14. An SEA assessment is carried out at an earlier stage than an Environmental Impact Assessment (EIA). The purpose of an EIA is to assess the likely environmental impact once a relevant project enters into the process of seeking authorisation, permission, or approval. By contrast the SEA Directive is aimed at requiring an assessment in respect of certain "strategic" plans or programmes rather than a case by case management of a specific project, and is seen for that reason to complement the EIA Directive, and to fill a gap apparent in the operation of the EIA Directive where effects on the environment "are already established on the basis of earlier planning measures" *per* Advocate General Kokott in her Opinion in joined cases *Terre wallonne* and *Inter-Environnement Wallonie* (C-105/09 :EU:C:2010:120 and C-110/09, :EU:C:2009:238) at para 32.

15. Advocate General Kokott in her opinion provides a useful illustration of this (at paragraph 33):

> "An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have

less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road construction project. For this reason, it should be considered, even as the corridor has been specified, what effects the restriction of the route will have on the environment and whether alternatives should be included."

16. As will later become apparent in the course of this judgment the consideration of alternatives is an important tool in the environmental assessment envisaged by the directive. For the present the point to be taken is that environmental effects are to be assessed at an early stage, and during the preparation of frameworks within which specific development consent may be granted.

17. To understand the place of the SEA Directive in land use decision making it is useful to consider the various stages or levels in decision-making at which environmental considerations may have a role. It is not intended that the SEA Directive would apply to government or local authority policies, although it could be said that those policies broadly speaking do, or can, shape subsequent decision-making. The SEA Directive aims to integrate environmental consideration into the next stage of the decision-making process: the decision to adopt a plan or programme which identifies broad goals within a country or region and the options selected to achieve the broad policies already identified. Thus, the plan or programme will be more than just a general proposal for a course of action but will involve some element of the identification of implementing measures, strategies to be adopted, and the identification of design or measures likely to achieve that policy. I return below (from para. 41) to a more full consideration of the interpretative question, but for the present it may be noted that the CJEU authorities and EU guidance documents suggest that "plan or programme" identifies the means by which a broad policy is to be achieved, and might best be understood as falling somewhere between a general policy identified by

government which operates at a political or general level, and a project which is assessed individually.

18. To elaborate on the example given by Advocate General Kokott, a plan or programme for future infrastructure development involves quite different environmental considerations than those arising in an application for development consent for a project consisting of an industrial estate with private roads which depends on the existence of public roadways and other services, the location of which has already been decided. The choice of the location of the roadway may have a direct influence and impact upon the choice of location of specific projects.

19. It could be said therefore that the SEA assessment does not have in mind any specific project and has a broad and probably long term perspective and must take place at a level which requires ongoing consideration of the impact of its broad purpose and may in certain contexts require amendment in the light of changing environmental knowledge or economic or social factors.

20. Finally, it bears noting that, unlike the Habitats Directive (which requires an assessment of a plan or project likely to have a significant effect on a European site, *viz.* a Special Area of Conservation or Special Protection Area, and imposes requirements for protection, conservation and management of habitats and species in European Sites) the SEA Directive does not dictate any substantive outcome.

21. The different requirement of the treatment of alternatives in the EIA Directive might also be noted, where the text of Article 5(3)(d) requires an "outline of the main alternatives" studied by the developer: see the judgment of this Court in *North East Pylon* ([2019] IESC 8). The CJEU in *Houlihan & Ors. v. An Bord Pleanála* (C-461/17, :EU;2018:883) held that the EIA Directive did not, in consequence of the language of Article 5(3)(d), require the main alternatives "to be subject to an impact assessment equivalent to that of an approved project. The text of the SEA Directive is materially different.

22. This general introduction belies the complexity of this appeal and the means by which an environmental assessment is to be carried out.

Background to the Claim: The National Planning Framework

23. Project Ireland 2040 is described in the foreword as a "most radical break with the past" with a view to creating a unified and coherent plan for the land use and development within the country. The NPF was described by Barr J. in the High Court (at para. 5 of his judgment) as "a macro spatial strategy which maps out general development goals for the country for the period up to 2040".

24. The foreword to the NPF describes it as "a planning framework to guide development investment over the coming years" and that it sets "national objectives and key principles from which more details and refined plans will follow". That does not in terms provide every detail for every part of the country but rather "empowers each region to lead in the planning and development of their communities" and that it contains "a set of national objectives and key principles from which more detailed and refined plans will follow". The foreword also provides that a "companion" to the document is the NDP, described as a "ten-year strategy for public capital investment of almost €116 billion". With a certain flourish it announces; "a vision and a credible development strategy to shape our national regional and local spatial development in economic, environmental and social terms to 2040".

25. In October 2014, the commencement of the preparation of a National Planning Framework was agreed by government. An SEA Scoping report was published on 2 February 2017.

26. The draft NPF, accompanied by the Strategic Environmental Assessment Environmental Report – Ireland 2040: The National Planning Framework' ("The Environmental Report"), prepared by RPS Consultants ("RPS") was published on 26 September 2017. The Environmental Report runs to 251 pages, to include the non-technical

summary to 20 pages. The purpose of the Environmental Report is said to be to inform the development of the NPF, to identify, describe and evaluate the likely significant effects of the proposed framework and its reasonable alternatives, and provide an early opportunity for the statutory authorities and the public to review any aspect of the draft.

27. The NPF was adopted following consultation with, and submissions from members of the public and interested parties at local, regional, national and EU levels. That consultation process concluded on 10 November 2017, and post consultation amendments were made to the draft NPF, the Natura Impact Statement, the Strategic Flood Risk Appraisal.

28. The adoption and publication of the NPF began on 16 February 2018. The SEA Statement was not published with the NPF and NDP in February 2018 but on 22 March 2018, following a request from the appellant that a statement be published in accordance with the requirements of the Directive. The NPF was intended to replace the National Spatial Strategy adopted in 2002.

29. The plan involved the division of the country into three regions, the Eastern and Midland Region, the Southern Region, and the Northern and Western Region. It anticipates a significant increase in population of one million by 2040, and the management of that growth in population and the demands it will create for working and living spaces, as well as the environmental challenges that will arise, are the focus of the policy objectives there recited. There is also a recital of the requirement to focus planning and development so as to enable a transition to a competitive, low carbon, climate resilient and environmentally sustainable economy by 2050.

30. It is said that the NPF would be given full legislative support within the planning system; that it would be regularly reviewed and updated and that an independent Office of the Planning Regulator would be established to monitor its ongoing implementation.

31. The NPF was published with the National Development Plan, an investment plan to insure and support implementation by the provision of capital investment, part of which was a dedicated €3 billion regeneration and development fund for urban and rural areas.

The National Development Plan

32. The NDP recites its purpose as the setting of "investment priorities that will underpin the successful implementation of the NPF" and again refers to an anticipated population increase of over one million people by 2040. It describes itself as a "budget and financial plan" and, expressly, that it is not part of a physical planning process but as being "fully integrated with the approach adopted in the National Planning Framework to spatial planning", as it sets out how funding will be made available for certain projects considered essential to the achievement of the strategic outcomes identified in the NPF.

33. The NDP identifies major infrastructure works it proposes to fund such as railway, road and airport infrastructure. It does not concern itself with any planning or development considerations, and insofar as a preference is found regarding transport infrastructure, its focus is on road rather than rail infrastructure.

This Appeal

34. The questions for determination may be summarised as follows:

(a) Whether the NPF and/or the NDP are within the scope of Article 2(a) of the SEA Directive and whether, therefore an environmental assessment of the effects of either or both plans was required in advance of adoption. (from para. 35)

(b) Subject to the answer to the first question, whether the assessment carried out before the adoption of the NPF was sufficient, whether the type of scrutiny met the legal requirements under the Directive, and in particular, whether a "comparable

assessment" of alternatives was properly carried out. Whether the selection of those reasonable alternatives was correctly done is not part of the appeal. (from para. 137)

(c) Whether the provision for monitoring included in the NPF is adequate and meets the requirements of Article 10 of the SEA Directive. (from para. 218)

(d) Whether, if the appellant succeeds, the Court may or should exercise its discretion to refuse the relief of *certiorari* sought in the proceedings. For reasons that will become apparent, this issue is not dealt with in this judgment.

Is the National Planning Framework a plan to which the SEA Directive applies?

35. The first question to be resolved is whether, the NPF is a plan of the type governed by the SEA Directive. The respondents argue that Court of Appeal was correct that an SEA assessment is not required, albeit the respondents did carry out an environmental assessment before adopting the NPF on 29 May 2018. What is in issue is whether the NPF required SEA assessment, and that is not answered merely by reason of the fact that one was conducted. No assessment was carried out before the adoption of the NDP.

36. The judgment of the Court of Appeal at paras. 90-92 noted that the point arose during submissions concerning the legislative basis for the adoption of the plan, as the precise legal basis for the adoption of the NPF was unclear.

37. The Statement of Opposition did plead that the SEA Directive did not apply, although this was not pursued in the High Court. The issue was subsequently raised on its own motion by the Court of Appeal on the second day of the hearing, which directed that the parties submit supplemental written submissions. There is ambiguity as to whether the Court of Appeal refused to determine this issue or determined that the SEA Directive applied to the NPF; Costello J. at para. 91 of her judgment "shortly rejected" the argument by the respondents that no SEA assessment was required, in reliance partly on a view that the point had not been pleaded.

38. A disagreement emerged between the parties at case management of this appeal as to whether this issue was one capable of being canvassed on appeal. In its ruling on the scope of the appeal given on 2 June 2022, this Court determined that it would consider the question of whether the NPF falls under the scope of, or requires assessment under the SEA Directive. The Court accepted that the point did fall for consideration in this appeal in the light of the possibility that there would otherwise be "a real risk that the Court would give an incorrect interpretation of the legislation in question" and followed the approach in *Callaghan v An Bord Pleanála* [2017] IESC 60, per Clarke J. A similar approach can be discerned in *Friends of the Irish Environment v An Bord Pleanála* [2019] IESC 53, where Irvine J. noted that "an appellant may be permitted to raise a European Union law argument not made in the court below if it is likely to be relevant to the proper construction of some relevant statutory provision or statutory framework."

39. Both of the lower Courts considered only the question of whether the assessments carried out of the NPF and the NDP met the relevant requirements of EU law including the requirements of the SEA Directive. It was assumed for the purposes of that analysis that in adopting each of the two plans the government was required to comply with the relevant EU provisions, including the SEA Directive.

40. The judgment of this Court therefore follows a different course from that to which the judgment of the High Court and the Court of Appeal were directed.

The Directive and National Regulations

41. I propose to commence the analysis by a consideration of the threshold tests set out in the Directive as interpreted by the CJEU. Two threads of the test are apparent: the plan or programme must be "required" by some legislative, regulatory or administrative provision which regulates its adoption; and the plan or programme must be one that sets the framework for future development.

42. European Directive 2001/42/EC (the "assessment of the effects of certain plans and programmes on the environment") does not in fact use the word "strategic" in its title and was adopted by the council and Parliament in 2004 and was transposed into Irish law by S.I. 435/2004 the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 and S.I. 200/2011 The European Communities (Environmental Assessment of Certain Plans and Programmes) (Amendment) Regulations 2011, which I will collectively here call the "SEA Regulations".

43. Assessment under the SEA Directive is required in regard to the effects of certain "plans and programmes" on the environment. An assessment under the SEA Directive is known as a Strategic Environmental Assessment ("SEA assessment")

44. To require assessment under the SEA Directive three cumulative criteria must be met:

(a) It must be "a plan or programme" within the meaning of Article 2(a).

(b) It must be one such plan or programme specified in Article 3(2), (3) or (4), and

(c) It must not be exempted under Article 3(8) or 3(9).

45. The first element of the test is that the plan or programme be "required" by national provisions. This aspect of the test is difficult, and has given rise to some commentary in the courts of England and Wales regarding the breath of its reach.

46. Article 2(a) defines those plans and programmes to which it has application:

> "'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;"

47. Article 3(2), 3(3) and 3(4) limits the class of plans and programmes for which assessment is required to those that set a framework for further development:

> "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."

48. Articles 3(3) and 3(4) have no applicant to the questions in issue in this appeal and do not need further comment.

49. Some plans or programmes are exempt, and the material exemption for the purpose of the issue regarding adoption of the NDP, "financial or budget plans and programmes" are excluded by Article 3(8).

50. I propose to consider the two elements of this test separately and commence with a discussion concerning the meaning of the provision that the adoption of a planner program be "required" by national provisions.

Required by Domestic Provisions: The Source of the Authority to Adopt the NPF

51. The CJEU has taken a broad approach to interpretation of the phrase "required" as it appears in Article 2(a) of the Directive. Indeed, it may be said that as so interpreted, the phrase does not bear the normative meaning that a literal interpretation of the word in the English language might otherwise connote.

52. It is common case that the NPF and the NDP were adopted by the Government, which as the executive arm of the State can be understood as a national authority. The question that presents is by what power or authority it was adopted and prepared, and whether the adoptions of these plans was *required* by legislative regulatory or administrative provisions.

53. The respondents argue that the NPF was prepared under a discretionary power of Government but accepts that this factor alone does not render its adoption to fall outside the SEA Directive. The focus rather is on whether the adoption of the plan (and I use this phrase throughout this judgment without seeking to distinguish between a plan or programme in any technical sense) was "required" by any legislative regulatory or administrative provision. The respondents contend in response that no legislative or regulatory provisions prescribe the preparation and adoption of the plan and no particular provision, whether legislative or regulatory, exists at a national level to so require its preparation or adoption.

54. The appellant argues that it is wrong to treat the word "required" as if it were a word in a domestic legislative provision mandating a particular action. It argues for a broad interpretation of the concept in the light of the jurisprudence of the CJEU.

55. The judgment of the Court of Appeal was that s. 2 of the Planning and Development Act 2000 (as amended) ("PDA") is the legislative basis for the adoption of the NPF. Section 2 **(**as inserted by the Planning and Development (Strategic Infrastructure) Act 2006, s. 6(a)) provides in its material part:

> "'National Spatial Strategy' means the 'National Spatial Strategy: 2002-2020' published by the Government on 28 November 2002, or any document published by the Government which amends or replaces that Strategy'"

56. The National Special Strategy ("The NSS") was adopted on the 28 November 2002. In October 2014 the Government gave approval for the commencement of the preparation of the NPF to replace the NSS. The process led to the substitution of the NSS with the NPF.

57. The public notice of the adoption and publication of the NPF dated 30 July 2018, and published in national newspapers, gave notice of the decision by Government "to adopt and publish the National Planning Framework on 29 May 2018 pursuant to s. 2 of the Planning and Development Act 2000 (as amended)". The public notice for the purpose of the SEA Directive published on 30 July 2018 used the same formula to identify the legislative source of the power to publish the plan.

58. But s. 2 of the PDA is simply a definition section. It is in no sense an enabling or empowering provision, nor one which mandates the adoption of a plan. Therefore, notwithstanding that the NPF itself declares that it was adopted pursuant to s. 2 of the 2000 Act, that statutory provision cannot be – and is not in fact - its legislative source.

59. Two documents were circulated in July 2018, after the NPF was formally adopted. A formal Government Circular FPS04/2018 dated 3 July 2018 and addressed to the chief executive of each local authority, the directors of each regional assembly, An Bord Pleanála, and the directors of planning services in City and County Councils and the senior planners in those councils and regional assemblies, enclosing a document called the "Implementation Road Map for the National Planning Framework" dated July 2018. It was noted that questions had been raised as to the "legal status" of the NPF, and the answer in the opening page of the chapter entitled "Legal Status and Project Governance" was again to point to s.2 of the PDA 2000 (as amended) as the legal source of the authority to adopt the plan and there the NPF was described as a strategy to replace the NSS for the purposes of s. 2 of the PDA 2002 (as amended).

60. No statutory or regulatory provision has been identified which required the Government to adopt the measure. One might add that its adoption was not regulated by any legislative or regulatory provisions and nor is there any legislative regulatory or administrative provision which provides who may adopt such a plan and the procedure for preparing the measure. The provision for publication is not a measure regulating its adoption

and as it comes into play only after adoption, it follows that it cannot be a regulating provision. I consider that it strains language to say that because the decision to adopt was a formal decision of the Government, and a minute of the decision made and signed, that the decision is thereby regulated within the plain meaning of Article 2(a).

61. Section 20b of the Planning and Development (Amendment) Act 2018 ("the 2018 Act") was commenced on 22 October 2018 (see S.I. No. 436/2018). But this was after the adoption of the NPF. However, the 2018 Act now provides a statutory basis for the adoption of a plan and declares that its objectives are as follows:

> "(a) to establish a broad national plan for the Government in relation to the strategic planning and sustainable development of urban and rural areas,
>
> (b) to secure balanced regional development by maximising the potential of the regions, and support proper planning and sustainable development, and
>
> (c) to secure the co-ordination of regional spatial and economic strategies and city and county development plans."

62. This particular (post-dated) statutory amendment cannot, however, govern the analysis of the current NDP and I do not therefore propose to consider the argument of the appellant that it is an interpretative guide to the question regarding the legislative source of the NDP. No authority was presented in argument for such an analysis.

63. Neither party asserts that the classification or characterisation made by the respondents in the recitals to the NPF or in public notices announcing its publication could be determinative. The question of whether an SEA assessment is required is one which must be objectively ascertained in the light of the function of each plan.

64. The appellant argues that the State went through the process of preparing an Environmental Report, public consultation, farmers' boundary consultation, the publication of an SEA statement and of a statutory notice and that it therefore acted on the basis that an SEA assessment was required before the NPF was adopted. The appellant derived from that

fact the proposition that the respondents had "promised" to follow a certain procedure and that therefore it should implement that promise: *Attorney General of Hong Kong v NG Yuen Shiu* [1983] 2 AC 629 at p. 635 cited with approval by Keane J. in *Wiley v Revenue Commissioners* [1994] 2 I.R. 160 at pp. 173-174. I do not propose to consider this point further for the purpose of this appeal, as it is well established that as the question of scope is one of European law, and must therefore be determined in a conforming manner and objectively, and not from the fact that Government did take an approach or may be considered to have represented that a particular approach was appropriate.

65. In conclusion, therefore, the general and vague language used in the Circular and in the preamble to the NPF itself does not assist in identifying the legal authority under which the plans were adopted. There can however be no doubt that Government expressed the view that the NPF was to replace the NSS, for which provision had been made in the earlier legislation of 2000, and that the replacement was itself effected by the legislation. This is, however, not the actual source of the authority to adopt the NPF and s. 2 was not a legislative basis for its adoption, and operates as an interpretation section only.

66. The fact that the Government believed it was adopting the plan by reason of a legislative power or obligation cannot determine its legislative basis, nor can the fact that an SEA assessment was carried out or that public consultation was subsequently conducted on this basis.

67. In the absence of a statutory or regulatory source it must be concluded that the plan was in fact adopted by executive decision of Government pursuant to its power under Article 28.2 of the Constitution. It is a document adopted by formal decision of the Government. The decision accordingly goes beyond being a statement of mere policy or political aspiration, and it bears the solemnity and importance of a government plan. It was intended to have a direct influence on down-stream land use and development decisions by national, regional and local decision makers, and to ensure "efficient and effective process of

alignment between all the levels of spatial planning" (page 2 of Implementation Roadmap for the National Planning Framework, July 2018).

68. This aspect of the NPF may now be examined in the light of the second part of the threshold test in Article 3(2)((a) of the Directive. This provides that the relevant plan or programme should "set a framework for future consent" of projects listed in Annex 6 or 7 of the Habitats Directive 92/43/EEC.

Influences or acts as Framework?

69. The NPF is intended to affect decision making at national, regional and local levels. It is a direct substitution for the NSS and in the amending legislation of 2018 replaces it in the relevant provisions. For the purpose of the analysis, it is useful, therefore, briefly to examine the place that the NPF enjoys in the domestic planning and development legislative scheme.

70. Section 9 (1) of the PDA requires each planning authority to make a plan (a "development plan") every 6 years. The development plan shall so far as is practicable be consistent with national plans, policies or strategies as the Minister determines relates to proper planning and sustainable development. The objective of the development plan is to regulate future land use and development within a functional area, and the development plan typically sets zoning and policy objectives

71. The degree of detail or specificity in a development plan can vary, but s. 10 of the PDA requires that the development plan "shall set out an overall strategy for the proper planning and sustainable development of the area of the development plan" and shall indicate the development objectives for the particular area.

72. Section 10(2) of the PDA requires that a development plan shall include objectives for zoning for particular purposes, whether residential, commercial, industrial, agricultural, recreational or as open spaces or otherwise, and for the conservation and protection of the

environment and heritage, including archaeological and natural heritage and European sites and other conservation protection sites.

73. This Court has previously noted the solemnity and importance of the development plan: *Byrne v. Fingal County Council* [2001] 4 I.R. 565 and *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99. In the latter case the development plan was described by McCarthy J. at p. 113 as an "environmental contract between the planning authority, the Council and community."

74. A development plan is adopted after members of the public are given the right to participate in its formulation.

75. Section 178 of the PDA (as substituted by s. 63(3) of the Local Government Reform Act 2014) provides for restrictions on development by a County Council of any development that materially contravenes the development plan. The planning authority is required to take steps to secure the objectives the development plan: s. 15(1) of the PDA. More important is the fact that a planning authority and (on appeal) An Bord Pleanála are required to have "regard to" the provisions of the development plan in determining an application for planning permission. In a general way, therefore, the development plan operates as a fetter on further downstream development. A special proceeding procedure exists when permission amounts to a departure from the development plan.

76. Below the development plan in the hierarchy is the local area plan which may be adopted by a planning authority or jointly by two or more planning authorities and such a local area plan may be in respect of an area, and the objectives of the local area plan are consistent with those of the development plan generally and also provided it is consistent with any regional spatial and economic strategy that apply to the area:

77. A local area plan is a mandatory consideration in an application for planning permission. Section 27 of the Act (as inserted by the Act of 2010) requires a planning

authority to ensure when making a development plan or a local area plan that the plan is consistent with any regional planning guidance in force for the area the area.

78. Thus the NPF is an apex plan or programme. Certain statutory provisions make direct reference to the NSS, and by substitution to the NPF.

79. Section 10(1A) of the PDA (as inserted by the amending legislation of 2010) makes it mandatory that a development plan which sets an overall strategy for the proper planning and sustainable development of a particular area shall in its compulsory written statement include a core strategy which shows that the development objectives are consistent as far as practicable with national and regional development objectives set out in the NSS:

> "The written statement referred to in subsection (1) shall include a core strategy which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives set out in the National Spatial Strategy and regional planning guidelines."

80. Section 23 (1)(a) requires that regional spatial and economic strategies shall support the implementation of the NSS.

> "The objective of regional planning guidelines shall be to support the implementation of the National Spatial Strategy by providing a long-term strategic planning framework for the development of the region for which the guidelines are prepared which shall be consistent with the National Spatial Strategy."

81. An Bord Pleanála has jurisdiction to grant permission for strategic infrastructure development under the Planning and Development (Strategic Infrastructure) Act 2006. Section 37A of the PDA requires that the Board must serve on a prospective applicant and notice in writing stating its opinion inter alia that the development would contribute substantially to the fulfilment of any of the objectives in the NSS or in any regional spatial and economic strategy in force in respect of the area or areas in which it would be situated.

"(1) An application for permission for any development specified in the Seventh Schedule (inserted by the Planning and Development (Strategic Infrastructure) Act 2006) shall, if the following condition is satisfied, be made to the Board under section 37E and not to a planning authority.

(2) That condition is that, following consultations under section 37B, the Board serves on the prospective applicant a notice in writing under that section stating that, in the opinion of the Board, the proposed development would, if carried out, fall within one or more of the following paragraphs, namely—

(a) the development would be of strategic economic or social importance to the State or the region in which it would be situate,

(b) the development would contribute substantially to the fulfilment of any of the objectives in the National Spatial Strategy or in any regional planning guidelines in force in respect of the area or areas in which it would be situate,

(c) the development would have a significant effect on the area of more than one planning authority.

(3) In subsection (2) ' prospective applicant ' means the person referred to in section 37B(1)"

82. Finally, s. 143 of the PDA (as amended in 2006 and 2014) mandates that the Board performing its function in general is to have regard to the NSS and to any regional spatial and economic strategy for the time being in force (substituted by the Local Government Reform Acts 2014, s. 5(7)).

"(1) The Board shall, in performing its functions, have regard to—

(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,

(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and

(c) the National Spatial Strategy and any regional spatial and economic strategy for the time being in force.

(2) In this section "public authority" means any body established by or under statute which is for the time being declared, by regulations made by the Minister, to be a public authority for the purposes of this section."

83. Thus the NPF is a plan which has downstream statutory effect, albeit it does not mandate a specific result. Regard is to be had to the plan in local development plans and these in turn create the limitations on development consent. It can be said that the NPF does foreclose certain options and sets a general framework, and it is more than a mere policy document in that it sets a context within which local and regional development plans are to be adopted and development permission granted, albeit the plan operates at a high level. Insofar as it operates as a framework, it must be said that the contents of the NPF and the measures it proposes to adopt are such as to be likely to have environmental effects through its direct impact on downstream decision-making. But it was not until the passing of the amending legislation in 2018 that direct legislative provision was made for the adoption of the NPF and which regulates the procedure for its adoption.

84. It could not therefore be said that in a strict sense, and on a literal interpretation of the requirements of Articles 2(a) the Directive, the adoption of the NPF was "required by any legislative, regulatory or administrative provision", nor was its adoption regulated by any legislative or regulatory provisions. Yet the SPF does aim to - and will have - effects on downstream decision making within the meaning of Article 3(2)((a).

85. This brings me to a consideration of the interpretative approach of the CJEU to the scope of the SEA Directive.

Jurisprudence of CJEU

86. The test of whether the adoption of a plan or programme is "required" is not to be interpreted as if this concerned a purely domestic measure: it must, rather instead to be given its autonomous meaning in European law. The jurisprudence of the CJEU supports a broad approach to the interpretation of the scope of the Directive, and this suggests that the word does not carry a normative meaning, but is rather more akin to "regulated". In an early case, the CJEU rejected the opinion of Advocate General Kokott that plans and programmes whose adoption are not compulsory are excluded from its scope: see her Opinion in *Inter-Environnement Bruxelles v. Région de Bruxelles-Capitale* (Case C-671/16, EU:C:2018:39).

87. It is useful to start with the judgment in *A and Others (Wind Turbines at Aalter and Nevelle* (Case C-24/19, EU:C:2020:503) on a reference for a preliminary ruling from the Rand voor Vergunningsbetwistingen, Belgium. The measure in question concerned a Circular which contained a certain number of provisions to be taken into consideration when giving consent to the installation of a wind turbine to regulate nuisance, compensation for damage to the environment, shadow flicker and security devices. Development consent was given for the construction and operation of five turbines. The plaintiffs, who lived near the proposed site, challenged the permission on the grounds that the order on the basis of which the planning consent was given had not been subjected to environmental assessment. The question was whether the Circular and Order were plans and programmes within the meaning of the SEA Directive.

88. This case is of particular importance because the domestic court invited the Court of Justice to reconsider the definition of plans and programmes which are "required" by legislative, regulatory or administrative provision in Article 2(a) of the Directive and in particular whether the broad meaning of the word "required" it had proposed in earlier judgments, and which did not connote a compulsion or necessary adoption of a plan or programme was correct. It was argued that the Circular was a "completely voluntary" policy

instrument, which the public authority had adopted in its discretion, and by reason of policy making but not legislative powers.

89. The Court was also asked whether an instrument or measure, which itself did not represent a requirement or necessary condition for the granting of consent, and was not intended to constitute a framework for further development, could be a plan or programme for the purpose of the Directive.

90. In its response to the question for reference the Court of Justice refused to depart from its previous view that "a measure must be regarded as 'required' where the legal basis of the power to adopt the measure is found in a particular provision, even if the adoption of that measure is not compulsory" (at para. 35). The Court relied on its earlier judgment in *Inter-Environnement Bruxelles v. Région de Bruxelles-Capitale* (Case C-671/16, EU:C: 2018: 403) and concluded that on these facts, the measures were adopted by government in implementation of "hierarchically superior rules" from legislation (at paragraph 50).

91. That conclusion was reached from an examination of the context of the objectives and purposes of the SEA Directive. It was accepted that there was some difference in the language used for the threshold test, between, for example, the Spanish "*exigidos*", German "*erstellt werden müssen*" and the English word "required". The Italian version was said to use a less prescriptive term "*previsti*". The analysis of the Advocate General from the different languages did not therefore assist the Court in the interpretative process, as different conclusions as to the degree of prescription connoted by the word was possible (paras. 38-40).

92. The Court took the view that whether the adoption of a plan or programme is compulsory or optional could not be the test, as such a test would not meet the diversity of situations or the wide-ranging practices of national authorities. That factor, it was said, must be taken together with the principles from Article 37 of the Charter of Fundamental Rights which advocated a high level of environmental protection, and the objectives of

improvement of the quality of the environment and the principles of sustainable development. Article 191 TFEU is to similar effect. A broad interpretation was also consistent with the European Union's international undertakings.

93. It warrants setting out the full conclusion of the Court of Justice in that case:

> "It follows that the second indent of Article 2(a) of Directive 2001/42 must be interpreted as meaning that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the authorities competent to adopt them and the procedures for preparing them, must be regarded as 'required' within the meaning of, and for the application, of that Directive." (para. 52)

94. There the Court appeared to take the broad and purposive approach to interpretation in treating the word "required" as akin to "regulated", so that any regulated or formal measure could be included within its meaning, having regard to the environmental aims the Directive sought to achieve. That would not be a meaning that sits comfortably with the normative connotation of the word "required" in the English language.

95. At para. 61 of its judgment, the Court noted that while the concept of plans and programmes can include legislative, regulatory or administrative instruments which are normative in nature, the Directive did not exclude or distinguish policies or general legislation, and the fact that a national measure "is to an extent abstract and pursues an objective does not prevent it from being included".

96. Finally the Court noted (at para.67) the other element of the definition: that any measure which establishes a significant body of criteria and detailed rules for the grant and implementation of one or more projects that are likely to have significant effects on the environment must be seen as a plan or programme that sets the framework for future development consents for projects.

97. On the facts, the Court regarded the Order as being clearly within that definition as it was adopted by an executive authority in implementation of rules emanating from the Flemish Parliament which had conferred on government the competence to adopt such an act. With regard to the Circular, and whether that could be considered to emanate from the Flemish government, it was observed as having been signed by the Minister/President and two Ministers responsible for the matter, and that it contributed to the attainment of objectives and standards to be achieved under Directive 209/28/EU and that the *raison d'etre* for the Circular is the decision by ministerial authority to restrict their own discretion and grant "environmental consents" within that legislation. This was so notwithstanding the fact that the Order and Circular were not a complete set of standards to regulate the grant of permission for the installation and operation of wind turbines.

98. The Court confirmed the view it had already expressed in *Patrice D'Oultremont and ors v Région wallonne* (Case-290/15, EU:C:2016:816), and in *Inter-Environnement Bruxelles* Case C-671/60 (at para. 53, 60).

99. The case law at that point suggested that a "plan or programme" is any measure which is formally adopted and which has a legal basis, the adoption of which does not arise from any compulsion, and which defines criteria and detailed rules for the development of land and which subjects the implementation of one or more projects to rules and procedures for scrutiny. The plan or programme does not need to set out a complete, comprehensive, and coherent framework for a particular sector.

100. As recently as its decision on 22 February 2022 in *Bund Naturschutz in Bayern v Landkreis Rosenheim* (Case C-300/20, EU: C: 2022: 102) the Court confirmed its view that a broad approach to interpretation was correct. The Court clarified the position as to the meaning of "required" in Article 2(a) as follows:

> "Thus, in view of the intended purpose of that provision, which is to provide for a high level of protection of the environment, and in order to preserve the effectiveness

of that provision, a plan or programme must be regarded as "required" where there exists in national law, a particular legal basis authorising the competent authorities to adopt that plan or programme, even if such adoption is not mandatory." (at para. 37)

101. The approach here suggests that a plan or programme which has a legal basis for its adoption is capable of being treated as "required" by the Directive.

102. The Court therefore has confirmed a broad and purposive interpretation be given to the scope of the Directive, both with regard to Article 2 and Article 3. It is true that the plans or programmes under consideration in the decision of the CJEU were themselves more prescriptive as to result, and contained more concrete restrictions on, or guidelines for development, but the broad purposive approach is evidence in all of the jurisprudence.

Does the Plan or Programme Establish a Framework? The Second Part of the Test

103. As to the separate question of whether a plan or programme must establish a framework for future development to meet the requirements of Article 3(2), in *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09 EU:C:2010:355), a judgment of 17 June 2010, on a reference for a preliminary ruling from the Conseil d'État of Belgium concerning the interpretation of Article 3 of the Directive, the Court agreed with the approach of Advocate General Kokott that the term "framework" did not require the plan or programme to be a conclusive determination but that a document which influenced downstream projects, in regard to their "location, nature, size, and operating conditions", even where some discretion remained, was capable of coming within the Directive.

104. In her Opinion Advocate General Kokott noted that during the procedure leading to the adoption of the Directive the Netherlands, Austria, and the Czech Republic proposed that the relevant plan or programme should determine the location, nature or size of projects requiring environmental assessment. She disagreed, and as the concept did not come to be

restricted in the manner proposed by Netherlands, Austria, and the Czech Republic in its final text, her view was that plans or programmes can be said to set a framework if they could influence the developmental consent in individual projects, which she notes could happen in very many different ways.

Discussion

105. The conclusions to be drawn from the case law of the Court of Justice are less than clear. The NPF was adopted by the Government voluntarily, but nonetheless it purports to be in substitution for an earlier plan and its text provides that it will be "given full legislative support within the planning system" (p.22).

106. My conclusion is that the NPF was prepared and published by the Government by virtue of the executive power which is vested in it by Article 28.2 of the Constitution. This is an autonomous, self-executing power the exercise of which does not in any sense depend on statutory authority. Against that background it is, I think, not easy to see how – judged at least by the bare language of the text of the Directive – a document of this kind prepared by the Government comes within the scope of Article 2(a) of the Directive.

107. It is true that the NPF may therefore be said to have been prepared or adopted by an authority at national level within the meaning of the fourth and fifth lines of Article 2(a) of the Directive, as the Government is obviously such a body. Yet given the autonomous nature of the executive power granted to the Government by Article 28.2, there is really no sense in which it could properly be said that the preparation or adoption of the NPF could be said to have been "required by legislative, regulatory or administrative provisions", even allowing for the expansive interpretation of the word "required" contained in the judgments of the CJEU in *A and Others (Wind Turbines at Aalter and Nevelle)* and *Bundnaturschutz in Bayern.* Specifically, there is here no "particular legal basis authorising the competent

authorities to adopt that plane or programme, even if such adoption is not mandatory": see *Bundnaturschutz in Bayern* at paragraph 37.

108. The fact that the NPF was adopted on a voluntary basis is not determinative as the Court of Justice does not adopt a narrow view as to the word of "required" in the second indent of Article 2(a), and that the word cannot be read as if it were a provision of national legislation enacted on account of a mandatory requirement.

109. On the other hand, the NPF was intended to influence some of the criteria for the grant of development consent for individual projects, and by reason of certain legislative provisions outlined above, regard is to be had to the provisions of the NPF in the adoption by local authorities of a development plan or a local area plan which in turn impacts upon decision-making at local level in application for development consent for projects. Thus, the NPF undoubtedly has, and is intended to have, an effect on downstream decision making, and that effect is mandatory in that decision making at local level is had within the confines of, and subject to the conditions set out in, the NPF.

110. The NPF seems to me undoubtedly to be a framework document, particularly if one has regard to its purpose and effect. Choices were made in this document regarding the appropriateness of, for example, ribbon development of domestic dwellings, and for the purposes of general land use strategy for housing. That framework ultimately influences the choices made at regional, local and the grant of permission for projects. Certain other options, such as the development of new cities or large conurbations, or the development of corridors to the regions are foreclosed in the high level choices there made.

111. In the language of *Bund Naturschutz in Bayern v Landkreis Rosenheim,* the "legal basis" for the adoption of the NPF is the executive power of Government derived from the Constitution. The Government acts collectively and by virtue of its executive function. While NPF was adopted on a voluntary basis, it does provide - and intends to provide - a set of national objectives for future development which establish a broad and high level

framework for future planning decision-making and has an impact on the adoption of lower level frameworks and consent for projects. Thus on this broad view, it may be a plan or programme to which the Directive does apply.

112. As I have just stated, the NPF was prepared and published by the Government by virtue of the executive power which is vested in it by Article 28.2 of the Constitution. This is an autonomous, self-executing power the exercise of which does not in any sense depend on statutory authority. It is not easy to see how – judged at least by the bare language of the text of the Directive – a document of this kind prepared by the Government comes within the scope of Article 2(a) of the Directive.

113. It is true that the NPF may therefore be said to have been prepared or adopted by an authority at national level within the meaning of the fourth and fifth lines of Article 2(a) of the Directive, as the Government is obviously such a body. Yet given the autonomous nature of the executive power granted to the Government by Article 28.2, there is really no sense in which it could properly be said that the preparation or adoption of the NPF was "required by legislative, regulatory or administrative provisions", even allowing for the expansive interpretation of the word "required" contained in the judgments of the CJEU in *A and others (Wind turbines at Aalter and Nevelle)* and *Bundnaturschutz in Bayern.* Specifically, there is here no "particular legal basis authorising the competent authorities to adopt that plane or programme, even if such adoption is not mandatory": see *Bundnaturschutz in Bayern* at para. 37.

114. Whilst the amending legalisation, which was enacted only two months after the adoption of the NPF on 19 July 2018, now makes express provision for the adoption of the NPF, and regulates its requirements, including expressly that it be subject to the SEA Directive, that legislation had not been enacted when the plan was adopted. It cannot inform the answer to the issue regarding the statutory basis for the plan. Nonetheless, express provision is made in that Act for the consideration of the measures in the NPF in downstream

decision-making. It would seem less than clear therefore that the happenstance of the adoption of the NPF only months before the enactment of the legislation should exempt the precise plan then in effect from assessment under the Directive.

115. Given, however, the expansive interpretation which the CJEU has already taken in respect of Article 2(a) in *A and others (Wind Turbines at Aalter and Nevelle)* and *Bundnaturschutz in Bayern,* one cannot exclude the possibility that that Court will take a different view of these words ("required by legislative, regulatory or administrative provisions"), even if, as a matter of national constitutional law, the Constitution cannot be regarded as being either legislative, regulatory or administrative in character.

Reference to the CJEU?

116. This Court is a court of last resort for the purposes of Article 267(3) TFEU. In view of the decision of the CJEU in *Consorzio Italian Management* (Case C-561/19, :EU:C:2021:799) and in view of the comments of that Court (at paragraph 51) regarding the extent of that duty, I cannot say that the issue presented here is so clear such that this Court could comfortably arrive at its own conclusion on that question. It is for that reason, therefore, that I consider that a reference in respect of this question is called for.

117. The Court of Justice has never determined the correct approach to the scope of the SEA Directive when a plan or programme is adopted by an executive arm of state without any legislative or regulatory requirement for its adoption, but where the plan or programme is intended to, and does have under domestic legislative provisions, an import on decision-making at local, regional level and in regard to development consent for a specific project. The broad approach to interpretation advocated by the CJEU is noted, but it does not afford a clear answer to this question.

The National Development Plan

118. The parties have agreed to the inclusion in the appeal of the separate question of whether the NDP fell within the ambit of the SEA Directive by reason of being a budgetary plan. The High Court and the Court of Appeal accepted that the NPD fell squarely within the exemptions to the SEA Directive, and that it was not a plan or programme to which the Directive applied.

119. The NDP was published as part of the larger *Project Ireland 2040* and, in summary, makes provision for the investment strategy to provide the infrastructure to support the spatial development objectives of the NPF. It provides for the allocation of resources to generally large-scale projects including hospitals, transport infrastructure, housing, and town or local area regeneration programmes.

120. One notable feature is how the investment priorities for transport are allocated under this plan which provides, inter alia, for the development of an Atlantic corridor between Cork. Limerick. Galway and Sligo, the development and financing of public transport in major urban centres, and the protection of existing inter-urban rail networks. Those road networks intended to be progressed are identified with some specificity. Funding for public transport is primarily for the upgrading or development of additional transport facilities in Dublin, Cork, Galway Limerick and Waterford.

121. Much of the plan is aspirational, including an ambition for 500,000 electric vehicles to replace existing diesel or petrol vehicles by the year 2030, support for renewable energy, domestic heat pumps and roof solar panels.

122. The question that arises is whether because the NDP makes, in some cases quite specific, provision for the allocation of resources for large-scale infrastructure projects, all of which are expressly identified as compatible with and supportive of the objectives of the NPF, the NDP is required to be assessed under the SEA Directive. The plans are linked, and

together set the framework, most obviously in transport infrastructure to further the spatial development strategy provided in the NPF.

123. The appellant says that while the NDP is described as a budget or financial plan, and would be outside the SEA Directive for that reason, it should have been subject to assessment under the SEA Directive because it was developed with, and cross refers to, the NPF and is a plan by which the infrastructure described in the NPF is proposed to be delivered. Further, it is argued that as NDP makes strategic choices around types of projects, for example, road rather than rail is preferred for connectivity, and it provides for the allocation of resources to meet that objective, the effect of the NDP is to foreclose an alternative allocation of the resources for the strategic developments. It is argued that the level of integration with the NPF means the NDP cannot be treated as a standalone budgetary plan and it supplements in material respects that plan.

124. Because there is no legislative or regulatory provision prescribing the preparation and adoption of the NDP, the respondents say that it cannot be a plan or programme for the purposes of the SEA Directive. They also say it is a purely budgetary plan and is thus exempt under Article 3(8) of the Directive.

125. The Court of Appeal regarded the NDP as falling outside the scope of the SEA Directive because it did not meet the requirements of Article 3, and also because it was excluded as being a budgetary plan. It did not address the question now arising whether the range of projects specifically identified, including specific road projects, new road developments or improved or upgraded rural roads, which were not identified in the NPF, do require an environmental assessment.

126. The Court of Appeal held that the NDP plan was one which set out investment priorities compatible with the objectives of the NPF and identified projects which may never come to be constructed, but would require planning and other development permissions before commencement. At para. 258 of the judgment, Costello J. said that for that reason

the NDP Plan is not a "integral part" of the NPF and did not require to be assessed pursuant to the SEA Directive, or under the Habitats Directive.

127. The Court of Appeal relied on the judgment of Smyth J. in *Kavanagh v. Ireland* [2007] IEHC 296 who was considering the status of an earlier NDP of January 2007. In that judgment, Smyth J. had taken the view was that the NDP was not intended to set a framework for development concerned with planning permission but was rather a financial or budgetary plan and further not one required by any legislative regulatory or administrative requirement.

128. Essentially the judgment of the Court of Appeal was that, because planning permission would be required for the development of any infrastructure projects identified as likely to require funding under the NDP, the relevant assessments would be carried out at that point.

129. Whether the NDP is a measure that requires assessment under the SEA Directive will depend first, on whether it meets the requirements of Article 3(2), (3) or (4) and the answer must await the response from the CJEU in the request for an Article 267 TFEU reference. As with the NPF, the NDP is not mandated under any legislative or administrative provision and was a decision of the executive acting under its constitutional authority from Article 28.2 of the Constitution.

130. The question of whether the NDP is a budgetary plan and thus exempted under Article 3 (8) and (9) is a separate question and I note the observation made by the CJEU in *Bund Naturschutz in Bayern* that the requirement in Article 3(2)(a) of the Directive

> "… must therefore be regarded as met where that plan or programme establishes a significant body of criteria and detailed rules for the grant and implementation of one or more of those projects, *inter alia* with regard to the location, nature, size and operating condition of such projects, or the allocation of resources connected with those projects."

131. As the NDP does provide for the allocation of resources for specific infrastructure projects, most especially for identified road projects and the upgrading of existing rail projects, the question is whether the NDP does establish criteria and detailed rules for the grant of consent for, and implementation of, those projects.

132. The Commission Guidance at paragraph 3.25 suggest that "a generalised allocation of financial resources would not appear to be sufficient to 'set the framework'", and gives the example of an allocation of funding for a country's housing programme. The Guidance goes on to say that "it will be necessary for the resource allocation to condition in a specific identifiable way how consent was to be granted" and gives the example of the setting out a future course of action by limiting the types of solutions which might be available.

133. It is the case that the NDP does not create a binding or limiting context within which development consent for projects must be considered, but it does make express and specific provision for the road networks and the upgraded rail networks specified in the plan, and to that extent it does foreclose development permission or consent for downstream projects which will depend on the existence and location of those road identified, albeit on a small scale map, but still identified by location and broad route. It could not be said that the NDP sets down rules and criteria, and the most it does is establish a general framework which might in due course limit the implementation location or precise parameters of projects.

134. In *Bund Naturschutz in Bayern* the CJEU accepted that the plan at issue "may have a certain influence on the location of projects" but considered that it should contain "sufficiently detailed rules regarding the content, preparation and implementation of projects" (paragraph 69 to 70).

135. The correct approach to this question is likely to be influenced by the response to the request for clarification on the scope of the Directive, and a further question arises with regard to the NDP, *viz*. whether the fact that the NDP was adopted to support the NPF is a

sufficient basis to treat it as a plan or programme requiring SEA assessment, notwithstanding that it is a plan framed as a budgetary or financial plan.

136. I propose seeking clarification to the additional question, the answer to which is not *acte clair*, concerning the overlap or interconnectivity between the two plans, *viz.* whether a plan or programme which makes specific provision for the allocation of funds to build certain infrastructure projects with a view to supporting the spatial development strategy of another plan could itself be a plan or programme within the meaning of the SEA Directive, or whether the fact that a plan which has as its objective the allocation of resources must be treated as a budgetary plan within the meaning of Article 3 (8).

The assessment of alternatives: pleading argument

137. The answer to the request for a reference might result in a conclusion that an SEA assessment was not required in respect of either or both the NPF or the NDP, and that answer could be dispositive of this appeal. The second strand of the appeal concerns the methodology engaged by the respondents in the assessment of the NPF and whether it is in conformity with the approach for which provision is made in Article 5(1) and Annex I of the Directive. For the reasons I now explain, I consider that the answer is not clear and that a further question needs to be addressed to the CJEU in regard to the mode of assessment.

138. Article 5(1) of the SEA Directive provides for the treatment of alternatives before a preferred option is chosen

> "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."

139. Article 4(1) requires an environmental assessment to be carried out during the preparation of a plan and before its adoption.

> "The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure."

140. The appellant argues that the assessment carried out on the National Planning Framework is flawed because the requirements of Article 5(1) were not met, as there was no adequate assessment or comparable consideration of reasonable alternatives to the preferred option. A preliminary procedural objection was raised in the High Court, the Court of Appeal, and now before this Court, as to whether this ground of challenge was pleaded in the statement of grounds and whether leave to seek judicial review was granted in respect of that point.

141. The statement of grounds pleads that there was no "adequate" environmental assessment of the likely significant effects of implementing the NPF, and that, while the Environmental Report does consider alternatives, they are briefly described, and without explanation of how assessments were made or the reasons why the options adopted were assigned or of the qualitative or quantitative basis for these. The appellant pleaded that the respondents in the circumstances failed to consider adequately or at all the reasonable alternatives and failed to identify, describe or evaluate the likely significant environmental effects of these alternatives or to specify any adequate reasons for the preferred option. The respondents pleaded that the Environmental Report did outline in some detail the alternatives and the reasons for the adoption of the preferred option, that each of the six strategy alternatives (described as options 1-6) were developed and a qualitative assessment carried out in respect of each.

142. The Court of Appeal determined the preliminary pleading issue by reference, *inter alia,* to the fact that the written submissions delivered by the applicants in the High Court

did make the case that the SEA Directive required all reasonable alternatives to be subject to assessment comparable to that of the preferred option, and this was responded to by the respondents in the High Court in their replying written submissions, and the point was argued at the oral hearing. The High Court judge, while he did accept that the statement of grounds may not have entirely covered the argument put forward, considered that the respondents were afforded the opportunity to file supplemental submissions and had adequate opportunity to deal with the point. The Court of Appeal, noting the importance of the issue, that the adequacy of the assessment of the reasonable alternatives was part of the case from the beginning, and that the respondents were not prejudiced by the lack of notice of the point or of an opportunity to address the point in oral and written submissions, considered that it would not be appropriate on a pleading point to prevent the applicant from advancing an argument in relation to an application of a significant EU environmental provision.

143. By its determination dated 21 February 2022 ([2022] IESCDET 22), this Court held that the point was of public importance:

> "[T]he three issues raised by the applicant (broadly speaking, the selection of the preferred option (including, in particular, whether the possible alternatives were adequately scrutinised), the extent of the proposed monitoring and whether the NDP was itself only a budgetary plan which did not fall within the ambit of the SEA Directive) are all clearly matters of general public importance."

144. The methodology of the assessment of alternatives now comes to be considered again before this Court.

The Environmental Report

145. It is useful at this point to describe the mode of assessment carried out in Chapter 7 of the 'Strategic Environmental Assessment Environmental Report – Ireland 2040: The

National Planning Framework' ("The Environmental Report"), described in some detail in the Court of Appeal decision and in the judgment of the High Court.

146. The Environmental Report runs to 251 pages inclusive of appendices and was prepared by RPS following a workshop in May 2017 with a wide group of stakeholders and following the publication of an "Issues and Choices Paper" and an SEA scoping report. Four key challenges to the environment and their relevance to the NPF are identified in the Report: (See para. 175 of the judgment of the Court of Appeal);

> "- Valuing and Protecting our Natural Environment
>
> - Building a Resource-Efficient, Low Carbon Economy
>
> - Implementing Environmental Legislation
>
> - Putting the Environment at the Centre of Our Decision Making."

147. Following on from the four key challenges, seven key actions for Ireland on the state of the environment have also been listed at page 8 of the Environmental Report, and comprise the following:

> "- Environment, health and wellbeing: recognise that a good quality environment brings benefits to health and wellbeing.
>
> - Climate change: the response to climate change needs to be accelerated - we need to act quickly, transform our energy systems and a shift to a more sustainable transport system.
>
> - Implementation of legislation: there needs to be an improvement in tracking plans and policies, as well as compliance with several directives and continued targeting of noncompliances by environmental enforcement bodies.
>
> - Restore and protect water quality: measures should continue to be implemented to achieve at least Good Status in all water bodies, while also acknowledging that while Ireland's marine waters are relatively unpolluted, pressures continue to increase.

- Nature and wild places: habitat and biodiversity loss continue - initiatives need to be developed which incorporate nature protection at the core of decision-making.

- Sustainable economic activities: the economy can be competitive, but in a sustainable way having regard to finite resources. Issues include the increase in exported residual waste, the need to phase out subsidies and exemptions which encourage unsustainable activities/emissions as well as the challenge of intensifying agricultural output in a sustainable way.

- Community engagement: a strong evidence-base and good communication strategies are key for keeping stakeholders and citizens reliably informed - sustainable growth requires changes to the way all consumers act."

148. The nine environmental components identified were: Population and Human Health; Biodiversity, Flora and Fauna; Soils; Water; Air Quality; Climatic Factors; Material Assets; Archaeology, Architecture and Cultural Heritage; and Landscape, and in respect of each a strategic environmental objective was identified and described. By way of example, objective 2 dealing with Biodiversity, Flora and Fauna has a strategic environmental objective of preserving, protecting, maintaining and, where appropriate, enhancing the terrestrial, aquatic and soil biodiversity, particularly in EU designated sites and of protected species.

149. The focus of the appeal is Chapter 7, which identifies the reasonable alternatives for an overall strategic planning framework. Chapter 7 begins with the correct statement that the consideration of alternatives is a requirement of the SEA Directive and notes that whilst the term "reasonable" is not defined in the legislation, that good practice would suggest that a constructive and informative exercise is what is required and that only "possible options" are examined. The narrative also points to the fact that the Directive does not prescribe at what stage consideration of alternatives should be undertaken, but that if the consideration

is to be a useful input into the planning making process that alternatives should be considered as early as possible. The Chapter notes that research carried out by the ESRI examining population growth, employment and job growth projections to 2040 shows that a key challenge is to "explore macro spatial alternatives" to accommodate projected growth in population in the most sustainable manner to achieve economic, social and environmental requirements. It also notes that the options are to be "strategic in nature" and notes also key challenges include regional disparity, weakness in rural areas, the hollowing out of settlements and infrastructure deficits.

150. Four "macros spatial alternatives" described as "pillars" were then identified as reasonable, realistic, viable and implementable. These are as follows:

> "Pillar 1: Regional distribution scenarios.
>
> Pillar 2: Concentration – dispersal scenarios.
>
> Pillar 3: Compact – sprawl scenarios.
>
> Pillar 4: Temporal infrastructure scenarios."

These are then contained in a pie chart at figure 7.1.

151. Under Pillar 1, four regional distribution options were explored: regional parity, regional rebalance, regional acceleration and regional dominance, each being a different approach to options for regional growth. The preferred solution chosen was regional parity (where the level of growth with the north and west and southern regions would be equal to that of the eastern and midlands region). The reason given for that choice was primarily the absence of a mechanism to redirect the majority of growth to different regions and the comparatively smaller size of regional cities.

152. Under Pillar 2, four options for a settlement structure were analysed, including city concentration, regional concentration, regional dispersal and national dispersal, and the result of the analysis was the choice of regional concentration as the preferred option, as this would contribute more to national objectives for regional development. The need to address

sustainable development in the northwest and to reduce growth pressures on the wider Dublin region were factors in this conclusion.

153. Under Pillar 3, it was noted that the fastest growing areas in the country are at the edges of, and outside, the cities and towns with the consequential strain on infrastructure and services, that city centres were becoming run down and that sprawl was extending the physical footprint of urban areas. Four options were explored: compact growth, contained growth, reduced sprawl and sprawled growth, and the preferred option was a combination of contained growth and reduced sprawl, which would mean that 40% of all new homes nationally would be delivered on infill or brown fill site within built-up existing urban settlements.

154. Under Pillar 4, it was noted that alignment was required with a national investment plan because of national infrastructure priorities. Four scenarios were explored: front loading provision, sequential provision, tangential provision and market-led provision. The preferred option is sequential provision, where some critical infrastructure would be provided in advance of plan growth, and the balance then would be delivered on a phased basis in tandem with development as it happened. This option was considered to provide flexibility especially in the light of the length of time it was likely to take to deliver projects from design stage.

155. There is again a pie chart at 7.2, refining the options within the four pillars into six strategy alternatives, identified to "integrate the preferred pillars into more focussed real-world alternatives".

156. The six alternative options were as follows: compacted concentration, regional effectiveness and settlement diversity, regional effectiveness and settlement consistency, regional dominance and settlement diversity, regional dominance and settlement consistency, and business as usual. The Report says that an assessment was carried out that was primarily qualitative in nature and that a matrix which provided a plus sign (+) indicated

a potential positive impact, a minus sign (-) a potential negative impact, and a plus/minus (+/-) indicated that both positive and negative impacts were likely or that in the absence of further detail the impact was unclear.

157. The options then were assessed in a matrix which used the plus and minus (+ and -) indicators for each of the six options. The preferred approach was the macro spatial growth approach because it provided for regional clarity, concentration towards cities and some regionally important larger settlements, contained growth and reduced sprawl, and sequential provision of infrastructure with some critical infrastructure being put in place to promote investment. The reasons for choosing this option were explained.

158. The preferred option was dealt with in some detail in Chapter 8 and assessed for its possible environmental effects and Chapter 9 dealt with possible mitigation measures to offset any significant adverse effects on the environment of the adoption of that option. Again, a plus and minus (+ and -) matrix was employed.

The Treatment of Alternatives

159. Chapter 7 of the Environmental Report contains the assessment of the reasonable alternatives. No argument is made as to the reasonableness of the selection of these alternatives, and the argument is focussed on the treatment of those five reasonable alternatives, once the "business as usual" option was discarded.

160. Five reasonable alternatives were identified in the SEA Environmental Report, one only of the possible options being rejected at that stage, the option of "business as usual". By reason of Article 5(1) of the Directive, each of those five reasonable alternatives was required to be described, identified and evaluated.

161. The issue concerning the assessment of reasonable alternatives concerns whether the reasonable alternatives were sufficiently identified, described and evaluated on a comparable basis to the analysis carried out in regard to the preferred option. The Court of Appeal

concluded that the applicant's focus was too narrow and that it ignored the earlier chapters of the report and failed to read the report as a whole.

162. It is the correct approach to the treatment of the alternatives that falls now for consideration in the appeal. The appellant says that once a number of options were expressly found to be reasonable, they had to be assessed at the same level and on the same basis as the preferred option, and that is the means by which a "comparable" assessment is to be conducted. Although the appellant maintains that the matrices are incomprehensible, its real argument is that there was no equivalence in the way in which the preferred options and the reasonable alternatives were examined. On a simple quantitative analysis, the appellant points to the fact that the 57 pages of text in Chapter 8 which contained the analysis of the preferred option is very different from the short narrative statement and blunt matrices used to evaluate and weigh the alternatives which have already been assessed as being reasonable.

The Treatment of Alternatives: Substantive Arguments

163. The appellant argues that the Strategic Environmental Assessment was flawed because it did not give comparable consideration to those reasonable alternatives which were identified.

164. The respondents contends for what is described as an "iterative approach" (language adopted from the jurisprudence of the Courts of England and Wales) so that, while a comparable assessment of reasonable alternatives and the preferred option does have to be carried out, the level of scrutiny will depend on the relevant stage of the process at which this is done. The respondents argue that the assessment of the likely significant environmental effects of the draft plan does require a high level of scrutiny, but that a lesser degree of scrutiny is appropriate with regard to alternatives and that this is apparent from the fact that alternatives are discarded at different stages of the process. It is suggested that the highest degree of scrutiny therefore is to be applied to the preferred option in respect of

which a "full assessment" is required and that this is evident from the fact that the SEA assessment is a process which requires first, the ascertainment of reasonable alternatives, then the comparison of those to arrive at a preferred option, and at that point a full assessment of the likely significant environmental effects of that option is to be performed.

165. This difference of approach is of some significance as the Environmental Report published with the draft NPF and submitted for broad consultation conducted a more intense and detailed examination of the preferred option than that performed with regard to the five alternatives identified by the process as being reasonable.

166. This aspect of the challenge was considered at some length by Costello J. in paras. 140-218 of her judgment. The Court of Appeal held that there is an obligation under the SEA Directive to assess alternatives in a manner comparable to the preferred option, but held that the obligation must be seen in the light of the stage of the process at which this occurs, so that the assessment of alternatives at a stage prior to the selection of the preferred option may be done in manner that outlines those options and the reasons for not progressing them in the analysis. It thus found that the respondents had not made an error in conducting a more limited assessment of the alternatives considered to be reasonable than that carried out on the preferred option. The Court of Appeal therefore rejected the argument of the appellant that what was called a "full assessment" was required of all five alternatives which had been identified as reasonable.

167. An argument that emerges from both sets of submissions is the precise meaning of the Directive, the authority to be afforded to the Commission Guidance, and the correctness of the approach found in the authorities of England and Wales.

The text of the Directive

168. It is convenient to commence with the text of the material parts of the Directive.

169. Article 5 provides for the contents of an 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."

170. Article 6 provides for the circulation of the report for consultation:

"1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

3. Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.

4. Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.

5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States."

171. Annex I makes provision for that information to be provided with respect to the plan or programme and not by reference to the preferred option and the alternatives discarded when that option was chosen:

"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 (These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative 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.

172. The appellant argues that all five reasonable alternatives were to be assessed with the same degree of scrutiny, and on the same basis as that afforded to the preferred option, and that this is the approach mandated by Article 5(1) and the correct means by which a proper comparison can be made between those alternatives.

173. The respondents argue that once five options had been identified as reasonable alternatives, it was sufficient to apply a degree of assessment to each of these, and that the

Directive did not preclude a more intense level of scrutiny of the preferred option once this was identified. They argue that the Article 3(2) of the Directive in its terms envisages that it is the draft plan that is to be comprehensively assessed for environmental impact, and that does not require that all reasonable alternatives, considered as possible other means to achieve the strategic ends for which the plan provides, are to be afforded an identical treatment to that afforded to the preferred option.

174. The trial judge considered that the requirement of the Directive was to carry out such a "full SEA" once a preferred option had been identified. The expression "full SEA assessment" crept into the discourse generally regarding the nature of assessment, although it is not found in the Directive itself, not in the Commission Guidance, but it is found in some authorities of the Courts of England and Wales. I will continue to use that expression for convenience to describe the detailed analysis of an option, the type engaged in Chapter 8 of the NPF, albeit noting it is not used in a technical sense to reflect any language of the Directive.

175. The trial judge relied on Annex I(h) of the Directive which he said meant that once alternatives had been selected and once reasons had been given for the choice, the requirements of that provision were met.

176. Both the High Court and the Court of Appeal considered that adequate consideration was given to the five identified options in the Environmental Report for the purposes of Article 5(1). Costello J. considered that the assessment carried out in Chapter 7 of the identified reasonable alternatives was sufficient to meet the requirements of the Directive and that the analysis was carried out in what she calls a "identical fashion" (para. 208). She held that the inclusion of a more detailed assessment of the preferred option as happened in Chapter 8 is not a factor of relevance to a conclusion on the adequacy of the assessment.

The Commission Guidance document

177. The phrase "comparable assessment" is not found in the text of the Directive itself, Article 5 of which requires the identification, description and evaluation of the likely significant effects on the environment of implementing the proposed plan or programme and reasonable alternatives. From Annex I(h) it is clear that an outline only of the reasons for selecting the alternative is required, but that provision concerns the reasons for selection which is not in issue in this appeal:

> "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)."

178. No express words of the Directive provide that the assessment of the preferred option and the alternatives is to be "comparable", but rather what is required is identification, description and evaluation. Whether a requirement for evaluation means that the preferred option and the reasonable alternatives are to be evaluated on a broadly equivalent or comparable basis is the central issue.

179. The European Commission published in 2003 a Guidance Document entitled "the implementation of Directive 2001/42 and the Assessment of the effects of certain Plans and Programmes on the Environment 2003 ("the "Commission Guidance") which at para. 5.6 states that the study of alternatives is "an important element" of the assessment to be carried out and that the SEA Directive requires a "more comprehensive assessment" of those alternatives than is required in the EIA Directive:

180. Later in the Commission Guidance the purpose or objective of that assessment is described as "to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption" (para 5.11).

181. The Commission Guidance goes on to say at 5.12 that the Directive makes no distinction between the assessment requirements for the draft plan or programme and for the alternatives. The requirement is rather that the assessment be done in a "comparable" way, and it is here that this word has made its way into the discourse:

> "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 [the environmental 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 in the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they are not 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 alternatives."

182. Finally, the Commission notes by way of explanation that the requirements of the SEA Directive are different from those in Article 5(3) and Annex IV of the EIA Directive which requires a developer to provide an "outline" only of the main alternatives.

183. The appellant argues that the Commission Guidance contains a correct interpretation of the requirements of the SEA Directive, and that a comparable and sufficiently detailed analysis was required of each of the five alternatives identified.

184. The respondents argue that a reading of the SEA Directive does not suggest a legislative intention that alternatives be assessed to the same degree as the preferred option, and that, insofar as the Commission Guidance suggests otherwise, it is not a correct reading of the legislative scheme.

185. Before I consider the question of interpretation, it is useful to examine some authorities of the courts of England and Wales in understanding the approach of those Courts to the Directive.

Jurisprudence of the Courts of England and Wales

186. The first judgment that offers guidance is *Save Historic Newcastle Ltd v Forest Heath District Council* [2011] EWHC 606 (Admin) where Collins J expressed the view that the authority responsible for the adoption of the plan or programme as well as the other statutory authorities and the public generally "must be presented with an accurate picture" of what reasonable alternatives there are and "why they are not considered to be the best option". The Commission Guidance (paras. 5.11-5.14) is expressly referred to.

187. Collins J noted what he described as the "iterative" process of ruling out alternatives which he correctly noted would have happened prior to the preparation of a draft plan. What he was speaking about there, however, was the process of ruling out alternatives as not being reasonable and also the different question, not relevant to the present appeal, of the giving of reasons for the rejection of those alternatives. That process is indeed iterative, but to so describe it does not answer the interpretative question here arising.

188. The next case was *Ashdown Forest Economic Development Llp v Secretary of State for Communities and Local Government and ors* [2014] EWHC 406 (Admin) where Sales J noted the procedural requirement of the Directive for consultation with authorities and with the public "with a view to them being able to contribute to the assessment of alternatives" (para. 91). He noted that there may in fact be only one reasonable alternative after others have been rejected as not reasonable, and that the process will invariably involve a "series of stages of examination". In the Court of Appeal Costello J. quoted from paras. 96 and 97 of his judgment which are central to his analysis:

"… It may be that a series of stages of examination leads to a preferred option for which alone a full strategic assessment is done, and in that case outline reasons for the selection of the alternatives dealt with at the various stages and for not pursuing particular alternatives to the preferred option are required to be given."

189. Costello J. read this as suggesting that it was only the preferred option that required a "full" assessment. I must respectfully disagree with her interpretation, as Sales J. was here dealing with the possibility that in the course of a process there may emerge only one reasonable alternative which is then to be progressed to evaluation.

190. It is following paragraph of the judgment of Sales J. which seems to me to be most relevant:

"A plan-making authority has an obligation under the SEA Directive to conduct an equal examination of alternatives which it regards as reasonable alternatives to its preferred option." (para. 97)

191. Sales J. did note that the Directive did not require an authority to engage in an artificial exercise and that alternatives which at an early stage in the iterative process are seen as not viable do not need to be assessed in what he called a "full strategic assessment". Nothing in what he says suggests an approach to treat reasonable alternatives in a different way from the preferred option, and in fact his comment reflects more a sensible approach which does not require a putative reasonable alternative to be set up and assessed alongside the only option which after consideration was selected as being reasonable.

192. The point to be discerned from that judgment is that the correct approach was that an equal or broadly equivalent assessment of those alternatives considered to be reasonable was to be engaged.

193. In *R (Friends of the Earth England Wales and Northern Ireland Ltd) v The Welsh Ministers* [2015] EWHC 776 (Admin) Hickinbottom J. also considered this point. It was claimed that the SEA Directive required assessment of not just the preferred option but all

potential viable alternatives. The judge agreed, and held that as the reasonable options must be the subject of public consultation in the form of a report with a draft plan or programme (Article 6) that:

> "… before the adoption of the plan or programme, the results of that consultation must be taken into account by the relevant authority (Article 8). The environmental evaluation of those alternatives must be on a comparable basis to the evaluation of the preferred option." (para. 12)

194. Hickinbottom J. accepted whilst the SEA process has as its focus the adoption of a particular plan, the assessment of reasonable alternatives must be done in a way that ensures there is a proper environmental evaluation and proper public consultation. Thus, an important distinction exists between the plan and the process. The draft plan contains an identification of a preferred option, but the process must involve an engagement with the reasonable alternatives before that preferred option is identified and finally adopted or chosen. That will involve, he said, the incorporation of the result of the consultation process and any new information that might emerge, a reassessment of whether the preferred option is still preferred, or whether reasonable alternatives were properly rejected. He made reference to "repeated appraisals of increased vigour". He considered that while the SEA Directive is focussed on a particular plan, that no distinction is made between the assessment requirements for that preferred plan and any reasonable alternatives thereto. That conclusion does not support the view of the Court of Appeal with regard to the meaning of Article 3(2) that only a plan or programme requires a full SEA assessment.

195. Finally, in *Heard v Broadland District Council* [2012] EWHC 344 (Admin) Ouseley J. said that while an iterative process is allowed "The SEA Directive requires an equal examination of all alternatives reasonably selected for examination at a particular stage, whether preferred or not." (para. 99)

Discussion

196. The SEA Environmental Report was published on 26 September 2017 for the purposes of public consultation. That consultation required that the participants have sufficient information regarding reasonable alternatives and the proposed preferred option if their engagement was to be meaningful. This would suggest that the assessment of alternatives is not merely an important element in the SEA process, but that a sufficient level of scrutiny be engaged with regard to the alternatives to fully inform discussion on the choice of final option.

197. Annex 5(1)(h) does not, in my view, offer much interpretative assistance as to the correct treatment of alternatives,

> "An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaking including any difficulty (such as technical deficiencies or lack of knowhow) encountered in compiling the required information".

198. This relates to the process of identifying the reasonable alternatives, and in its plain meaning it applies to the selection of those reasonable alternatives, and not how they are to be assessed.

199. The position adopted in the Commission Guidance that an assessment of alternatives be carried out in a "comparable" manner does not derive from the legislative text. However the Commission Guidance is undoubtedly a document of high importance, and it was prepared with the aim of helping Member States to implement the Directive so as to meet its requirements, and gain the benefits expected from it. It bears noting that the Irish EPA document "Developing and Assessing Alternatives in strategic Environmental Assessment" (EPA Research Report No. 157, published in 2015) uses precisely the formula and language proposed by the Commission: see in particular p.25.

200. It is correct, as the Court of Appeal noted, that the process of arriving at a preferred option is an iterative one, and this is the view also expressed by the Commission at paragraph 5.2 of the Commission Guidance:

> "One of the reasons for consultation is to contribute to the quality of the information available to those responsible for the decisions that are made concerning the plan or programme. Consultation might sometimes reveal important new information which leads to substantial changes to the plan programme and subsequently its likely significant environmental effects."

201. The decisions of the High Court of England and Wales supports a requirement for a degree of scrutiny, and there is no decision of the CJEU which offers any interpretative assistance as to the level of scrutiny required.

202. Further, a purposive approach to the interpretation of Article 5(1), in particular in the light of the contents of Annex I to the Directive suggests that the approach found in the courts of England and Wales is correct, as an environmental report is aimed at contributing to more sustainable solutions in decision-making. One of the purposes of the consultation process is to "contribute to the quality of the information available to those responsible for the decisions that are made", and that consultation may result in a revision of the report, as in fact occurred in regard to the draft NPF. The environmental assessment must be performed during the preparation of the plan or programme and before its adoption by reason of Article 4(1) and this would suggest that a comparable analysis be carried out of the alternatives judged to be reasonable so that the consultees may engage in an informed scrutiny of the preferred option.

203. Consultation is regarded as central to the process envisaged by the SEA Directive, and if the requirements of assessment and consultation are to be read in conjunction with the Aarhus Convention (The Convention on Access to Information Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus 25 June

1998), then it might be said that consultation can best occur, or perhaps can only properly occur, if a sufficient degree of assessment is carried out of alternatives which are identified as reasonable, and if those alternatives are submitted to the same broadly similar degree of scrutiny as that afforded to the preferred option, so that the likely environmental impact of the preferred option can properly be tested and understood in the light of the information on the likely environmental effects of other reasonable alternatives that might achieve the same broad strategic end.

204. In her Opinion in *Patrice D'Oultremont and ors v Région wallonne*, Advocate General Kokott noted that as the SEA Directive provides for public participation, an environmental assessment can "serve as a forum for disputes concerning projects … and may help bring greater objectivity to the debate" (para. 2). The importance of that value must be seen as a guide to interpretation.

205. It could perhaps be argued that the preparation of a more detailed analysis of a preferred option before the consultation process is concluded, and before a plan is finally adopted, could have the effect of operating as a kind of gravitational pull towards that preferred option at too early a stage in the process. The observations from the consultees could be, and possibly almost always would be, be more focused and clearer in regard to the preferred option where a greater deal of detail is available as to its likely environmental impact. The Court of Appeal however, found that the fact that the preferred option was afforded a much greater degree of scrutiny and detail in chapter 8 of the Environmental Report did not impact on its view that the treatment of the alternatives was adequate.

206. It is true, as can be observed from the approach of the Courts in England and Wales that the SEA directive does not require the artificial exercise of selecting putative reasonable alternatives when these can clearly be seen at an earlier stage of the iterative process as not readily being viable candidates for adoption.

207. The further question arises is whether the approach for which the appellant contends is neither practical nor feasible, and would impose unduly onerous and unworkable obligations (see the *dicta* of Hogan J. in *An Taisce v. An Bord Pleanála & Ors* [2022] IESC 8, [2022] 1 ILRM 281). It may be that there are likely to be few instances where five reasonable alternatives would be identified that might require to be progressed to assessment, and I note that in the case of *Ashton*, only three reasonable alternatives were identified and each was regarded as requiring a full assessment. It is also possible that one alternative will be considered in the iterative process to be reasonable, as happened in *Heard.* It is possible that no reasonable alternatives will emerge from the process, but that is not what occurred in the instant case. That is not the conclusion to which the respondents came in the draft plan where five reasonable alternatives were proposed.

208. Finally, I note that the respondents argue however that the plain text of Article 3(1) of the Directive which requires that an environmental assessment in accordance with Articles 4 to 9 shall be carried out for plans and programmes likely to have significant environmental effects, leads to a conclusion that the obligation to carry out a full SEA can arise only in respect of a plan or programme, i.e., once that plan or programme has ascertained and identified the preferred option.

Application for a Preliminary Reference?

209. The difference in the approach for which the parties contend resolves to this: the respondents say that the treatment of the reasonable alternatives was adequate to meet the requirements of the Directive in the light of the fact that the SEA process is iterative and because this is a high level plan; the appellant argues that once a number of preferred options are identified (in this case five) each must be assessed at the same or broadly similar level of detail and scrutiny, and while the plan is a high level plan, it must fully assess each option in the same way as was done for the preferred option.

210. The text of the Directive does not provide an answer: it is undoubtedly the case that an SEA assessment must be carried out in respect of a draft plan, but what is not clear is whether an assessment of a particular level of detail is required for all reasonable alternatives identified in a draft plan submitted for consultation before a plan is finally adopted.

211. That is a question which in my mind cannot clearly be answered from a reading of the Directive nor from the Commission's Guidance.

212. As explained above, in the light of this Court's obligations as a final court, I propose referring this interpretive question to the CJEU under Article 267 TFEU before I can come to a concluded view as to the correct interpretation of the requirement for an evaluation and assessment of reasonable alternatives.

The Assessment Matrix

213. The second limb of the challenge of the appellant to the Environmental Report is that the assessment matrix used is incomprehensible, makes no sense, and does not meet the requirements of the SEA Directive. The appellant points to certain examples of this where option 3, option 4 and option 5 were described as having "clear differences" but each obtained the same score of plus or minus (+/-). The argument is that the use of that form of matrix is unacceptable because it does not amount to an identification, description or evaluation of the effects on the environment, and that it is neither objective, qualitative nor quantitively sufficient to provide a reason for the selection. The appellant also points to the fact that certain research such as was carried out by the ESRI and which is said to have fed into the assessment of the alternatives is not referenced in the Environmental Report and that the Court of Appeal erred in failing to address the fact that the public had no readily accessible access to that document and without a "paper chase".

214. The appellant also argues that, while the matrices were accompanied by a narrative, it was too broad to be a useful interpretation or to contain a sufficient measure of environmental indicators.

215. The respondents argue that the appellant's argument in part must be seen as an impermissible challenge to the merits of the evaluation of the reasonable alternatives, or that the analysis must be seen as one within the discretion of the respondents and subject to very limited review for that reason. They say that this flows from the breadth of discretion given to a competent authority by Article 5 which may decide information may be "reasonably required" in the Environmental Report and rely on the possible wide range of autonomous judgments that are possible (as was pointed out in *R. (Friends of the Earth) v. Secretary of State for Transport* [2020] UKSC 52 at para. 144).

216. The High Court held that the Environmental Report did contain a reasonable and comprehensive assessment of each of the reasonable alternatives and considered the analysis to be understandable and logical (para. 68 of the High Court judgment) and the Court of Appeal agreed.

217. This matter of domestic law will be considered in the light of the response to the clarification of the CJEU to the reference intended to be made by this Court.

Monitoring

218. Article 10 of the SEA Directive, as implemented by Article 17 of the SEA Regulations, provides as follows:

> "The competent authority shall monitor the significant environmental effects of implementation of the plan or programme, or modification to a plan or programme, in order, inter alia, to identify at an early stage unforeseen adverse effects and to be able to undertake appropriate remedial action and, for this purpose existing

monitoring arrangements may be used, if appropriate, with a view to avoiding duplication of monitoring."

219. Chapter 7 of the SEA Report provides for monitoring and observes that the Environmental Protection Agency (EPA) had undertaken to provide detailed guidance on monitoring in the course of 2019.

220. Chapter 9 of the Environmental Report deals with monitoring and the Court of Appeal concluded that the proposed establishment of an Office of the Planning Regulator would play an important part in the ongoing monitoring of the NPF which, combined with the contents of the SEA Statement and the Environmental Report were sufficient to meet the requirements of Article 10 of the Directive.

221. The appellant's argument concerns the absence of detail as to how monitoring will occur, who will do it, when it will be done, and how any identified or unforeseen adverse environmental effects will be addressed.

222. The respondents argue that the obligation is one to carry out monitoring, not one to set out in an environmental assessment the monitoring measurements that will be undertaken, and that monitoring can in practice be carried out only on implementation.

223. The Commission Guidance points out that Article 10 does not contain any technical requirements about the methods to be used for monitoring. Further, the SEA Directive is not prescriptive as to the exact arrangements for monitoring, the frequency of monitoring, the methodology or the bodies who should conduct monitoring. The requirement is to monitor the implementation of a plan or programme and to ensure early intervention where this is needed.

224. This issue is one of the application of the provisions of the Directive and no interpretative difficulty requires further clarification form the CJEU.

225. Any further consideration of the adequacy of the proposals for monitoring should await the response to the questions proposed to be asked by this Court under Article 267 TFEU.

Concluding remarks

226. I propose therefore that the above questions be referred to the CJEU for the reason stated. It should be recalled that the case law of the CJEU makes clear that it is for this Court alone to formulate the precise terms of the order of reference. However, the Court feels it appropriate to afford the parties an opportunity to make any observations which they wish. The Court has therefore circulated to the parties a draft of the proposed Order of Reference for any observations they may wish to make before the Order is finalised. The decision to refer has already been taken, and the broad nature of the issues identified. Observations are required only in respect of the form of the reference document. In the light of the Court's consideration of such observations as the parties may make, the Court will finalise the text of the order for reference which will then be transmitted to the CJEU.