



[2024] IEHC 472

**THE HIGH COURT  
PLANNING & ENVIRONMENT**

[H.JR.2022.0000458]

**BETWEEN**

**AN TAISCE - THE NATIONAL TRUST FOR IRELAND**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**AND**

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

**NOTICE PARTIES**

**(No. 4)**

**JUDGMENT of Humphreys J. delivered on Tuesday the 30th day of July 2024**

**Subject-matter of the dispute**

1. This request for a preliminary ruling concerns the interpretation of Directives 91/676, 92/43, 2000/60 and 2001/42 and the validity of Commission Implementing Decision 2022/696.
2. The request is being made in proceedings concerning a challenge by the applicant to the validity of Ireland's Fifth Nitrates Programme under Directive 91/676 and implementing measures, together with a challenge to the validity of Commission Implementing Decision 2022/696 which permits a derogation for Ireland which allows that, for each relevant farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, may exceed an amount of manure containing 170 kg N/ ha.

**Legal context**

**European Union law**

**TEU**

3. Article 3(3) TEU provides:  
"3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.  
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.  
It shall promote economic, social and territorial cohesion, and solidarity among Member States.  
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."
4. Article 4 TEU provides:  
"Article 4  
1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.  
2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.  
3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

**TFEU**

5. Article 11 TFEU provides:  
"Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."
6. Article 191(2) TFEU provides:  
"2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

**EU Charter of Fundamental Rights**

7. Article 37 provides:  
"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

**Directive 91/676 and Commission Implementing Decision 2022/696**

8. Article 3 of Directive 91/676 provides:  
"1. Waters affected by pollution and waters which could be affected by pollution if action pursuant Article 5 is not taken shall be identified by the Member States in accordance with the criteria set out in Annex I.  
2. Member States shall, within a two-year period following the notification of this Directive, designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution. They shall notify the Commission of this initial designation within six months.  
3. When any waters identified by a Member State in accordance with paragraph 1 are affected by pollution from waters from another Member State draining directly or indirectly in to them, the Member States whose waters are affected may notify the other Member States and the Commission of the relevant facts.  
The Member States concerned shall organize, where appropriate with the Commission, the concertation necessary to identify the sources in question and the measures to be taken to protect the waters that are affected in order to ensure conformity with this Directive.  
4. Member States shall review if necessary revise or add to the designation of vulnerable zones as appropriate, and at last every four years, to take into account changes and factors unforeseen at the time of the previous designation. They shall notify the Commission of any revision or addition to the designations within six months.  
5. Member States shall be exempt from the obligation to identify specific vulnerable zones, if they establish and apply action programmes referred to in Article 5 in accordance with this Directive throughout their national territory."
9. Article 4 provides:  
"Article 4  
1. With the aim of providing for all waters a general level of protection against pollution, Member States shall, within a two-year period following the notification of this Directive:  
(a) establish a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis, which should contain provisions covering at least the items mentioned in Annex II A;  
(b) set up where necessary a programme, including the provision of training and information for farmers, promoting the application of the code(s) of good agricultural practice.  
2. Member States shall submit to the Commission details of their codes of good agricultural practice and the Commission shall include information on these codes in the report referred to in Article 11. In the light of the information received, the Commission may, if it considers it necessary, make appropriate proposals to the Council."
10. Article 5 provides:  
"Article 5  
1. Within a two-year period following the initial designation referred to in Article 3 (2) or within one year of each additional designation referred to in Article 3 (4), Member States shall, for the purpose of realizing the objectives specified in Article 1, establish action programmes in respect of designated vulnerable zones.  
2. An action programme may relate to all vulnerable zones in the territory of a Member State or, where the Member State considers it appropriate, different programmes may be established for different vulnerable zones or parts of zones.  
3. Action programmes shall take into account:

- (a) available scientific and technical data, mainly with reference to respective nitrogen contributions originating from agricultural and other sources;
- (b) environmental conditions in the relevant regions of the Member State concerned.

4. Action programmes shall be implemented within four years of their establishment and shall consist of the following mandatory measures:

- (a) the measures in Annex III;
- (b) those measures which Member States have prescribed in the code(s) of good agricultural practice established in accordance with Article 4, except those which have been superseded by the measures in Annex III.

5. Member States shall moreover take, in the framework of the action programmes, such additional measures or reinforced actions as they consider necessary if, at the outset or in the light of experience gained in implementing the action programmes, it becomes apparent that the measures referred to in paragraph 4 will not be sufficient for achieving the objectives specified in Article 1. In selecting these measures or actions, Member States shall take into account their effectiveness and their cost relative to other possible preventive measures.

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

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

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

**11.** Annex III is as follows:

"ANNEX III

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

(a) The measures shall include rules relating to:

1. periods when the land application of certain types of fertilizer is prohibited;
2. the capacity of storage vessels for livestock manure; this capacity must exceed that required for storage throughout the longest period during which land application in the vulnerable zone is prohibited, except where it can be demonstrated to the competent authority that any quantity of manure in excess of the actual storage capacity will be disposed of in a manner which will not cause harm to the environment;
3. limitation of the land application of fertilizers, consistent with good agricultural practice and taking into account the characteristics of the vulnerable zone concerned, in particular:

- (a) soil conditions, soil type and slope;
  - (b) climatic conditions, rainfall and irrigation;
  - (c) land use and agricultural practices, including crop rotation systems;
- and to be based on a balance between:

(i) the foreseeable nitrogen requirements of the crops,  
and

- (ii) the nitrogen supply to the crops from the soil and from fertilization corresponding to:
- the amount of nitrogen present in the soil at the moment when the crop starts to use it to a significant degree (outstanding amounts at the end of winter),
  - the supply of nitrogen through the net mineralization of the reserves of organic nitrogen in the soil,
  - additions of nitrogen compounds from livestock manure,
  - additions of nitrogen compounds from chemical and other fertilizers.

2. These measures will ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare.

The specified amount per hectare be the amount of manure containing 170 kg N. However:

(a) for the first four year action programme Member States may allow an amount of manure containing up to 210 kg N;

(b) during and after the first four-year action programme, Member States may fix different amounts from those referred to above. These amounts must be fixed so as not to prejudice the achievement of the objectives specified in Article 1 and must be justified on the basis of objectives criteria, for example:

- long growing seasons,
- crops with high nitrogen uptake,
- high net precipitation in the vulnerable zone,
- soils with exceptionally high denitrification capacity.

If a Member State allows a different amount under point (b) of the second subparagraph, it shall inform the Commission, which shall examine the justification in accordance with the regulatory procedure referred to in Article 9(2).

3. Member States may calculate the amounts referred to in paragraph 2 on the basis of animal numbers.

4. Member States shall inform the Commission of the manner in which they are applying the provisions of paragraph 2. In the light of the information received, the Commission may, if it considers necessary, make appropriate proposals to the Council in accordance with Article 11."

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

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

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

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

**16.** Recital 16 to Commission Implementing Decision (EU) 2022/696 provides:

"(16) After an examination of the request from Ireland in accordance with paragraph 2, third subparagraph, of Annex III to Directive 91/676/EEC, and in the light of the Irish Action Programme coupled with the experience gained from the derogation provided for in Decision 2007/697/EC and Implementing Decisions 2014/112/EU and (EU) 2018/209, the Commission considers that the amount of manure proposed by Ireland, corresponding to 250 kg nitrogen/ha per year, will not prejudice the achievement of the objectives set out in Directive 91/676/EEC, subject to certain strict conditions that should apply to farmers covered by authorisation."

**17.** Recital 23 provides:

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

**18.** Article 1 of the decision provides:

"Derogation

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

**19.** Article 4 provides:

"Annual application and commitment

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

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

**20.** Article 5 provides:

"The granting of authorisations

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

**Directive 92/43**

**21.** Article 6 of Directive 92/43 provides:

"1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

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

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

**Directive 2000/60**

**22.** Article 4 of Directive 2000/60 provides:

"Environmental objectives

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

(a) for surface waters

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

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

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

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

(b) for groundwater

(i) Member States shall implement the measures necessary to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of

groundwater, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

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

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

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

(c) for protected areas

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

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

2. Where more than one of the objectives under paragraph 1 relates to a given body of water, the most stringent shall apply.

3. Member States may designate a body of surface water as artificial or heavily modified, when:

(a) the changes to the hydromorphological characteristics of that body which would be necessary for achieving good ecological status would have significant adverse effects on:

(i) the wider environment;

(ii) navigation, including port facilities, or recreation;

(iii) activities for the purposes of which water is stored, such as drinking-water supply, power generation or irrigation;

(iv) water regulation, flood protection, land drainage, or

(v) other equally important sustainable human development activities;

(b) the beneficial objectives served by the artificial or modified characteristics of the water body cannot, for reasons of technical feasibility or disproportionate costs, reasonably be achieved by other means, which are a significantly better environmental option.

Such designation and the reasons for it shall be specifically mentioned in the river basin management plans required under Article 13 and reviewed every six years.

4. The time limits laid down in paragraph 1 may be extended for the purposes of phased achievement of the objectives for bodies of water, provided that no further deterioration occurs in the status of the affected body of water when all the following conditions are met:

(a) Member States determine that all necessary improvements in the status of bodies of water cannot reasonably be achieved within the timescales set out in that paragraph for at least one of the following reasons:

(i) the scale of improvements required can only be achieved in phases exceeding the timescale, for reasons of technical feasibility;

(ii) completing the improvements within the timescale would be disproportionately expensive;

(iii) natural conditions do not allow timely improvement in the status of the body of water.

(b) Extension of the deadline, and the reasons for it, are specifically set out and explained in the river basin management plan required under Article 13.

(c) Extensions shall be limited to a maximum of two further updates of the river basin management plan except in cases where the natural conditions are such that the objectives cannot be achieved within this period.

(d) A summary of the measures required under Article 11 which are envisaged as necessary to bring the bodies of water progressively to the required status by the extended deadline, the reasons for any significant delay in making these measures operational, and the expected timetable for their implementation are set out in the river basin management plan.

A review of the implementation of these measures and a summary of any additional measures shall be included in updates of the river basin management plan.

5. Member States may aim to achieve less stringent environmental objectives than those required under paragraph 1 for specific bodies of water when they are so affected by human activity, as determined in accordance with Article 5(1), or their natural condition is such that the achievement of these objectives would be infeasible or disproportionately expensive, and all the following conditions are met:

(a) the environmental and socioeconomic needs served by such human activity cannot be achieved by other means, which are a significantly better environmental option not entailing disproportionate costs;

(b) Member States ensure,

— for surface water, the highest ecological and chemical status possible is achieved, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution,

— for groundwater, the least possible changes to good groundwater status, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution;

(c) no further deterioration occurs in the status of the affected body of water;

(d) the establishment of less stringent environmental objectives, and the reasons for it, are specifically mentioned in the river basin management plan required under Article 13 and those objectives are reviewed every six years.

6. Temporary deterioration in the status of bodies of water shall not be in breach of the requirements of this Directive if this is the result of circumstances of natural cause or force majeure which are exceptional or could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, or the result of circumstances due to accidents which could not reasonably have been foreseen, when all of the following conditions have been met:

(a) all practicable steps are taken to prevent further deterioration in status and in order not to compromise the achievement of the objectives of this Directive in other bodies of water not affected by those circumstances;

(b) the conditions under which circumstances that are exceptional or that could not reasonably have been foreseen may be declared, including the adoption of the appropriate indicators, are stated in the river basin management plan;

(c) the measures to be taken under such exceptional circumstances are included in the programme of measures and will not compromise the recovery of the quality of the body of water once the circumstances are over;

(d) the effects of the circumstances that are exceptional or that could not reasonably have been foreseen are reviewed annually and, subject to the reasons set out in paragraph 4(a), all practicable measures are taken with the aim of restoring the body of water to its status prior to the effects of those circumstances as soon as reasonably practicable, and

(e) a summary of the effects of the circumstances and of such measures taken or to be taken in accordance with paragraphs (a) and (d) are included in the next update of the river basin management plan.

7. Member States will not be in breach of this Directive when:

— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

— failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

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

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

8. When applying paragraphs 3, 4, 5, 6 and 7, a Member State shall ensure that the application does not permanently exclude or compromise the achievement of the objectives

of this Directive in other bodies of water within the same river basin district and is consistent with the implementation of other Community environmental legislation.

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

**23.** Article 11 provides:

"Programme of measures

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

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

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

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

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

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

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

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

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

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

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

(i) for any other significant adverse impacts on the status of water identified under Article 5 and Annex II, in particular measures to ensure that the hydromorphological conditions of the bodies of water are consistent with the achievement of the required ecological status or good ecological potential for bodies of water designated as artificial or heavily modified. Controls for this purpose may take the form of a requirement for prior authorisation or registration based on general binding rules where such a requirement is not otherwise provided for under Community legislation. Such controls shall be periodically reviewed and, where necessary, updated;

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

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

They may also authorise, specifying the conditions for:



- injection of water containing substances resulting from the operations for exploration and extraction of hydrocarbons or mining activities, and injection of water for technical reasons, into geological formations from which hydrocarbons or other substances have been extracted or into geological formations which for natural reasons are permanently unsuitable for other purposes. Such injections shall not contain substances other than those resulting from the above operations,
- reinjection of pumped groundwater from mines and quarries or associated with the construction or maintenance of civil engineering works,
- injection of natural gas or liquefied petroleum gas (LPG) for storage purposes into geological formations which for natural reasons are permanently unsuitable for other purposes,
- injection of carbon dioxide streams for storage purposes into geological formations which for natural reasons are permanently unsuitable for other purposes, provided that such injection is made in accordance with Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide ( 22 ) or excluded from the scope of that Directive pursuant to its Article 2(2),
- injection of natural gas or liquefied petroleum gas (LPG) for storage purposes into other geological formations where there is an overriding need for security of gas supply, and where the injection is such as to prevent any present or future danger of deterioration in the quality of any receiving groundwater,
- construction, civil engineering and building works and similar activities on, or in the ground which come into contact with groundwater. For these purposes, Member States may determine that such activities are to be treated as having been authorised provided that they are conducted in accordance with general binding rules developed by the Member State in respect of such activities,
- discharges of small quantities of substances for scientific purposes for characterisation, protection or remediation of water bodies limited to the amount strictly necessary for the purposes concerned

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

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

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

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

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

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

- the causes of the possible failure are investigated,
- relevant permits and authorisations are examined and reviewed as appropriate,
- the monitoring programmes are reviewed and adjusted as appropriate, and
- additional measures as may be necessary in order to achieve those objectives are established, including, as appropriate, the establishment of stricter environmental quality standards following the procedures laid down in Annex V.

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

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

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

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

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

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

**24.** Article 13 provides:

"Article 13

River basin management plans

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

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

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

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

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

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

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

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

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

**25.** Annex VI provides (notes omitted):

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

PART A

Measures required under the following Directives:

- (i) The Bathing Water Directive (76/160/EEC);
- (ii) The Birds Directive (79/409/EEC);
- (iii) The Drinking Water Directive (80/778/EEC) as amended by Directive (98/83/EC);
- (iv) The Major Accidents (Seveso) Directive (96/82/EC);
- (v) The Environmental Impact Assessment Directive (85/337/EEC);
- (vi) The Sewage Sludge Directive (86/278/EEC);
- (vii) The Urban Waste-water Treatment Directive (91/271/EEC);
- (viii) The Plant Protection Products Directive (91/414/EEC);
- (ix) The Nitrates Directive (91/676/EEC);
- (x) The Habitats Directive (92/43/EEC);
- (xi) The Integrated Pollution Prevention Control Directive (96/61/EC).

PART B

The following is a non-exclusive list of supplementary measures which Member States within each river basin district may choose to adopt as part of the programme of measures required under Article 11(4):

- (i) legislative instruments
- (ii) administrative instruments
- (iii) economic or fiscal instruments
- (iv) negotiated environmental agreements
- (v) emission controls

- (vi) codes of good practice
- (vii) recreation and restoration of wetlands areas
- (viii) abstraction controls
- (ix) demand management measures, *inter alia*, promotion of adapted agricultural production such as low water requiring crops in areas affected by drought
- (x) efficiency and reuse measures, *inter alia*, promotion of water-efficient technologies in industry and water-saving irrigation techniques
- (xi) construction projects
- (xii) desalination plants
- (xiii) rehabilitation projects
- (xiv) artificial recharge of aquifers
- (xv) educational projects
- (xvi) research, development and demonstration projects
- (xvii) other relevant measures"

#### **Directive 2001/42**

#### **26.** Article 2 of Directive 2001/42 provides:

##### "Definitions

For the purposes of this Directive:

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

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

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

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

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

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

#### **27.** Article 3 provides:

##### "Scope

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

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

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

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

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

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

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

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

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

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

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

**28.** Article 5 provides:

"Environmental report

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

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

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

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

**29.** Article 10 provides:

"Monitoring

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

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

**30.** Article 11 provides:

"Article 11

Relationship with other Community legislation

1. An environmental assessment carried out under this Directive shall be without prejudice to any requirements under Directive 85/337/EEC and to any other Community law requirements.

2. For plans and programmes for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, Member States may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation in order, *inter alia*, to avoid duplication of assessment.

3. For plans and programmes co-financed by the European Community, the environmental assessment in accordance with this Directive shall be carried out in conformity with the specific provisions in relevant Community legislation."

**31.** Annex I provides:

"ANNEX I

Information referred to in Article 5(1)

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

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

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

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

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

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

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

#### **Domestic law**

##### **Planning and Development Act 2000**

**32.** Section 2 of the Planning and Development Act 2000 (<https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/html>) provides *inter alia*:

"'agriculture' includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the training of horses and the rearing of bloodstock, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and 'agricultural' shall be construed accordingly;"

**33.** Section 4(1)(a) provides:

"4.—(1) The following shall be exempted developments for the purposes of this Act—  
(a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used;"

**34.** Section 4(4) provides:

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

##### **European Communities (Birds and Natural Habitats) Regulations 2011**

**35.** Article 28(1) of the European Communities (Birds and Natural Habitats) Regulations 2011 ([https://www.npws.ie/sites/default/files/files/European%20Communities%20\(Birds%20and%20Natural%20Habitats\)%20Regulations%202011%20to%202021%20-%20Unofficial%20Consolidation%20\(Updated%20to%2028%20July%202022\)\(1\).pdf](https://www.npws.ie/sites/default/files/files/European%20Communities%20(Birds%20and%20Natural%20Habitats)%20Regulations%202011%20to%202021%20-%20Unofficial%20Consolidation%20(Updated%20to%2028%20July%202022)(1).pdf)) provides:

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

##### **European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022**

**36.** Legal provision to make a NAP was set out at the material time in S.I. No. 605/2017 - European Union (Good Agricultural Practice for Protection of Waters) Regulations 2017 (<https://www.irishstatutebook.ie/eli/2017/si/605/made/en/print>), Article 28, which provided for the publication of a NAP by 31st December 2021 and every four years thereafter.

**37.** To implement the NAP, provision for good agricultural practice measures is made in the European Union (Good Agricultural Practice for Protection of Waters) Regulations 2022 (S.I. No. 113 of 2022) (<https://www.irishstatutebook.ie/eli/2022/si/113/made/en/print>) ("the **GAP regulations**"). The regulations revoke the 2017 regulations. The current provision to make a NAP is in Article 28 of the 2022 GAP regulations which envisages a NAP by 31st December 2025 and every 4 years thereafter.

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

GAP regulations, as so amended, provide that a farmer cannot rely on the derogation without authorisation from the Minister for Agriculture, Food and the Marine under regulation 35(1)(a) of the regulations. The regulations do not themselves require appropriate assessment (“AA”) under Directive 92/43. The legal obligation is in the Planning and Development Act 2000 and more specifically in Article 28 of the 2011 regulations.

**39.** Article 2 of S.I. No. 393 of 2022 provides:

“2. In these Regulations :

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

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

**40.** Articles 34 to 40 of the GAP regulations as amended by S.I. No. 393 of 2022 provide:

“Part 7

Implementation of Commission Decision

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

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

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

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

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

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

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

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

36. The Minister for Agriculture, Food and the Marine shall carry out, or arrange for the carrying out of, such monitoring, controls and reporting as are necessary for the purposes of Articles 10, 11 and 13 of the Commission Decision.

37. The Agency shall prepare annually a report of the results of water quality monitoring carried out by local authorities for the purposes of Article 10(4) of the Commission Decision and, where appropriate and as agreed from time to time between the Agency and the Minister for Agriculture, Food and the Marine, shall assist that Minister in compiling water quality data for reporting in accordance with the requirements of the Commission Decision.

38. The Agency shall submit, by 30 June 2023, the assessment described in Article 10 of the Commission Decision, corresponding to the year 2022, an annex containing the results of monitoring as regards the nitrates concentrations of groundwater and surface waters and the trophic status of surface water bodies as outlined in Article 12 (1) and (2) of the Commission Decision.

39. In accordance with the requirements of Article 12 (3) and (4) of the Commission Decision the Minister for Agriculture, Food and the Marine, shall assist the Minister in informing the Commission, by 30 September 2023, of the outcomes of this two-year review, and in particular on the areas and farms with an authorisation where the maximum amount of manure to be applied is 220 kg nitrogen/ha per year and of the additional measures to be applied within the Nitrates Action Programme.

40. The Agency shall make such recommendations and give such directions to a local authority in relation to the monitoring of water quality as it considers appropriate and/or necessary for the purposes of the Commission Decision.”

**41.** Further amendments (which did not affect the text cited above) were made by S.I. No. 716 of 2022 (<https://www.irishstatutebook.ie/eli/2022/si/716/made/en/print>) and S.I. No. 62 of 2023 (<https://www.irishstatutebook.ie/eli/2023/si/62/made/en/print>).

**Domestic caselaw and related matters**

**42.** Domestic caselaw provides abundant examples of challenges being permitted to time-limited decisions which are “capable of repetition but evading review” applies (*Southern Pacific Terminal Co. v. Interstate Commerce Co.* (1911) 219 U.S. 498 at p. 501 *per* McKenna J. cited in *Condon v. Minister for Labour* [1981] I.R. 62, [1979] 12 JIC 1102 at p. 72 *per* Kenny J., *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768, [2015] 11 JIC 2709; *JA Cameroon v. Governor of Cloverhill Prison* [2017] IEHC 611, [2017] 10 JIC 2012).

**43.** This is consistent with CJEU jurisprudence on mootness: the principles in the judgment of 11 January 2024, *Friends of the Irish Environment CLG v Minister for Agriculture, Food and the Marine*, C-330/22, ECLI:EU:C:2024:19.

**44.** Relatedly, in judicial review, the court has jurisdiction to grant reliefs not pleaded, within the scope of the grounds as acknowledged in *Concerned Residents of Treascon v. An Bord Pleanála* [2024] IESC 28 *per* Murray J., applying Order 84, Rules 18 and 19 of the Rules of the Superior Courts:

“18. (1) An application for an order of certiorari, mandamus, prohibition or quo warranto shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to:

(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition, certiorari, or quo warranto,

(b) the nature of the persons and bodies against whom relief may be granted by way of such order, and

(c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

19. On an application for judicial review any relief mentioned in rule 18(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter and in any event the Court may grant any relief mentioned in rules 18(1) or (2) which it considers appropriate notwithstanding that it has not been specifically claimed.”

## Facts

**45.** The current River Basin Management Plan (“**RBMP**”) was published in 2018 (<https://www.gov.ie/en/publication/429a79-river-basin-management-plan-2018-2021/>). It was subject to AA and SEA. Under the heading “ 3.1.1 Legal Framework for Water Framework Directive Implementation and Associated Actions” it states *inter alia*:

“The European Communities Environmental Objectives (Surface Water) Regulations 2009 (S.I. 272 of 2009) and the European Communities Environmental Objectives (Groundwater) Regulations 2010 (S.I. 9 of 2010) establish the legal framework needed to implement the environmental objectives of the WFD [i.e., Directive 2000/60]. They lay down the criteria and environmental quality standards for classifying water status and impose an obligation on public authorities to take the necessary steps to achieve the objectives set out in river basin management plans. Both sets of Regulations, *inter alia*, require licensing authorities to examine, and where necessary, review discharge licences where these are needed to achieve the water-quality objectives as set out in river basin management plans.”

**46.** The Environmental Protection Agency (“**EPA**”) is a statutory body charged *inter alia* with environmental monitoring. Its report, *Water Quality Monitoring Report on Nitrogen and Phosphorus Concentrations in Irish Waters* (2020), stated:

“The 2013-2018 assessment of water quality in Ireland (EPA,2019) found that only just over half of our rivers and lakes were in satisfactory ecological health and overall water quality was in decline. The picture for our estuaries was even more stark with only 38% in satisfactory condition. The assessment indicated the main problem damaging our waters was the presence of too much phosphorus and nitrogen. This report finds that nitrogen concentrations remain too high in rivers, groundwater and estuaries in the south, south east and east of Ireland; and the concentrations have been increasing since 2013...Agriculture and wastewater discharges are the main sources of phosphorus in surface water .... The EPA assessment shows that comparatively the nitrogen load reduction required in the Suir, Slaney and Barrow catchments in the south east, and the Blackwater catchment in the south is substantially higher than the other nine catchments with elevated nitrogen concentrations. The analysis includes nitrogen load reduction assessments and the generation of load reduction maps at the sub-catchment level and indicates that approximately 85% of the nitrogen in these catchments is from agricultural sources. Assessments by the EPA have shown that there is a clear nitrogen response in water to changes in herd numbers and gross nitrogen balance.”

- 47.** This analysis is repeated in the EPA's Water Quality 2020 Indicators Report. Its Conclusion (p. 21) notes:  
 "The indicators show us that nutrient levels are too high in many of our waters, and in some areas trends are still going in the wrong direction. High nitrates are predominantly found in our rivers, groundwaters and estuaries in the south and southeast of the country, areas with intensive agriculture over freely draining soils...Agriculture and waste water are the predominant sources of nutrients in our waters. Recent analysis by the EPA shows that up to 85% of nitrogen in rivers in predominantly rural catchments in the south and southeast comes from agriculture. It is essential for the protection of our rivers, groundwaters and estuaries that urgent and focussed action is taken to reduce the nitrate losses to our waters or we are in danger of losing our excellent coastal water quality."
- 48.** The first consultation on the current NAP occurred when the first respondent initiated a Fourth Review of Ireland's NAP – Stage 1 on 25th November 2020. The applicant made a submission on 14th January 2021.
- 49.** The first respondent initiated a second public consultation on Ireland's NAP on 9th August 2021 with a deadline of 20th September 2021 for public submissions.
- 50.** The applicant made a submission on 20th September 2021.
- 51.** The Natura Impact Statement ("**NIS**") under Directive 92/43 for the 3rd cycle RBMP 2022 to 2027 (<https://assets.gov.ie/294558/b89b7956-1f5f-4fec-90fa-9b9720bbf1b7.pdf>), drafted by consultants (RPS) in September 2021 and ultimately adopted by the first respondent in the context of that plan, states at p. 57:  
 "The new NAP is being prepared; however it is not yet published in draft. There are expectations as to what actions may be included within the new NAP, however these are not confirmed. The actions arising from the new NAP have potential for significant adverse effects on European Sites; particularly mindful of nutrient loss to water from agriculture is one of the most significant pressures on water quality in Ireland. The new NAP will be subject to AA and SEA in its own right and the new NAP will be required to be cognisant of the RBMP; including the mitigations identified within this NIS for the RBMP. In the context of nitrates derogations, it is noted that where a farm has a derogation and has an eco-hydrological pathway to a European site, there is potential risk to the favourable conservation status objective of those European sites. The derogations will be decided as part of the NAP process. However, it is estimated that over 5,000 farms within the state would seek to avail of the derogation status, covering significant land areas. The list of farms and /or their location is not available. From a precautionary perspective it is assumed that these some of these farms and their activities have eco-hydrological pathways to European sites and that some of these European sites are within the landholding. Therefore, there is significant potential for adverse effects on maintaining and achieving conservation objectives and therefore integrity of European Sites with respect to these derogations both individually and in combination with other derogations, plans and projects. Given the scale of derogations under previous cycles of the NAP, the potential for in-combination effects is significant. It will therefore be vital that any derogations which emerge from the NAP will be subject to AA; which should include a robust assessment of in-combination adverse effects."
- 52.** It can be noted that while this NIS says that it is "vital" that derogations be subject to AA, in fact such derogations are not being subjected to AA.
- 53.** On 14th October 2021, Ireland submitted to the Commission a request for an extension of the derogation under paragraph (2), third subparagraph, of Annex III to Directive 91/676/EEC.
- 54.** A third consultation period on the draft NAP focused on the draft NIS and draft Strategic Environmental Assessment ("**SEA**") report for the Programme then took place. The first respondent published a NIS and SEA report for the Draft Fifth NAP on 14th December 2021 and invited further public submissions by 26th January 2022. The applicant made a submission on 26th January 2022.
- 55.** Insofar as the applicants complained that the SEA report took an overly broad view of the concept of material assets, the referring court would not accept that but in any event the material assets concerned were in the nature of strategic infrastructure and so constitute material assets even on a narrow definition.
- 56.** The alternative options were not considered in comparable detail in the SEA process.
- 57.** In the assessment under Directive 2001/42 there was no meaningful assessment of the NAP by reference to Article 4 of Directive 2000/60 and certainly no express assessment in that regard. Nor was there a full assessment of the impacts of the underlying agricultural activities.
- 58.** Full details of monitoring were not included in the environmental report in the SEA process. The environmental report did not include a full description of the measures envisaged concerning monitoring in accordance with Article 10 in sufficient detail to demonstrate that Article 10 would be complied with, including details of how this monitoring would occur; when it would be done; or how



the monitoring would be used and how any identified unforeseen adverse environmental effects would be addressed

**59.** The economic implications for material assets were considered in the SEA process, and were treated as outweighing of what might otherwise have been more environmentally friendly options. Thus the assessment under Directive 2001/42 here took into account and included an assessment of broader economic matters such as the value of material assets, the broad societal impacts of agricultural activities, the impact of the plan or project on the agricultural industry and on the output and income of farmers, the sustainability of the agricultural industry Ireland, the food supply chain, and the employment of a significant portion of the population.

**60.** The EPA is the competent authority for preparing and implementing the National Water Quality Monitoring Programme. The National Water Quality Monitoring Programme has been in place since 2006 and is reviewed and updated periodically. The current programme runs from 2022 to 2027. The EPA reports on water quality with respect to Directive 91/676 using data generated under the National Water Quality Monitoring Programme. There are two categories of waters: (i) small waterbodies which are below the threshold of a surface area of 0.5 km<sup>2</sup> or more do not need status assigned but are protected by basic measures, and (ii) identified water bodies with a surface area of 0.5 km<sup>2</sup> or more, of which there are approximately 5,000. With respect to the identified supra-threshold water bodies, approximately 3,000 are monitored individually, and all 5,000 have been assigned ecological status (either based on the monitoring or based on modelling). 2,000 water bodies are not monitored but are assigned status through modelling. Type-specific reference conditions are set once and establish the benchmark, while status assessments are carried out subsequently on a regular basis considering the benchmark. The benchmarks are intercalibrated across Member States. Benchmarks were in place to allow the status to be determined for all water bodies when the NAP was adopted and this has not changed. There is a type-specific reference condition assigned to each water body above the threshold for the purposes of Directive 2000/60.

**61.** The EPA engaged in a global categorisation of hitherto unclassified water bodies in the State with a surface area of 0.5 km<sup>2</sup> or more. The status designations for the relevant water bodies took effect on 22nd February 2022 (not 22nd April 2022 as stated in previous material). The relevant data was available from that date upon request from the EPA. The data in respect of the status designations for unmonitored lakes for the 2013–2018 period were uploaded to the EPA’s geoportal on 25th February 2022

**62.** In February 2022, an AA screening report, Ireland’s Fifth NAP Screening for AA, was prepared. This stated (p. 12):

“Just over half of Ireland’s monitored surface water bodies have satisfactory water quality and agriculture is the most widespread and significant pressure impacting on the water environment. The EPA report that nearly half of all river sites and one quarter of all groundwater sites have elevated nitrate concentrations. Given the known and observed significant impact that the previous Nitrate Action Programmes have had on water quality and water dependent ecosystems, the fifth NAP is considered to have potential for significant direct, indirect or cumulative effects to European Sites.”

**63.** An NIS was prepared by consultants (RPS) on behalf of the first named respondent dated 25th February 2022 (<https://www.gov.ie/pdf/?file=https://assets.gov.ie/218455/0ba5a7df-50dd-431e-a036-03218b30bdc2.pdf#page=null>) which concluded as follows on p. 103:

“This Natura Impact Statement has considered the potential of the measures proposed within the NAP to give rise to adverse effects on the integrity of European Sites, with regard to their qualifying interests, associated conservation status and the overall site integrity, alone and in combination with other relevant plans and programmes. The NAP does not determine the precise location of any development project or designate or allocate specific land uses, nor does it preclude the consideration of alternatives. In light of this and where necessary, a precautionary approach has been adopted in the NIS to ensure that the measures proposed with respect to implementing the actions of the NAP are, where necessary, subject to Appropriate Assessment. As such, the NAP will not adversely affect the integrity of any European Site either alone or in combination with other relevant plans or programmes and subject to securing the mitigation prescribed above. In light of the conclusions of the assessment contained in this NIS, the authors are of the view that the adoption of the NAP alone, or in combination with other plans and programmes, will not adversely affect the integrity of any European site. Accordingly, and in light of the conclusions of the assessment contained here and the Appropriate Assessment that the Ecological Assessment Unit shall conduct on the implications for the European sites concerned, the competent authority is enabled to ascertain that the adoption of the NAP, alone or in combination with other relevant plans and programmes, will not adversely affect the integrity of any European Site.”

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

**65.** The applicant hasn't shown that European-site-specific analysis (or of water-body-specific analysis) in the plan-level in the NAP AA was practicable.

**66.** The AA of the NAP did not fully address the impacts of the underlying agricultural activities, an omission which is reinforced by the lack of farm-level AA in practice at the derogation stage.

**67.** In the assessment under Directive 92/43 there was no meaningful assessment of the NAP by reference to Article 4 of Directive 2000/60 and certainly no express assessment in that regard.

**68.** In particular, prior to adopting the NAP, the competent authority did not consider the question of whether, and thus did not lawfully satisfy itself as to whether, the particular protections afforded by the plan either alone or together with other binding measures adopted by the Member State were sufficiently rigorous to ensure that the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan would not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by Directive 2000/60.

**69.** More specifically, the competent authority did not satisfy itself that the adoption of the plan or programme is not liable to cause a deterioration of the status of any surface water body which has been or ought to have been identified by that Member State as constituting a surface water body 'type', nor is it liable to compromise the attainment of good surface water status or of good ecological potential and good chemical status of such a surface water body and, secondly, that the adoption of the plan or programme is compatible with the measures implemented pursuant to the programme under Directive 2000/60 established, in accordance with Article 11 of that Directive, for the river basin district concerned.

**70.** On 9th March 2022, the first named respondent approved the Fifth NAP 2022-2025: (<https://www.gov.ie/pdf/?file=https://assets.gov.ie/218449/f1a6725a-6269-442b-bff1-2730fe2dc06c.pdf#page=null>). On the same date, the Minister signed the GAP Regulations.

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

**72.** The assessments for the NAP did not include a full assessment of the environmental effects of the Nitrate-emitting agricultural activities that were to be carried out on foot of derogations. The focus of the assessments was on the protective measures alone. It is clear from the material (in particular EPA reports and the NIS for the RBMP 2022 to 2027) that an assessment of the environmental effects of the underlying agricultural activities would have been likely to have demonstrated significant adverse environmental effects including on European sites for the purposes of Directive 92/43.

**73.** The data in respect of the status designations for unmonitored river bodies were uploaded to the EPA's geoportal on 15th March 2022. The data is in the form of an excel spreadsheet which includes the waterbody code and water body name, the assigned ecological status and method of assessment (for both monitored and unmonitored waterbodies). On 5th April 2022, the status designations for unmonitored waterbodies were uploaded to <https://www.catchments.ie> and EPA Maps.

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

**75.** Approximately 6,500 farmers apply for a derogation each year out of over 130,000 farms in Ireland. The considerable majority of these applicants are dairy farmers. The individual derogations are not published, only aggregated data as to the location, by local electoral area (LEA), of the farms concerned (<https://opendata.agriculture.gov.ie/dataset/https-assets-gov-ie-213396-fec4151b-4730-4c8c-a0e3-c2e50b0b2f26-xlsx>). In practice AA has not been carried out for any of these decisions and there is no practical system in place to do this. The domestic legislation to give effect to Directive 92/43 (such as Article 28 of the 2011 regulations) is not applied in practice in this context.

#### **Procedural history**

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

**77.** The court then disposed of pleading objections and dealt with factual findings and issues, and identified 9 questions for reference, consisting of 8 questions regarding the interpretation of EU law and one question regarding the validity of EU law, which were necessary for the disposal of the

proceedings. The parties other than the IFA proposed answers to these questions as summarised below.

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

**The first question**

**79.** The first question is:

**Do Article 6(3) of Directive 92/43, Article 4(1) of Directive 2000/60 and/or Article 3(1) of Directive 2001/42 read in the light of Article 3(3) TEU and/or Article 11 and/or 191(2) TFEU and/or Article 37 of the Charter of Fundamental Rights have the effect that an action programme under Article 5 of Directive 91/676 that is assessed under or by reference to such Directives is required to be assessed in relation to the effects on the environment of the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan, either generally or insofar as such effects are indirectly contributed to by the absence of more rigorous protective measures in the plan, as opposed to being assessed by reference to the protective measures the plan positively includes and those alone?**

**80.** The applicant submitted:

"Yes. The NAP is supposed to involve a global examination, at the level of the whole of the national territory, of the environmental issues linked to nitrate pollution from agricultural sources - Joined Cases C 105/09 and C 110/09 *Terre Wallonne and Inter-Environnement Wallonie*. Here, the NAP includes the derogation - in the words of the Directive, it 'allows' an amount higher than the 170 kg N in the Directive. So the environmental issues linked to nitrate pollution from the derogation fall within that examination. The assessments carried out under the Habitats Directive, the WFD and the SEA Directive must consider the effects on the environment of the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan. To confine such assessments to the protective measures the plan positively includes, and those alone, would be contrary to the nature of the NAP and the purpose of those assessments."

**81.** The State submitted:

"None of the cited provisions - Article 6(3) of Directive 92/43 ('the Habitats Directive'), Article 4(1) Directive 2000/60 ('the WFD'), or Article 3(1) of Directive 2001/42 ('the SEA Directive') - requires that an action programme under Article 5 of Directive 91/676 ('the Nitrates Directive') be assessed by reference to the effects on the environment of the Nitrate-emitting agricultural activities regulated by that action programme, either generally or by reference to whether the protective measures in the action programme are sufficiently rigorous to prevent such damage."

**82.** The ICMSA submitted:

"ICMSA adopts the submissions made by the State Respondents under this Issue. ... In addition, ICMSA would merely note, and echo, the concern which the State expresses ... regarding 'an impossible standard that could never be met'. Much case law inclines against impossible, or impracticable, standards."

**83.** The referring court's proposed answer is Yes. The assessment of the NAP under Article 6(3) of Directive 92/43, Article 4(1) of Directive 2000/60 and/or Article 3(1) of Directive 2001/42 must include an assessment of the environmental harms caused by the activities being regulated by the NAP. It must be recalled that the NAP establishes a framework within which, subject to Commission decision, consents can be granted for use of additional Nitrates on individual farms. Thus while not itself a development consent, the NAP establishes a framework for development consent. Such a framework can only meaningfully be assessed by reference to the environmental impacts of the activities being regulated. Otherwise, the establishment of a framework to permit the use of Nitrates in excess of standard levels will fail to ensure a high level of environmental protection contrary to Article 3(3) TEU and/or Article 11 and/or 191(2) TFEU and/or Article 37 of the Charter of Fundamental Rights. Assessment of the effects of the proposed derogations is not an impossible standard, because at the NAP level it need only be carried out in general terms, not on a farm-by-farm basis.

**84.** The relevance of the question is that the NAP did not include a full assessment of the environmental effects of the Nitrate-emitting agricultural activities that were to be carried out on foot of derogations. The focus of the assessments was on the protective measures alone. An assessment of the environmental effects of the underlying agricultural activities would have been likely to have demonstrated significant adverse environmental effects including on European sites for the purposes of Directive 92/43. If the answer to the question is Yes, then the NAP was adopted without a proper assessment and therefore in breach of EU law.

**The second question**

- 85.** The second question is:  
**If the answer to the first question in general is No, do the provisions referred to have that effect where provisions in the domestic law of the Member State concerned for assessment of individual derogations granted consequent on an action programme pursuant to Article 5 of Directive 91/676 are not operated in practice in that context so that there is in practice no assessment carried out under Directive 92/43 of individual derogations granted consequent on the plan in terms of the effect on European sites of Nitrate-emitting agricultural activities which will be carried out on foot of such derogations?**
- 86.** The applicant submitted:  
 "Yes. The key issue in the question is the non-application in practice of the law. Where an AA is performed of an NAP which establishes a derogation from the 170 kg N limit, but the Habitats Directive is not in fact applied to individual derogation applications, it is imperative that the AA of the NAP consider the underlying Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan, rather than merely the protective measures the plan positively."
- 87.** The State submitted:  
 "The provisions referred to do not have that effect, even where in practice there is no assessment carried out of individual derogation decisions under the Habitats Directive. An alleged failure to comply with obligations under the Habitats Directive with respect to a downstream measure will, if established, result in consequences for that downstream measure. However, there is no basis to contend that an upstream measure would be invalidated in those circumstances, or that the obligations arising under the Habitats Directive with respect to an upstream measure would alter on that basis. There is no textual support for that position in the Habitats Directive, and a purposive approach would not support that claim. The purpose of Article 6(3) is to prevent the implementation of measures that will have adverse effects on the integrity of a site. Refusing to authorise the NAP under Article 6(3) would only prevent the authorisation of the NAP. It would have no effect on the underlying agricultural activities and, in particular, would not prevent those activities from continuing. It would serve only to remove the regulation of those activities that currently are in place under the NAP."
- 88.** The ICMSA submitted:  
 "ICMSA adopts the submissions made by the State Respondents under this Issue."
- 89.** The referring court's proposed answer is that this question does not arise because the answer to the first question is Yes, but if it does arise the answer is Yes. The absence of the application of domestic legislation for AA in the context of individual derogations at farm level is strongly suggestive of a reluctance to enforce EU law. It is not necessary for the referring court to come to any final conclusions on the legality of the State's approach because the mere fact that there is no farm-level assessment makes it all the more imperative that a full assessment of the impacts of the agricultural activities be carried out at the plan level. The State's defence that "[r]efusing to authorise the NAP under Article 6(3) would only prevent the authorisation of the NAP ... [i]t would have no effect on the underlying agricultural activities and, in particular, would not prevent those activities from continuing ... [i]t would serve only to remove the regulation of those activities that currently are in place under the NAP" is tendentious because it ignores the fact that the NAP, the Commission decision and the GAP regulations form a coherent system to permit farm-level derogations. The formal development consent is an authorisation of the Minister under article 35(1)(a) of the GAP regulations as amended, but that power only exists by reason of the NAP and the Commission decision. The NAP and Commission decision therefore form the framework within which unassessed development can take place, including development that impacts on European sites. There is a broad analogy with the decision of the Netherlands Raad van State in *Stichting Werkgroep Behoud de Peel, gevestigd te Deurne v. het college van gedeputeerde staten van Noord-Brabant*, 29 May 2019, ECLI:NL:RVS:2019:1603, e.g., at para. 31.1, "Zoals volgt uit deze uitspraak is met de passende beoordeling die aan het PAS ten grondslag ligt niet de zekerheid verkregen dat de natuurlijke kenmerken van de Natura 2000-gebieden die in het PAS zijn opgenomen niet zullen worden aangetast. Er is met andere woorden niet verzekerd dat de instandhoudingsdoelstellingen van de gebieden niet in gevaar worden gebracht." (As follows from this ruling, the appropriate assessment underlying the [Netherlands Nitrogen action programme] does not provide certainty that the natural characteristics of the Natura 2000 areas included in the [programme] will not be affected. In other words, it does not ensure that the conservation objectives of the areas will not be jeopardised.) (<https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RVS:2019:1603>)
- 90.** The relevance of the question is that domestic law on AA is not operated in practice at the farm level when derogations are granted. That has the effect that the only assessment that is actually carried out occurs at the plan level. Accordingly if the plan level assessment must take into

account the effects of the agricultural activities concerned, then the assessment here was defective and the NAP was adopted in breach of EU law.

**The third question**

91. The third question is:

**Do Article 6(3) of Directive 92/43 and/or Article 3(1) and/or 5(1) and/or 11(2) of Directive 2001/42 read in the light of Article 3(3) TEU and/or Article 11 and/or 191(2) TFEU and/or Article 37 of the Charter of Fundamental Rights have the effect that assessment of a plan or programme that is subject to those articles and that is capable of having environmental effects on a water body must include assessment by reference to Article 4 of Directive 2000/60 either alone or together with other binding measures adopted by the Member State are sufficiently rigorous to ensure that the plan or programme will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by Directive 2000/60, and if so, do those provisions or either of them require such an assessment to state in express and/or clearly ascertainable terms whether the relevant environmental objectives of Directive 2000/60 will be met following adoption of the plan or programme; either generally or in the specific case of the proposed adoption of a basic measure as defined by Article 11(3) of Directive 2000/60 and in particular a nitrates action programme under Article 5 of Directive 91/676 (as referred to in Annex VI part A para (ix) of Directive 2000/60 as referenced in Article 11(3)(a) of that Directive)?**

92. The applicant submitted:

"There is an obligation to conduct the assessment identified in the Court's question and to refuse a proposed development unless the assessment is conducted and the requisite degree of certainty (no change in status and no deterioration) is substantiated. That conclusion must be expressly stated."

93. The State submitted:

"Neither Article 6(3) of the Habitats Directive, nor Articles 3(1) and/or 5(1) and/or 11(2) of the SEA Directive require that, as part of the assessment of a Plan for the purposes of those provisions, there is an additional assessment under Article 4(1) of the WFD. The Applicant has identified no authority for that proposition. Moreover, there is no obligation to assess the NAP under Article 4(1) of the WFD, separate to the assessment of the Programme of Measures under Article 11 of the WFD, under the principle established in Weser. The CJEU has never held that the Weser obligation applies to plans or programmes. Even if it did, it could never apply to the assessment of one part of the programme of measures adopted under Article 11. Even if those provisions did require an assessment under Article 4(1), that assessment would be limited to whether the positive measures to be implemented under the NAP caused a deterioration in a body of water. There could be no requirement for an assessment as to whether the NAP is sufficiently rigorous, either alone or together with other binding measures, to ensure that there would be no deterioration of any water body in the State. Strictly without prejudice to the foregoing, if any such obligation arose, a measure could not be invalidated by reason of a failure to state in express and/or clearly ascertainable terms whether the objectives of the WFD will be met, once the necessary assessment was completed in substance."

94. The ICMSA submitted:

"ICMSA adopts the submissions made by the State Respondents under this Issue."

95. The referring court's proposed answer is that the requirement of a high level of environmental protection and the obligation to ensure the attainment of the objectives of Directive 2000/60 require that where a plan or programme is likely to have significant effects on one or more water bodies in a Member State, an assessment under Directives 92/43 and/or 2001/42 must include an assessment of whether the plan or programme either individually or together with other binding measures adopted by the Member State is sufficiently rigorous to ensure that the plan or programme will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by Directive 2000/60. This is not an unworkable requirement. Legal certainty and the requirement for a high level of environmental protection require such a conclusion to be clearly stated.

96. The relevance of the question is that in the assessment under Directives 92/43 and 2001/42 there was no meaningful assessment of the NAP by reference to Article 4 of Directive 2000/60 and certainly no express assessment in that regard. If the answer to the question is Yes, then the NAP was adopted without a proper assessment and therefore in breach of EU law.

**The fourth question**

97. The fourth question is:  
**If the answer to the third question is such that that assessment of a plan or programme that is subject to Article 6(3) of Directive 92/43 and/or Article 3(1) of Directive 2001/42 and that is capable of having environmental effects on a water body must include assessment by reference to Article 4 of Directive 2000/60 and the answer to the first or second questions is such that assessment for the purposes of Directive 2001/42 in terms of compliance with Directive 2000/60 is required to include an assessment of the effects on the environment of the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan and/or in particular the omission of more rigorous provisions in a plan, does Article 4(1) of Directive 2000/60 (and specifically the principle of law having the effect that Member States are required, unless a derogation is granted, to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the Directive), read in the light of Article 3(3) TEU and/or Article 11 and/or 191(2) TFEU and/or Article 37 of the Charter of Fundamental Rights, have the effect that a Member State must also refuse to adopt a plan if the particular protections afforded by the plan either alone or together with other binding measures adopted by the Member State are insufficiently rigorous to ensure that the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by Directive 2000/60, either generally or in the specific case of the proposed adoption of a basic measure as defined by Article 11(3) of Directive 2000/60 and in particular a nitrates action programme under Article 5 of Directive 91/676 (as referred to in Annex VI part A para (ix) of Directive 2000/60 as referenced in Article 11(3)(a) of that Directive)?**
98. The applicant submitted:  
 "There is an obligation to refuse to adopt a plan if the particular protective measures are not sufficiently robust."
99. The State submitted:  
 "There is no such obligation, for all of the reasons already set out ...".
100. The ICMSA submitted:  
 "ICMSA adopts the submissions made by the State Respondents under this Issue."
101. The referring court's proposed answer is that by analogy with the judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, ECLI:EU:C:2015:433, Member States are required, unless a derogation is granted, to refuse authorisation for a plan or programme if the particular protections afforded by the plan either alone or together with other binding measures adopted by the Member State are insufficiently rigorous to ensure that the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan will not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by Directive 2000/60.
102. The relevance of the question is that prior to adopting the NAP, the competent authority did not consider the question of whether, and thus did not lawfully satisfy itself as to whether, the particular protections afforded by the plan either alone or together with other binding measures adopted by the Member State were sufficiently rigorous to ensure that the Nitrate-emitting agricultural activities which will be carried out on foot of derogations granted consequent on the plan would not cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by Directive 2000/60. If the answer to the question is Yes, then the plan was adopted in breach of EU law because the competent authority was not satisfied in the manner referred to in the question.

#### **The fifth question**

103. The fifth question is:  
**If the answer to the third and/or fourth questions in general is No, do the provisions referred to have the effect referred to where provisions in the domestic law of the Member State concerned for assessment of individual derogations granted consequent on an action programme pursuant to Article 5 of Directive 91/676 are not operated in practice in that context so that there is in practice no**

**assessment carried out under Directive 92/43 (whether by reference to Article 4 of Directive 2000/60 or otherwise) of individual derogations granted consequent on the plan in terms of the effect on water bodies in the Member State of Nitrate-emitting agricultural activities which will be carried out on foot of such derogations?**

- 104.** The applicant submitted:  
 "Yes. If farm level permitting or assessments are not undertaken in order to assess at farm level the potential impacts of the nitrates emitting activities that will result as a consequence of individual derogations, the certainty required for the purposes of Article 4 WFD must be found in the assessments of the NAP itself. that is the only way in which the requirements of Article 4 WFD can be achieved if the effects of individual derogations are not assessed at farm level."
- 105.** The State submitted:  
 "No, for the same reasons as detailed in response to [the second question]."
- 106.** The ICMSA submitted:  
 "ICMSA adopts the submissions made by the State Respondents under this Issue."
- 107.** The referring court's proposed answer is that this question does not arise because the answer to the third and fourth questions is Yes, but if it does arise the answer is Yes. The lack of any system in practice for assessment of individual derogations under Directive 92/43 gives rise to a breach of EU law unless the assessment of the NAP is sufficient to guarantee no impact on European sites, which was not the case here.
- 108.** The relevance of the question is that there was and is no assessment of individual derogations under Directive 92/43, even derogations that occur in or affecting European sites, and there was no comprehensive or sufficient assessment on impacts on European sites (including by reference *inter alia* to Directive 2000/60) at the stage of adoption of the NAP. If such an assessment is a requirement, then the NAP was adopted without a proper assessment and therefore in breach of EU law.

**The sixth question**

- 109.** The sixth question is:  
**Does Article 4 of Directive 2000/60 read in the light of Article 3(3) TEU and/or Article 11 and/or 191(2) TFEU and/or Article 37 of the Charter of Fundamental Rights have the effect that a plan or programme in particular a nitrates action programme under Directive 91/676 with the potential to affect the status of any relevant water body within a Member State cannot be adopted by the competent authority of a Member State unless the competent authority is required to satisfy itself firstly, that the adoption of the plan or programme is not liable to cause a deterioration of the status of any surface water body which has been or ought to have been identified by that Member State as constituting a surface water body 'type', nor is it liable to compromise the attainment of good surface water status or of good ecological potential and good chemical status of such a surface water body and, secondly, that the adoption of the plan or programme is compatible with the measures implemented pursuant to the programme under Directive 2000/60 established, in accordance with Article 11 of that Directive, for the river basin district concerned?**
- 110.** The applicant submitted:  
 "... outside of the de minimis exclusions, there is such an obligation to assess the potential impacts on all water bodies; however, based on the decision of the Court of Justice in Sweetman the answer to this question is unclear. In the Weser case the Advocate General observed §53 'In the present case, it is clear from the documents in the main proceedings that a management plan covering a programme of measures was adopted for the Weser river basin district. Consequently, the Court is not called upon to determine the effects of Article 4(1) of the WFD with regard to a body of water in respect of which the assessment and planning measures required by Article 4 of the WFD have not been adopted.'"
- 111.** The State submitted:  
 "... there is no obligation to assess the compliance of the NAP with Article 4(1) of the WFD, and the contention that the assessment obligation established in Weser and developed in Sweetman applies to the adoption of an action programme under Article 5(1) of the Nitrates Directive is misconceived."
- 112.** The ICMSA submitted:  
 "ICMSA adopts the submissions made by the State Respondents under this Issue."
- 113.** The referring court's proposed answer is that to ensure the requirement for a high level of environmental protection, and to ensure the attainment of the objectives of Directive 2000/60, a plan or programme cannot be adopted by a Member State unless the competent authority satisfies

itself that the adoption of the plan or programme will not occasion any non-compliance with the objectives of Directive 2000/60 or any incompatibility with the measures adopted under that Directive for the river basin district concerned.

**114.** The relevance of the question is that the competent authority did not satisfy itself that the adoption of the plan or programme is not liable to cause a deterioration of the status of any surface water body which has been or ought to have been identified by that Member State as constituting a surface water body 'type', nor is it liable to compromise the attainment of good surface water status or of good ecological potential and good chemical status of such a surface water body and, secondly, that the adoption of the plan or programme is compatible with the measures implemented pursuant to the programme under Directive 2000/60 established, in accordance with Article 11 of that Directive, for the river basin district concerned. If that is an obligation under Directive 2000/60 then such an obligation was breached here and the NAP was adopted in breach of EU law.

**The seventh question**

**115.** The seventh question is:

**Do Article 5(1) of and Annex I para. (i) to Directive 2001/42 read in the light of Article 3(3) TEU and/or Article 11 and/or 191(2) TFEU and/or Article 37 of the Charter of Fundamental Rights have the effect that the environmental report itself must include a description of the measures envisaged concerning monitoring in accordance with Article 10 in sufficient detail to demonstrate that Article 10 will be complied with, including details of how this monitoring will occur; when it will be done; and/or how the monitoring will be used and how any identified unforeseen adverse environmental effects will be addressed?**

**116.** The applicant submitted:

"Article 5(1) and Annex 1 paragraph (i) to Directive 2001/42 requires that the environmental report must include a description of the measures envisaged for monitoring under Article 10 in sufficient detail to demonstrate how Article 10 will be complied with. This is clear from the wording of the Directive, the context and the purpose of SEA. The public is entitled to comment on envisaged monitoring measures and therefore ought to be given sufficient information to verify that they are consistent with Article 10. Furthermore clarity in monitoring serves other purposes such as avoidance of duplication by facilitating reuse of monitoring in other plans or programmes or coordinating SEA monitoring activities into a larger suite of environmental surveillance."

**117.** The State submitted:

"The Respondents' position is that Article 5(1) of the SEA Directive does not contain a bright line rule as to the level of detail that is required to be included in an environmental report, which is to be determined on an individual basis, in light of the Respondents' discretion pursuant to Article 5(2) of the SEA Directive to include the information in the environmental report that may reasonably be required. Accordingly, the Respondents disagree with the proposition that Article 5(1) of the SEA Directive requires an environmental report to include a description of the measures envisaged concerning monitoring in accordance with Article 10 of the SEA Directive in sufficient detail to demonstrate that Article 10 of the SEA Directive will be complied with."

**118.** The ICMSA submitted:

"ICMSA adopts the submissions made by the State Respondents under this Issue."

**119.** The referring court's proposed answer is that the express wording of Directive 2001/42 requires that the assessment include "a description of the measures envisaged concerning monitoring in accordance with Article 10". If the details referred to in the question are not included but are left over for later decision, it cannot be said that a description of the measures concerning monitoring in accordance with Article 10 has been provided. Failure to specify these details jeopardises the practical attainment of the objectives of the Directive and also undermines the Union objective of a high level of environmental protection.

**120.** The relevance of the question is that the assessment carried out in the present case under Directive 2001/42 did not include the level of detail referred to in the question. If the answer to the question is Yes, then the NAP was adopted without a proper assessment and therefore in breach of EU law.

**The eighth question**

**121.** The eighth question is:

**Does the term 'material assets' in para. (f) of annex I of Directive 2001/42 exclude the value of such assets and/or in particular in the case of the assessment of an action programme pursuant to Article 5 of Directive 91/676, does that term exclude the broad societal impacts of agricultural activities, the impact of the plan or project on the agricultural industry and on the output and income of farmers, the sustainability of the agricultural industry in the Member State concerned, the**



**food supply chain, and the employment of a significant portion of the population, and if so does Directive 2001/42 have the effect that consideration of such matters is unlawful in assessing the effects of the plan?**

- 122.** The applicant submitted:  
 "By analogy with the judgment in Case C-420/11, *Leth* the term 'material assets' in paragraph (f) of Annex I to the SEA Directive excludes the value of material assets and in the case of an action plan under Directive 91/676 excludes other economic or social impacts on the agriculture sector and farmers except in so far as these factor have an impact on the environment. Such an interpretation is not supported by the wording of the Directive and is not consistent with the objective of the Directive."
- 123.** The State submitted:  
 "Even if 'material assets' excludes a consideration of 'critical infrastructure essential for the functioning of society' (which is not accepted), the Respondents submit that the taking into account of 'critical infrastructure essential for the functioning of society' is still permissible in an environmental report prepared pursuant to Article 5(1) of the SEA Directive for the following reasons given that Article 5(2) provides that the environmental report prepared pursuant to Article 5(1) shall include the information 'that may reasonably be required...' and that paragraph f of Annex I of the SEA Directive, which refers to 'material assets' is non-exhaustive. The interpretation of 'material assets' in *Leth* is specific to the EIA Directive and not capable of automatic transposition to an SEA Directive context in light of the fact that environmental assessment at a strategic level is a fundamentally different process from that at a project level."
- 124.** The ICMSA submitted:  
 "C-420/11, *Leth* merely concerns what is required to be included in an EIA. It says nothing about what must not be included in such an assessment, much less one for SEA purposes. An Taisce adduces no case law on this in the SEA context, EIA context or any context. An Taisce's arguments seem predicated on an assumption that readers of the report are, in effect, so easily confused that they could not process or understand the report if it contained anything other than environmental matters. There is no warrant for this assumption, nor does An Taisce provide any. Even assuming arguendo that something had been included which ought not to have been, An Taisce has not demonstrated that any 'consideration' which follows is 'unlawful' as a result."
- 125.** The referring court's proposed answer is that the term "material assets" for the purpose of Directive 2001/42 does not include the financial value of such assets, by analogy with the judgment of 14 March 2013, *Leth*, C-420/11, ECLI:EU:C:2013:166 which referred to assessment under Directive 85/337. However *Leth* only established that assessment of financial value of material assets was not "necessary". It does not follow that including such assessment is unlawful. Directive 2001/42 does not prohibit the competent authority of a Member State from assessing additional matters above and beyond the minimum necessary under the Directive, provided that the matters falling within the Directive are also assessed.
- 126.** The relevance of the question is that the assessment carried out in this case did consider financial issues, therefore rendering it necessary to establish whether such consideration was lawful.

**The ninth question**

- 127.** The ninth question is:  
**If the answers to one or more of the first to eighth questions have the consequence that the adoption of the NAP involved a breach of Directives 92/43, 2000/60 and/or 2001/42, is Commission Decision 2022/696 invalid having regard *inter alia* to Article 3(3) TEU and/or Article 11 and/or 191(2) TFEU and/or Article 37 of the Charter of Fundamental Rights?**
- 128.** The applicant submitted:  
 "The threshold that the Applicant has to meet is to raise a doubt in the Court's mind such that the matter has to be referred to the Court of Justice. In circumstances where the Derogation expressly relies on the NAP, if the adoption of the NAP involved a breach of the Habitats Directive, the WFD or the SEA Directive that raises (at the very least) a doubt whether the Derogation remains valid."
- 129.** The State submitted:  
 "If the answers to the previous issues have the consequence that the adoption of the NAP involved a breach of the Habitats Directive, WFD and/or SEA Directive, the Commission Implementing Decision (EU) 2022/696 of 29 April 2022 granting a derogation requested by Ireland pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources nonetheless remains valid."
- 130.** The ICMSA submitted:

“161. ICMSA adopts the submissions made by the State Respondents under this Issue. Those run from §235 to §259.”

**131.** The referring court’s proposed answer is that the conclusion that would follow from the proposed answers to the earlier questions would be that the NAP was adopted in breach of Directives 92/43, 2000/60 and/or 2001/42. Commission Decision 2022/696 presupposes a valid NAP that was subject to proper assessment. In the absence of such proper assessment in conformity with EU law, the referring court’s proposed answer is that the CJEU should declare that Commission Decision 2022/696 is invalid on that basis. Relatedly and in particular, the Commission Decision is expressly predicated on the need for compliance with Directive 92/43, but a practical system to ensure such compliance is absent given the lack of any farm-level AA prior to the grant of individual derogations. In the absence of such a factual precondition, combined with the lack of any other compensating adequate assessment at the stage of adopting the NAP, the referring court’s proposed additional answer is that the CJEU should declare that the Commission Decision is invalid on that specific basis in particular.

**132.** The critical point is that the Commission decision is predicated on the adoption of the Irish NAP (recital 9 and art. 14) and thus implicitly on the valid adoption of a NAP in compliance with Union law. The State submits that the reference to the NAP is just context, but that is implausible. Any legal inadequacy in the NAP would therefore flow through into the Decision.

**133.** Commission Decision 2022/696 is also expressly premised on the basis that the habitats directive will be fully implemented – see recital 23. The fact that there is no system in place in practice to apply the habitats directive prior to making farm-level derogation decisions is highly relevant. It appears likely to the referring court that the European Commission was not fully seized of the gap in domestic enforcement of the habitats directive. While the Commission decision recites that the directive should be complied with, there does not seem to have been any engagement with the fact that farm-level derogations are being allowed by the thousand without any appropriate assessment, including adjacent to or even within European sites. All of this has potentially negative results on water quality in Ireland. It seems unlikely on the face of things that the European Commission could lawfully have granted the derogation had it been focused on that situation.

**134.** The issue is necessary and appropriate for reference to the CJEU. It is clear from established caselaw that a domestic court at any level, not just an apex court, *must* refer an issue regarding the validity of EU secondary law if it considers that such law should be declared invalid by the CJEU: the judgment of 14 December 2000, *Masterfoods*, C-344/98, ECLI:EU:C:2000:689. That applies here.

**135.** Insofar as the State made points that the CJEU doesn’t have jurisdiction to answer this question, that argument is unprincipled and contrary to the established jurisprudence of the CJEU: see for example the judgment of 11 January 2024, *Friends of the Irish Environment*, C-330/22, ECLI:EU:C:2024:19 at 43:

“It is apparent from settled case-law of the Court that, when a question on the validity of a measure adopted by the institutions of the European Union is raised before a national court or tribunal, it is for that court or tribunal to decide whether a preliminary ruling on the matter is necessary to enable it to give judgment and consequently whether it should ask the Court to rule on that question. Consequently, where the questions referred by the national court or tribunal concern the validity of a provision of EU law, the Court is, as a general rule, obliged to give a ruling (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 49 and the case-law cited).”

**136.** The present action isn’t a case where the applicant brings an abstract or free-standing challenge to EU measures without reference to domestic implementation or a dispute in national law. The challenge is firmly situated in the context of a concrete domestic dispute which for good measure also involves a challenge to national implementing measures. Nor is this a case where there is nothing left to decide by the national court in the event that the CJEU rules on the validity of the Commission Decision, because the applicant also challenges the GAP regulations which include amendments consequent on the Commission Decision. Furthermore, the applicant did not have standing to bring a direct action to the CJEU to challenge the Decision: see the tests laid down in cases such as the judgment of 30 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11, ECLI:EU:C:2013:625.

**137.** As regards the State’s proposed objection to the CJEU that the reference regarding the validity of the Commission decision is inadmissible because it is not necessary for anything that the court has to decide to resolve a dispute between the parties, that is also misconceived. The applicant has, as it is entitled to do, challenged an EU law measure in the context of a concrete dispute between the parties that involves, for good measure, a challenge to implementing measures. That is a standard procedure. To resolve that dispute the issue of the validity of the Commission decision must be addressed, and that can only be answered definitively by the CJEU. The State’s admissibility objection (to an extent supported by the notice parties) would be destructive of the rule of law, because it would essentially eliminate Article 267 TFEU as a channel for oversight by the CJEU of the

Union legislative process. In practice almost all legislative challenges would manifest in a complaint about some domestic implementing measure, and a new doctrine that allowing the national court to adjudicate on the domestic measure eliminated the need to address the validity of the relevant element of EU secondary legislation would effectively eliminate the possibility of ever reaching such issues. That would hollow out and render redundant the express provisions for reference of issues as to the validity of secondary EU law as set out in Article 267 TFEU.

**138.** The State's argument that this issue should be postponed is also misconceived. That would potentially require a second reference, some time in 2025 or 2026, which seems procedurally cumbersome and amounts to pointless formalism. The referring court has endeavoured to set out the reasons for the questions and thus the nexus between the questions and the issue of whether any breach of EU law has occurred in the adoption of the NAP and consequently the Commission Decision. It should therefore be legitimately open to the CJEU to draw any appropriate conclusions in answer to this question.

**139.** For completeness the referring court should note that this issue will not be moot even if this question is not answered until after 31st December 2025 being the expiry date of the Decision. It may be possible for the CJEU to determine the reference before then, but in any event the principles in the judgment of 11 January 2024, *Friends of the Irish Environment CLG v Minister for Agriculture, Food and the Marine*, C-330/22, ECLI:EU:C:2024:19, apply and the reference is appropriate on a similar basis. The referring court will not be precluded from granting at least some relief to the applicant if the answers to the questions referred indicate that a legal infirmity has occurred.

**140.** Viewed from the perspective of Irish law, the domestic jurisprudence allowing review of temporary decisions that are "capable of repetition but evading review" applies as set out earlier in this judgment. The present case falls squarely within the principle even if it is not finally determined by December 2025. Thus the present challenge can legitimately be pursued, for at least some relief, even after December 2025.

**141.** Indeed, the State accepted this in written submissions of 8th July 2024:

"15. If the Court decides to refer a question to the CJEU, with the consequence that the proceedings may not be finally determined prior to 31 December 2025, being the date until when the Commission Decision applies, the Respondents confirm that they would not raise a mootness objection before the CJEU. This is without prejudice to the Respondents raising an objection before the CJEU that questions concerning the validity of the Commission Decision are inadmissible on account of their being unnecessary to resolve any dispute between the parties to the proceedings."

**142.** In the event that the final order is made after the expiry of the instruments concerned, the court, if it finds for an applicant, is not without capacity to grant a remedy for a range of reasons, not least because the court does have jurisdiction to grant reliefs not pleaded, within the scope of the grounds (see domestic law referred to earlier in this judgment). So at least a declaration would be available in any event. Alternatively, if the court decides to direct an alternative remedy to *certiorari*, such as for example an order compelling the undertaking of further assessment, it is not an answer to that to say that the relief was not expressly sought. Again, that is because an unpleaded relief can be granted if within the scope of the grounds of challenge. The State again concedes this point in submissions of 8th July 2024:

"16. The Respondents do not consider that any issue arises at this juncture in circumstances in which pursuant to Order 84, Rule 19 [of the Rules of the Superior Courts] the Court may grant any relief mentioned in Order 84, Rule 18(1)-(2) which it considers appropriate notwithstanding that it has not been specifically claimed. Alternatively, the Applicant may seek leave of the Court to amend its Statement of Grounds."

**143.** Thus the challenge can legitimately be pursued, for at least some relief, even after December 2025. It can in any event be noted that the previous derogation expired in December 2021, but was replaced only in April 2022, so there may be a run off period of at least *de facto* application in any event.

**144.** The relevance of the question is that in the proceedings, the applicant challenges the validity of Commission decision 2022/696. An answer to this question is therefore relevant and necessary to addressing the relief sought by the applicant.

#### **Order**

**145.** For the foregoing reasons, it is ordered that:

- (i) the questions set out in this judgment be referred to the CJEU pursuant to article 267 TFEU;
- (ii) the CJEU be requested to note that the notice parties who are natural persons have requested the referring court to inform the CJEU that they do not wish their names to be anonymised for the purposes of the proceedings in the CJEU and therefore that all such persons can be named by the CJEU including by way of the publication of materials or of the judgment of that court; and

- (iii) the substantive determination of the proceedings be adjourned pending the judgment of the CJEU, without prejudice to the determination of any appropriate procedural or interlocutory issues in the meantime or the determination of the appropriate way to proceed in respect of grounds that have been adjourned to await progress in other proceedings.