



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2021:000091

[2022] IESC 8

**O'Donnell CJ
Dunne J
Charleton J
Woulfe J
Hogan J**

Between/

AN TAISCE - NATIONAL TRUST FOR IRELAND

Appellant

-AND -

**AN BORD PLEANÁLA, THE MINISTER FOR COMMUNICATIONS,
CLIMATE ACTION AND THE ENVIRONMENT, IRELAND AND
THE ATTORNEY GENERAL**

Respondents

-AND-

KILKENNY CHEESE LIMITED (FORMERLY JHOK LIMITED)

Notice Party

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 16th day of February 2022

Part I: Introduction and Background

Introduction

1. In 2021 the Oireachtas gave legislative approval to a decision by the Government to effect significant and far-reaching changes to the structure of Irish society so that we

could achieve the goal of carbon-neutrality by 2050. This decision reflects commitments made not only by the Irish Government, but also by the other Member States of the European Union and by the Union itself to give practical effect to a range of international commitments designed first to arrest and ultimately to eliminate the continued dependence on fossil fuels and other similar practices contributing to the increase in greenhouse gas emissions (“GHGs”).

2. While the detail of these legislative changes do not directly concern or govern the present appeal, the following extract from the Long Title of the Climate Action and Low Carbon Development (Amendment) Act 2021 (“the 2021 Act”) nonetheless succinctly describes the aims of both the Oireachtas and the Government:

“An Act to provide for the approval of plans by the Government in relation to climate change for the purpose of pursuing the transition to a climate resilient, biodiversity rich and climate neutral economy by no later than the end of the year 2050 and to thereby promote climate justice...”

3. Agricultural emissions – not least from the dairy sector – also present a challenge in this context. It is these emissions which form a key part of the overall context of this appeal which concerns the indirect environmental effects which the construction and operation of a proposed major cheese factory are said to entail. Will this lead to enhanced milk production (and, by extension, greater GHG emissions), or will this milk be produced in any event? And, one way or the other, should the likely emissions from this enhanced milk production be identified and assessed as part of the required environmental impact assessment in respect of the cheese factory project?
4. Article 3(1) of the Environmental Impact Assessment Directive 2011 (2011/92/EU) (“the EIA Directive”) (as inserted by Article 1(3) of Directive 2014/52/EU) articulates what at first blush seems a straightforward principle. It provides that every environmental impact assessment shall “identify, describe and assess” in an appropriate manner “in the light of each individual case, the direct and indirect significant effects of a project” on a range of matters, including biodiversity and “land, soil, water, air and climate.” The object of the EIA Directive is itself perfectly clear, in that it seeks to ensure that the likely environmental impacts of any major project are themselves considered and assessed before any development permission is granted, even if, as this Court has already held, “the outcome of that examination, analysis, evaluation and

identification informs, rather than determines, the planning decisions which should or may be made”: *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 IR 617 at 642, per Finlay Geoghegan J.

5. The difficulty arises in the application of this principle and, specifically, the reference to significant indirect effects. Nearly every major construction project will have both direct and indirect effects on the environment. The question is: what is meant by “significant indirect effects of the development” in Article 3(1) of the EIA Directive?
6. As I have already hinted, this problem arises in the present appeal in an acute form. In these judicial review proceedings the appellant seeks to quash a decision of An Bord Pleanála dated the 30th June 2020 to grant planning permission in respect of an application by the developer Notice Party to construct a major cheese factory at Slieverue, Co. Kilkenny. The developer is a joint venture between Glanbia and a Dutch company, Royal-a-Ware. It is envisaged that this project will facilitate a move by Glanbia from the supply of cheddar cheese to the UK market to the development of different lines of cheese production designed principally to satisfy demand in the continental European markets.
7. The central issue in this appeal is whether the Board was under an obligation to assess – whether for the purposes of an environmental impact assessment under the EIA Directive or an appropriate assessment under the Habitats Directive – the upstream consequences of the operation of the proposed cheese factory and, specifically, the milk that is necessary to supply this factory. At the heart of the appellant’s objections to this grant of permission is its contention that such is the scale and size of the proposed factory that it will consume very large quantities of milk – estimated to be some 4.5% of the national milk supply in 2025 – and that this milk can only realistically be sourced by an expansion of the national herd, leading in turn to enhanced methane and other GHG emissions. These are said to be the indirect consequences which will flow from the construction of this factory. The respondents maintain, however, that there is in fact no causal link between the anticipated increase in milk production and the factory. They contend that this increase in milk production will occur in any event, so that even if this increase in milk production results in increasing GHGs, these indirect environmental effects will not be as a result of the operation of the factory.

8. Before considering these difficult and troubling questions, it is necessary first to describe the parties and to set out the background to the present proceedings.

Background

9. The appellant is a non-governmental organisation dedicated to the protection and conservation of the environment. As such it enjoys a privileged status under the provisions of the Planning and Development Act 2000 and it was a statutory consultee in respect of this project. No serious challenge has been advanced as to its general standing to advance the present proceedings, although its entitlement to advance discrete and particular arguments has been challenged. For its part, the developer Notice Party is a joint venture between an Irish multi-national (Glanbia) and a Dutch company, Royal-A-Ware. Purely for reasons of convenience, I propose to describe the developer as Glanbia.
10. In these proceedings the appellant seeks to quash a decision of the Board to grant permission to the Notice Party to construct and operate a cheese manufacturing plant at Slieverue, Co. Kilkenny. The appellant was given notice of the original application for planning permission by the planning authority, Kilkenny County Council, as a statutory consultee, pursuant to Article 28(1) of the Planning and Development Regulations 2001. In accordance with these regulations, the appellant was also provided with details of the various assessments undertaken by the Notice Party including those made under the EIA Directive and the Habitats Directive.
11. As a statutory consultee, the appellant made a submission to the planning authority on the 23rd October 2019. Notwithstanding the appellant's submission, Kilkenny County Council decided to grant permission for the development on the 14th November 2019. Following the County Council's decision, the appellant appealed the permission to the Board on the 11th December 2019 on the ground that permission would prevent the State from meeting its climate targets, which requires the reduction of the national herd of cows, and would lead to unsustainable and adverse environmental impacts.
12. The Board's inspector produced a report on the 15th June 2020 which was favourable to the planning application. In her report the inspector refers to a number of national policies and regional and local plans. She also addresses potential indirect effects of the proposed cheese factory (at paragraph 8.4.2.) including the effect on dairy farms but concludes that these effects were too remote to be fully assessed. She further concluded

that, based on the evidence that she received, the supply of milk to the proposed cheese factory would not result in any additional emissions beyond what was currently projected by the Government (at paragraph 8.6.3).

13. The environmental impact assessment report itself envisages that the proposed cheese factory will require 450 million litres of milk each year, of which approximately 20% is already in circulation. The remaining milk will be sourced from Glanbia's own milk suppliers. This consists principally of some 4,500 farms, largely based in Kilkenny and surrounding counties. Some 75% of these farms have rivers or streams or other watercourses running through them or are immediately adjacent to them. Of these farms only 57% have nutrient management programmes designed to mitigate water quality deterioration. A significant portion of the milk supply for the plant is already available but is currently supplied to other processors.
14. In the High Court Humphreys J delivered a written judgment on the 20th April 2021 dismissing the application for judicial review: [2021] IEHC 254. By a subsequent decision delivered on the 2nd July 2021 Humphreys J refused leave to appeal to the Court of Appeal: see [2021] IEHC 422. (I will return presently to these two judgments). By a determination dated the 23rd September 2021 this Court granted leave for a direct appeal to this Court pursuant to Article 34.5.4 of the Constitution: see [2021] IESCDET 109.
15. Two judgments have already been delivered by this Court in respect of these proceedings. The first concerned a significant disagreement between the three parties (An Taisce, the Board and Kilkenny Cheese) as to the scope of the leave to appeal granted by this Court in its Determination. In a judgment delivered on the 7th December 2021 this Court held that the appellant should be allowed to raise at the substantive hearing all of the grounds set out in its Notice of Appeal, including arguments pertaining to the environment effects of the off-site milk production and the Water Framework Directive (Directive 2000/60/EC): see *An Taisce v. An Bord Pleanála (No. 1)* [2021] IESC 79.
16. The second judgment concerned the question as to whether the Attorney General should be permitted to be joined as a party to this appeal in his capacity as guardian of the public interest. In a judgment delivered on the 21st December 2021 this Court held that the Attorney General should be permitted to be joined as a party to this appeal subject

to the condition that he must abide by his own costs: see *An Taisce v. An Bord Pleanála (No.2)* [2021] IESC 83.

17. In light of this Court’s judgment delivered on the 7th December 2021 the precise issues to be determined can be summarised as follows:
- a. The extent of the obligation on the Board to assess the indirect environmental impacts of the proposed cheese factory under Article 2(1) of the Environmental Impact Assessment Directive (Directive 2011/92/EU as amended) (“the EIA Directive”) and Article 6(3) of the Habitats Directive (Directive 92/43/EEC as amended) and, specifically, whether the obligation includes an assessment of the indirect environmental impact of the off-site milk which will be needed to supply the factory.
 - b. The correct approach to evidence and argument in respect of whether all reasonable scientific doubt has been removed such that a decision maker can conclude that a proposed development will not adversely affect a European Site having regard to its conservation objectives, as required by Article 6(3) of the Habitats Directive.
 - c. The extent of the Board’s obligation under the Water Framework Directive to assess the environmental impact of the discharge of pollutants on adjoining rivers and the treatment of scientific evidence in this respect.

Part II: The High Court judgments

The Decision of the High Court

18. The appellant commenced judicial review proceedings in the High Court arguing that the Board had failed to carry out adequate environmental assessments of the production of milk that would be necessary for the cheese factory. The appellant further sought to impugn the decision of the Board on grounds which had not been raised in the planning process, namely that the Board had failed to conduct an adequate appropriate assessment as required under the Habitats Directive and had acted in breach of the Water Framework Directive by granting permission of a project that will result in effluent discharge and thus additional pollutants to the River Suir (which was said to have not attained “good” status for the purposes of Article 28 of the Surface Water Regulations (SI No. 272 of 2009)).

19. In the High Court proceedings the Board and the Notice Party challenged the appellant's standing to raise these latter issues, though did not contest the standing of the appellant to raise the issue that the milk supply should have been assessed as part of the project. The High Court nevertheless proceeded to consider all of the grounds raised on their merits. In his first judgment Humphreys J rejected the appellant's central argument regarding the off-site environmental impact of the proposed milk production, saying (at paragraph 46):

“The basic reason is that effects of raw material production where such production is sufficiently removed from the project as not to be capable of assessment in site-specific terms are not to be considered part of the project for the purposes of the EIA or AA. Such effects need to be considered on a more programmatic basis and hence lie outside the direct purview of grounds from challenging an individual planning decision.”

20. The judge had earlier stated (at paragraph 13) that:

“...that doesn't mean that production could never be sufficiently proximate as to require assessment – just that that has not been demonstrated here, either by reference to the relationship between the production and the project or by reference to expert economic evidence.”

21. In his second judgment (dealing with the application for a certificate) Humphreys J clarified (at paragraph 17) that it is the effects of the project which are subject to an assessment, regardless of whether they are site-specific or not:

“If the effects concerned are the effects of the project, then they do require assessment whether they are site-specific or not. The No 1 judgment should be read as subject to that clarification. But that doesn't help the applicant here because I didn't think the effects were the effects of the project.”

22. In his first judgment Humphreys J went on to reject the appellant's arguments under the Habitats Directive and the Water Framework Directive. He addressed first the appellant's questions under the Habitats Directive, namely, whether the inspector erred in screening out certain interests, such as Atlantic salt meadows, in the appropriate assessment, and the alleged failure to adequately consider the impact of treated effluent. He found that as “there was no scientific evidence put before the board to contradict

the Natura Impact Statement... it cannot be maintained now that the board acted in a way which left open scientific doubt when there was no such doubt on the materials which it had” (at paragraph 26). He made a similar statement as regards the impact of treated effluent (at paragraph 29).

23. Humphreys J then went on to address the Water Frameworks Directive issue on the merits. On this point, he held that the appellant had not overcome the onus of proof necessary to persuade him that the particular part of the river into which the discharge will take place had not been designated as “good” for the purposes of Regulations 28 of the Surface Water Regulations S.I.272 of 2009 (at paragraph 32).
24. It should be noted at this stage that there is some dispute over what Humphreys J actually held in respect of the Habitats Directive issue. The appellant maintains that the High Court precluded it from impugning the conclusions of the Board in respect of the planning process on the basis that An Taisce had not adduced scientific evidence in respect of the points that it had raised, which An Taisce argues is erroneous on the part of the High Court. The Board and the Notice Party, however, argue that this was not what the High Court in fact held, and the High Court’s point was that no scientific evidence had been raised – by anyone – which would suggest that the Board was not entitled to reach the findings that it did in its appropriate assessment.

Part III: The submissions of the parties

The Appellant’s Submissions

25. At the heart of the appellant’s case lies the contention that the Board did not properly take into account the upstream consequences of the operation of the proposed cheese factory. Specifically, it is contended that there was no adequate environmental impact assessment of the 450 million litres of milk necessary to supply the factory. It is further said that such supply will have consequences for Ireland’s greenhouse obligations in that, for example, the supply of milk at these quantities will have consequences for methane and nitrate emissions. The appellant accordingly maintains that the Board was under an obligation under Article 2(1) of the EIA Directive to assess these wider (if indirect) environmental impacts due to the demand for milk likely to be created by the project.

26. The appellant originally maintained that the milk supply was originally part of the project itself. On appeal to this Court and in response to a written request from the Court in advance of the oral hearing for clarification of this point, the appellant expressly – and, in my view, clearly correctly - accepted that the milk supply did *not* form part of the project itself but was rather an indirect effect. To anticipate somewhat, it is worth observing at this juncture that this is in fact a significant step in the entire argument regarding the scope of the project, because it means that only an actual increase in milk production by reason of the project – something which almost by definition is difficult to identify and assess – is capable of being regarded as a significant environmental effect.
27. The appellant adopts a similar argument in respect of Article 6(3) of the Habitats Directive insofar as these indirect impacts may affect a Natura 2000 site. But it also argued that the Board’s inspector erred in screening out certain interests, particularly Atlantic salt meadows, in any assessment. (Atlantic salt meadows are communities of salt-tolerant small plants which congregate in tidal estuaries and rivers). It also contended that the Board had failed to have regard to the impact of treated effluent.
28. A slightly different point is made in respect of the Water Framework Directive (Directive 2006/60/EC): it is said that the Board was precluded from granting permission in circumstances where this will lead to an increased discharge of pollutants into the River Suir and where it is said that that waterbody has not achieved what is termed “good” status for the purposes of Article 28 of the Surface Water Regulations (SI No. 272 of 2009).

The Board and Notice Party’s Submissions

29. The Board and Notice Party’s submission in response to the appellant are largely the same and can be summarised together. The Board and Notice Party argue, in the first place, that if the Board was under an obligation to assess the environmental impact of the off-site production of milk for the proposed cheese factory under the EIA Directive this could only be on the basis that the off-site production of milk is an indirect environmental impact that falls within the ambit of that Directive. The Board and Notice Party note that in this Court’s decision in *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 IR 617 it was held that the EIA Directive only requires an EIA to be carried out in respect of the *project* for which planning permission is sought, which is

defined by reference to the proposed development which is the subject matter of the application for planning permission. The Board and Notice Party contend that in this case it is clear from the application for planning permission that the proposed development was the “construction and operation of a cheese factory.” The Board and Notice Party refute An Taisce’s assertion that the proposed development also includes the off-site production of milk, not least because such an assertion is inconsistent with An Taisce’s subsequent argument that that production is an *indirect* effect of the proposed development.

30. Having concluded that the off-site production of milk is not part of the project for which planning permission was sought, the Board and Notice Party next consider the question of whether the off-site production of milk could nevertheless be subject to assessment under the EIA Directive as an indirect environmental effect. It is said that this question raises two issues: whether the Board was required to assess the environmental effects of the off-site milk production at all; and, if so, whether the assessment that was actually carried out by the Board was irrational and thus unlawful (since the Board and Notice Party contend that despite the fact that the Board was not obliged to consider the effects of the off-site milk production in its EIA, it did so anyway).
31. In respect of the first issue, the Board and Notice Party submit that the High Court was correct to find that the Board did not have an obligation to assess the environmental impact of the off-site milk production on the basis that it was too remote. It is said that all proposed developments must have a beginning and end and thus a consideration of remoteness must come into play. This, the Board and Notice Party contend, is supported by the High Court decision in *An Taisce v. An Bord Pleanála* [2015] IEHC 633 in which White J interpreted the words in Article 3 of the EIA Directive – “in light of each individual case” – as meaning that there was a limit to the obligation to assess certain matters and that this limit must be framed by reference to the question of remoteness. The Board and Notice Party then both refer to the High Court of England & Wales’ decision in *R.(Finch) v. Surrey County Council* [2020] EWHC 3566 (Admin) and the Scottish Court of Session’s decision in *Greenpeace Limited v. The Advocate General* [2021] CSIH 53 to guide this Court on how the question of remoteness should be applied. The Board and Notice Party maintain that on a correct application of the case law the off-site production of milk does not constitute an “indirect” environmental

impact for the purposes of the EIA Directive and thus it was not under an obligation to assess as much.

32. The Board and Notice Party further contend that even if the Board was under such an obligation, it discharged that obligation by the assessment that it in fact conducted. The Board and Notice Party emphasise that the EIA completed by the Board included an assessment of the potential indirect effects arising from the production of milk supply and that the Report concluded that the proposed development would not increase milk production and would not result in any additional emissions beyond those that were already projected by Government and accommodated in Government policy. The Board and Notice Party submit that the Board was entitled – and indeed required – to have regard in that assessment to the National Climate Change Action Plan and the Draft National Climate Air Roadmap for the Agricultural Sector, and that An Taisce’s suggestion that this is inconsistent with this Court’s decision in *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49 is misplaced. The Board and Notice Party submits that the Board was also entitled to have regard to mitigation schemes implemented in the dairy industry for reasons outlined from paragraph 66 of its supplemental submissions. It is therefore submitted that any obligation that the Board was under to assess the indirect environmental impact of the off-site milk production was discharged.
33. In respect of the Habitats Directive, the Board and Notice Party address in their original submissions the arguments advanced by An Taisce to the effect that the Inspector erred in screening out certain interests from the appropriate assessment, including the Atlantic salt meadows, and failed to have regard to the impact of treated effluent. The crux of their argument on this point is that An Taisce has mischaracterised the finding made by the High Court in its principal judgment in dismissing An Taisce’s application. It is argued that An Taisce has erroneously suggested that the High Court held that in order to pursue a challenge to the appropriate assessment under the Habitats Directive it was necessary for An Taisce to have placed scientific evidence before the Board. The Board and Notice party contend, however, that this was not what was found by the High Court, and that the point being made by the Court was that there was nothing before the Board which raised any scientific doubt with regards to the Natura Impact Statement. In this respect, the Board and Notice Party submit that the High Court was correct to dismiss An Taisce’s application for judicial review on this point as there was, indeed,

nothing to suggest that the Board was not entitled to make the findings in its report that it did.

34. The Board and Notice Party adopt a similar argument to that made under the EIA Directive in respect of the obligation to assess the indirect environmental impact of off-site milk production under the Habitats Directive. They first make the point that contrary to what is suggested in An Taisce's legal submissions, the effects of milk production were considered as part of the appropriate assessment in so far as the Inspector identified the effect of milk production as having a potential indirect impact which was likely to change year to year. The Board further noted that the Inspector raised an important point to the effect that these off-site activities would be subject to other environmental controls such that they are unlikely to adversely affect the integrity of any European sites. The Board and Notice Party then both repeat the argument that, in any event, because the off-site production of milk did not constitute part of the "project" under Article 3 of the EIA Directive for the purpose of the appropriate assessment, the Board was not in fact required to carry out any assessment of the potential effects of the milk production. But that, even if it was so required, the appropriate assessment conducted by the Board did consider the potential indirect effect of the milk production and accordingly it did also discharge any obligation it may have had under the Habitats Directive.
35. Finally, in relation to the Board's alleged non-compliance with the Water Framework Directive, it is argued that An Taisce does not have sufficient *locus standi* to raise the argument that the Board was precluded from granting planning permission in circumstances where this will lead to an increased discharge of pollutants into the River Suir and where it is said that that waterbody has not achieved what is termed "good" status for the purposes of Article 28 of the Surface Water Regulations (SI No. 272 of 2009). The Board and Notice Party note that this was not a ground of challenge which the High Court had granted leave to apply for judicial review and that, accordingly, it is not a ground which An Taisce is entitled to pursue under section 50A(5) of the Planning and Development Act 2000. Nevertheless, in so far as the ground was raised in the High Court anyway, the Board and Notice Party underline that it was not dismissed on the basis of a *locus standi* objection but rather on the basis that the High Court determined that An Taisce had not overcome the onus of proof in respect of any

of the arguments that it made. The Board and Notice Party contend that the High Court was correct in this finding and it should be upheld accordingly.

The Attorney General's Submissions

36. The Attorney General's submissions largely mirror those filed by the Board and the Notice Party. The Attorney General submissions begin by considering whether the obligation to assess the indirect environmental impacts of the proposed cheese factory under the EIA Directive extends as far as including the off-site production of milk. He submits that the "project" to be assessed for the purpose of a particular development consent is limited to that in respect of which development consent was sought (citing *Fitzpatrick* at paras 36 and 37), and the Attorney General agrees with the High Court in this respect that *Fitzpatrick* determines this matter definitively. In the instant case the Attorney General considers that the "project" for which development was sought does not include the off-site production of milk and that therefore the milk production does not fall within the scope of "project" which needs to be assessed.
37. Next the Attorney General turns to the question of whether the off-site production of milk could nevertheless be subject to assessment as an *indirect* effect of the "project". It is the Attorney General's position that the "indirect effects" of a "project" for the purposes of the EIA Directive is fact-specific to the individual case and is determined by reference to the question of remoteness. In this regard the Attorney General agrees with the High Court that the off-site production of milk could in certain circumstances be sufficiently proximate as to require assessment, but that such proximity has not been demonstrated here, either by reference to the relationship between the production and the project or by reference to expert economic evidence. In support of this, the Attorney General, like the Board and the Notice Party, draws comparisons with what was decided in related cases such as *An Taisce v. An Bord Pleanála* [2015] IEHC 633, *R (Finch) v. Surrey County Council* [2020] EWHC 3566, and *Greenpeace Limited v. The Advocate General* [2021] CSIH 53. Applying the analysis in those cases here, the Attorney General concludes that the off-site production of milk in this case may have environmental consequences as a matter of fact, but that is not to say, as a matter of law, that it falls within the ambit of "indirect effects" for the purposes of the EIA Directive.

38. In the alternative, if it is decided that the milk production is an indirect effect, the Attorney General submits that the Board did assess the effect of such production, in so far as it was practicable to do so, and therefore the Board did discharge its duty under the EIA Directive. It is noted that the High Court did, indeed, find that the Board undertook an assessment of the effect of milk production even though same was unnecessary and that, by necessity, this assessment was limited in nature. Furthermore, the Attorney General contends that the purported inadequacy of the assessment does not, in any case, immediately give rise to grounds to interfere with the Board's decision to grant planning permission unless the assessment was so inadequate so as to be irrational (*O'Keefe v. An Bord Pleanála* [1993] 1 IR 39). It is submitted that this threshold has not been met and thus this ground of appeal should be dismissed.
39. Separately, the Attorney General addresses the similar argument made by the appellant under the Habitats Directive insofar as the indirect effects of the off-site milk production may affect a European Site. The Attorney General observes that the appellant does not explain how a failure to assess the indirect effects of the off-site milk production is alleged to have arisen in light of the fact that the following is not known: (i) the location of the farms which may supply milk to the cheese factory; (ii) what "sites" the farms are proximate to; (iii) what, if any, are the pathways from the farms to the "sites"; and (iv) how many farms are proximate to those "sites" – all of which, the Attorney General contends, are key pieces of information that would be required to carry out an appropriate assessment. The Attorney also notes that, in any case, as with the adequacy of the assessment under the EIA Directive, the adequacy of the assessment under the Habitats Directive is a matter for the Board and can only be challenged on grounds of irrationality.
40. The Attorney General next considers the argument made by the appellant under the Habitats Directive that the Inspector erred in screening out certain interests, particularly Atlantic salt meadows, in any assessment and failed to have regard to the impact of treated effluent. The Attorney General raises the same two objections to these arguments as made by the Board and the Notice Party, namely that there is an issue of *locus standi* that stands to be resolved and a question as to the proper approach to evidence in respect of whether all reasonable scientific doubt has been removed such that a decision maker can conclude that a proposed development will not adversely affect a European Site. In essence, the Attorney General states that the proper role of a

court in judicial review proceedings is well-established: the appellant in this case is not entitled to an appeal or a *de novo* hearing and is therefore not entitled to raise new arguments which were not ventilated before the Board. The Attorney General argues that there are good reasons for requiring an applicant to raise any issues it may identify before the planning authorities as can be seen from the case-law. The Attorney General submits that there is nothing in the decisions of the CJEU which would require the Court to disregard these principles and that therefore the appellant should be found to lack standing on these grounds.

41. On the issue of the alleged requirement to adduce scientific evidence, the Attorney General argues that the appellant has failed to acknowledge that the High Court did not actually hold that there is a requirement for a party to have adduced scientific evidence to be entitled to impugn conclusions reached by the consent authority for the purposes of the EIA or Habitats Directive. What the High Court actually held, in the Attorney's view, is that there must be some evidential basis for arguments made in judicial review proceedings by reference to the materials before the decision-maker, but that it is not necessary that the appellant has adduced this evidence. Accordingly, it is submitted that as the appellant cannot point to any evidence put before the Board – by the developer, or by any other member of the public – which would put into reasonable scientific doubt the findings made by the Board in its appropriate assessment, the High Court was perfectly entitled and correct to dismiss the appellant's application on this ground.
42. Finally, as regards the Water Framework Directive, the Attorney General similarly argues that the appellant has failed to point to any material that was before the Board which would suggest that it was not entitled to find that relevant surface water bodies had not achieved "good" status. The Attorney General also points out that the burden of proof is on the appellant to demonstrate that the status of the relevant water bodies was not properly identified by the Board and that the High Court was correct to conclude that the appellant had not discharged this burden.

Part IV: The Challenge based on the EIA Directive

The requirements of the EIA Directive

43. I propose first to consider the challenge based on the alleged non-compliance with the requirements of the EIA Directive. I then propose to consider separately the appeal so far as both the Habitats Directive and the Water Framework Directive is concerned.

44. In any consideration of this question, it is necessary first to commence with an analysis of the EIA Directive itself. While the first iteration of the EIA Directive dates from 1985, this was replaced by a consolidated version, Directive 2011/92/EU. This itself was amended in 2014 by Directive 2014/52/EU (“the 2014 Directive”). These various provisions have been transposed into Irish law by Part X of the Planning and Development Act 2000 (as amended) and by s. 171A(1) of that Act. Nothing turns on this so far as the present appeal is concerned and no issue has been raised regarding the adequacy of the transposition of the 2014 Directive.
45. Recital 7 of the 2014 Directive acknowledges that concerns about climate change had increased over the preceding years. Recital 13 states that:
- “Climate change will continue to cause damage to environment and compromise economic development. In this regard it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change.”
46. The new version of Article 3(1) of the EIA Directive requires that the effect of the development in respect of climate must also now be considered. Recital 7 of that Directive provides that:
- “Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer which may be supplemented by the authorities and by the public likely to be concerned by the project in question.”
47. Article 1(1) of the EIA Directive provides that:
- “This Directive shall apply to an assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.”
48. The term “project” is itself defined by Article 1(2)(a) as meaning:
- “– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape, including those involving the extraction of mineral resources.”

49. Article 2(1) provides:

“Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4.”

50. Article 3(1) now provides:

“The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
- (c) land, soil, water, air and climate;
- (d) material assets, cultural heritage and the landscape;
- (e) the interaction between the factors referred to in points (a) to (d).

51. Article 5(1) requires the developer to provide the information specified in Annex IV of the Directive. Paragraph 1(d) of Annex IV provides that this must include an estimate of the level of emissions which will be produced during the construction and operation phases and paragraph 5(f) states that there must be “a description of the likely significant effects of the project on the environment” resulting from “the impact of the project on climate (for example, the nature and magnitude of greenhouse gas emissions)”. The description should cover, inter alia, the direct and indirect effects of the project.

The evidence which was before the Board

52. It is next necessary to assess the evidence which was before the Board. This principally consisted of an EIA report (“EIAR”) prepared on behalf of the developer in September 2019, a Natura Impact Statement (“NIS”) from the same month and the report of the

Inspector dated the 15th June 2020, along, of course, with submissions from An Taisce and other interested parties and bodies. The EIAR also contained a range of important exhibits, including, for example, two important reports from Teagasc (the National Farm Survey 2017 and a March report entitled, “An Analysis of Abatement Potential of Greenhouse Gas Emissions in Irish Agriculture 2021-2030), along with a report from the Environmental Protection Agency entitled, “Nitrogen and Phosphorous in Irish Waters 2018”. It is only proper to say that all these documents are extraordinarily comprehensive and detailed.

53. Perhaps the first question which should be asked in this context was whether there was or is any evidence of a causal relationship between the factory and enhanced milk production in the State. A key contention of both the Board and the developer was that the increased milk production was going to happen in any event and that, in some senses, the proposed factory was a response to that anticipated increase in milk production rather than the other way around. Here a word by way of background may be appropriate.
54. Ireland has many advantages when it comes to milk production because, along with New Zealand, we have perhaps the most ideal climate for the grass fed and largely outdoor, pasture-based dairy production which results in a bountiful supply of high quality milk. To some extent, that production was artificially constrained by the introduction of the milk quota regime by the (then) European Economic Community in 1984. With the increased professionalism and productivity of farmers and the rise of indigenous agri-food multinationals there were many reasons why Irish milk production was set to grow significantly following the ending of the milk quota regime in April 2015.
55. This was, indeed, the conclusion of the EIAR itself (at paragraph 2.6):

“Following the removal of quotas, dairy production in Ireland has increased significantly. Within 12 months of the expiration of quotas, milk production had increased in Ireland by 37%. Comparing livestock surveys from the Central Statistics Office from December 2014 (shortly before the end of milk quotas) and December 2018 reveals that the number of dairy cows in Ireland had increased by 21.4% since the expiration of milk quotas, from 1.128 million in December 2014 to 1.369 million by the end of 2018. However, much of the growth occurred immediately after the end of the quota system and the trend of

dairy herd growth has been slowing in recent years...According to *Road Map 2025 for Dairy* and *People in Dairy Action Plan* the dairy herd is set to increase further from its current population of approximately 1.4 million to 1.7 million by 2025. Milk production per cow is also expected to increase from 5.036kg/cow to 5.739 kg/cow, giv[ing] a projected increase of approximately [2].6 billion litres of milk by 2025 to 9.8 billion litres/year from the current output levels of 7.2 billion litres/year. In regard to the 450 million/litres per year that will be required for proposed development from 2022, approximately 20% is already in circulation, and as such it will equate to approximately 4.5% of the milk pool projected to be available in Ireland in 2025.”

56. I should perhaps pause here to clarify that the reference to “approximately 20% in circulation” is a reference to the milk which Glanbia currently re-sells to other producers but which will be instead re-directed to service the needs of this plant should it proceed as planned.
57. The EIAR continues (at paragraph 2.9):
- “Glanbia already has a significant portion of the milk required for the proposed development available, as it is currently being resold to other processors. Additionally, milk production from the existing dairy herd is expected to increase by 1.5% year-on-year, which will increase the milk supply without additional emissions. Given the uncertainty surrounding Brexit, it is also expected that some of the milk currently supplying the existing UK cheddar cheese market will be diverted to the proposed development, depending on business conditions once the production commences.”
58. The EIAR further states (at paragraph 6.7):
- “Given the already high degree of grassland cover in Ireland and the prevalence of pasture farming, it is expected that any increase in dairy production will be confined to improving efficiency coupled with the modest herd expansion on existing farms, rather than significant new lands being brought under agriculture, thereby limiting potential impacts on biodiversity.”
59. Pausing at this point it can be said that that the focus of the EIAR so far as this issue was concerned was that any increase in the milk supply was projected to happen in any

event, regardless of whether the cheese factory went ahead or not. Implicit in this was the contention that the construction of the factory could not have upstream effects of this nature because there was, in essence, no co-relation between any anticipated increase in national milk production or in the national herd and the construction of the factory.

- 60.** Following the grant of permission by Kilkenny County Council of the 14th December 2019, An Taisce appealed that decision to the Board. In its appeal An Taisce noted the claim that the proposal would not require an increase in the dairy herd. It then stated (at paragraph 3.1):

“Even if the bulk of the subject plant’s milk supply would come from subject farms, the increase in productivity nevertheless represents a significant intensification of dairy production with a likely resulting exacerbation of the aforementioned adverse environmental impacts...The EAIR has not provided any data to indicate that productivity increase would not result in additional GHG and nitrogen emissions. Moreover, those other processors currently receiving Glanbia [milk] will still require a milk supply if the proposed cheese plant is built, thereby increasing the amount of milk needed and intensifying production. Additionally, the combination of dairy and related beef related projects under FoodWise 2025, of which the subject proposal is part, will entail an increase in the national herd.”

- 61.** This appeal was responded to in some detail in a submission made by Tom Phillips Associates on behalf of Glanbia on the 20th January 2019. In that submission Messrs. Phillips contended that (at paragraph 1.2):

“...the indirect effects to be addressed are those created by the proposed development, not the impacts of the 4,500 [number of] existing dairy farms, not the impacts of some future supplier farms (which are impossible to predict) and not the impacts of a sect[or] generally (that have been addressed).”

- 62.** This issue was addressed in even further detail at paragraph 3.3.2:

“It is impossible to state definitively the exact number of farms that will supply the proposed development, as some farms may change their structure in the future. Nevertheless, it is important to note that there will be no appreciable

land-use change as a result of the proposed development. As highlighted in section 2.9 of the EIAR, in addition to the significant portion of milk that is already available within the system (but being sold on to other industrial processors at present), an increase in 1.5% productivity gain, year on year, from the existing dairy herd, is expected across the farms in Ireland, and also within Glanbia's milk pool. This will be coupled with a modest expansion on existing farms. Productivity increase is typically based on increasing efficiency at the farms, including more efficient grassland management. Glanbia proactively promotes scientific-based mitigation measures which are detailed in section 8.8 'indirect impacts' of the EIAR. Glanbia's *Milk Planning Census 2019-2023* (based on data collected from farms that account for 86% of Glanbia's milk pool) shows that milk supply is predicted to increase from 2,347 million litres of milk in 2018 to 3,014 million litres of milk in 2023. This amounts to a 28% increase over the 5 years, or an additional 667 million litres of milk per year, arising from the aforementioned productivity gains and a modest increase in dairy herd numbers at Glanbia's supply farms (as per section 2.9 of the EIAR). This increase in milk supply arising from Glanbia's supply farms is encompassed both by *Food Wise 2025* and the national projected increase of milk production (figures produced by the Central Statistics Office) which is set out in further detail within this section. For clarity, this increase in milk production would occur regardless of whether the proposed development takes place, or not. In addition to the above stated milk sources, it is a further strategic priority to redirect some of the existing milk currently proposed for the UK market to the proposed development as a product/market diversification in response to Brexit uncertainties. While it is not possible to quantify this amount given the uncertainties surrounding the extent of impacts associated with the Brexit process, it is likely that this will be a further milk supply input for the development. To re-emphasise, this source relates to milk that already exists within the system, regardless of the requirements of the proposed development....[This information demonstrates] that the proposed development would not in itself drive increased milk production, but would essentially become an additional outlet for milk already in production or planned for production."

The Inspector's report

63. All of these matters were considered by the Inspector in her report dated the 15th June 2020. It should be said immediately that the report is an impressively comprehensive document running to some 86 pages. So far as the milk supply issue is concerned, the following comments of the Inspector should be noted.

64. She stated (at paragraph 8.6.3) that the “supply of milk to the proposed development will not result in any additional emissions beyond what is currently projected by the Government.” She then concluded (at paragraph 8.8.1) that she agreed that any “assessment of all 4,500 Glanbia farms is impractical. The EIAR and the NIS should assess the indirect effects of the proposed development if they are likely and to the extent that is reasonable and practicable at the time the planning application is lodged. However...there must be a limit or the effects will be too remote.” Further it should be done:

“in the light of each individual case... the indirect effects to be assessed in this case are those created by the proposed development: not the impacts of c. 4,500 dairy farms, not the impacts of some future expansion of dairy farms (which are impossible to predict) or the impacts of some future supplier farms (which are impossible to predict) and not impacts a sector generally (that have been addressed separately).”

65. The Inspector then went on say (at paragraph 8.8.2):

“The proposed development would not of itself drive increased milk production and any reference to an expected increase of milk production on Glanbia’s farms, or nation-wide, sits within a national policy context for a managed increase of dairy production in Ireland, subject to the implementation of mitigation measures. Further this national increase in milk production aligns with national climate change policy. Any objection to the principle of such national policy sits outside the scope of this appeal and relevant planning assessment.”

66. There are other statements in the report to similar effect. So, dealing with the impact on lands and soils, the Inspector stated (at paragraph 11.48):

“It is expected that the 450 million litres of milk required for the proposed development will mostly come from the existing Glanbia milk [supply] which comprise[s] approximately 4,500 farms with standard year to year changes. The increase in milk supply will largely come from the increase in productivity at the existing farm[s], i.e., there will be no significant increase in the number of new farms.”

67. So far as impact on climate is concerned, the Inspector stated (at paragraph 11.91):

“The production of 450 million litres of milk produces [0.513] megatonnes of CO₂ [equivalents]. However, this is expected to decrease due to the increase[d] production efficiency of the dairy herd and implementation of mitigation measures as previously outlined. Further, a significant portion of this milk will already be in circulation or will be produced as part of an increased milk supply regardless of whether the proposed development is in existence. These emissions are already accounted for and regulated through the National Climate Action Plan as part of dairy sector emissions. The proposed development will not directly or indirectly result in an increase of CO₂ emissions proportionate to the required milk input.”

68. The Inspector concluded (at paragraph 11.138):

“Impacts on climate are likely to arise in the production of 450 million litres of milk which produces [0.513 megatonnes] of CO₂ [or their equivalents]. While the impact of the proposed development alone is considered insignificant, there is an indirect impact. This impact is expected to decrease by virtue of the production efficiency of the existing dairy herd and implementation of mitigation measures as outlines in the EIAR. Further, these emissions are already accounted for and regulated through the National Climate Action Plan as part of dairy sector emissions. The proposed development will not directly or indirectly result in an increase of CO₂ emissions proportionate to the required milk input. The impacts arising would be mitigated through compliance with both the Government and Glanbia’s sustainability programme as outlined in the EIAR which I have reviewed and consider reasonable.”

69. The Inspector accordingly recommended the grant of permission.

The Board's decision

70. In its direction of the 25th June 2020 granting permission for the project the Board stated that it considered that the EIAR “provided information which is reasonable and sufficient to enable the Board to reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account current knowledge and methods of assessment.” Crucially, however, it went on to identify the main “significant direct and indirect effects of the proposed development on the environment”. Dealing with the environmental effects of the milk supply issue, the Board stated (at page 5 of the decision):

“Indirect impacts on climate are likely to arise in the production of 450 million litres of milk but the emissions arising [have] already [been] accounted for and regulated through the National Climate Action Plan as part of the dairy sector overall emissions. The impact is expected to be offset by virtue of the increased production efficiency of the existing dairy herd, compliance with the Government’s and Glanbia’s sustainability programmes and implementation of other mitigation measures as outlined in the EIAR, including use of state of the art energy systems.”

71. The Board further stated (at page 6) that, having regard to the EIAR, it had concluded that:

“...subject to compliance with the conditions set out above, the effects on the environment of the proposed development, by itself and in conjunction with other development in the vicinity, would be acceptable. In doing so, the Board adopted the report and conclusions set out in the Inspector’s report.”

What exactly did the Board and the Inspector decide?

72. Against this background, one must then ask: what exactly did the Board (and, by extension, the Inspector) actually find and conclude? The principal finding of the Board appears to be that while the production of 450 million litres of milk will have indirect climate implications, these indirect effects are already known and measured in the context of existing Government policy in respect of GHGs from the dairy sector. These indirect effects will, in any event, be off-set and mitigated by a range of other factors.

73. It also seems implicit in this finding by the Board that the project will not *in and of itself* create a demand for milk production. This, in any event, was an express finding of the Inspector which the Board may be taken to have accepted. The Inspector herself frequently stressed in her report that any increase in the milk supply is likely to come from the enhanced productivity at the existing 4,500 Glanbia farms, changing production lines (so that milk currently utilised to make cheddar cheese for the UK market will be diverted to the new factory) and from the diversion of approximately 20% of the milk it currently sells to other suppliers to the new factory. As the Tom Phillips report itself had stated in several places (see, e.g., at paragraph 3.3.2) “this source relates to milk that already exists within the system, regardless of the requirements of the proposed development.”
74. While the Inspector expressly disclaimed any endeavour on her part to assess the environmental impacts of the milk production on the 4,500 farms on the basis that such was too remote from the project and would be impractical and unreasonable, at times her report nonetheless gives the impression that she did just that. Insofar as she looked at these indirect effects, it seems fair to say that she concluded that these indirect environmental impacts were already separately assessed and known and would, in any event, be mitigated by a range of measures.
75. While the Board (and the Inspector) must therefore be taken to have found that the factory will not *in and of itself* create a demand for milk, that is not quite the same thing as saying that a project which will take 4.5% of the national milk supply will not have significant effects on demand for milk production. The very fact that Glanbia proposes to divert the 20% of its existing milk supply which is currently sold to other producers to this factory in order to meet its milk requirements is illustrative of this. This will naturally create a significant vacuum in the existing milk market in the State and it would, I suggest, be unrealistic to expect that these other producers will not have to look elsewhere for supplies.
76. One must, of course, allow for the fact that – as the Tom Philips’ report demonstrated – the projected increase in dairy production will be the result of productivity increases generally. Naturally, these productivity increases will not be confined just to Glanbia suppliers, but other milk processors who are supplied by other farmers will also receive increased milk volumes arising the projected 1.5% year on year productivity increases.

77. Nevertheless, the existence of the factory is likely to reinforce and strengthen the overall demand for milk if only in the particular sense that in its absence the *demand* for milk generally would be reduced. At some elevated macro-economic level one may therefore say there is some link between the factory's requirements for milk and the milk supply. It is, of course, true that allowing for the fact that (as the Inspector found) general productivity increases leading to enhanced milk production would be more than enough to supply the factory's requirements, this is a process which is not infinite. It must accordingly be accepted that the establishment of a new factory which will require 4.5% of current national milk supply will have some relationship to, and possible effect upon, supply. This in turn may have some implications for general milk production within the State and, ultimately, the size of the national herd.

Whether the project will strengthen the overall demand for milk

78. In a complex market economy such as ours it is, of course, all but impossible to predict in advance all the consequences – which are likely in any event to be multi-factorial – of a major economic stimulus resulting from a new project which will take 4.5% of the national milk supply. While the Board found – and, on the evidence, was fully entitled to find – that the factory's requirements would be met from the existing Glanbia milk pool, this still cannot take from the inevitable conclusion that this project is likely to strengthen the *overall* demand for milk, with implications for general milk production on non-Glanbia farms and, as a consequence, environmental emissions arising as a result.
79. In effect, therefore, in the light of these findings from the Board (and, by extension, the Inspector) the EIA question reduces itself to this: are the implications for general milk production on non-Glanbia farms and, as a consequence, environmental emissions arising as a result part of “indirect significant effects of a project” within the meaning of Article 3(1) of the EIA Directive which the EIA itself was required to identify and assess?
80. The key words of Article 3(1) of the EIA Directive are the “direct and indirect significant effects of a project on the following factors...” It should be recalled that the word “project” is defined by Article 1(2)(a) as meaning “the execution of construction works or of other installations or schemes, other interventions in the natural

surroundings and landscape, including those involving the extraction of mineral resources.”

- 81.** The definition of what constitutes a “project” for this purpose is, of course, of critical importance. (While the term “project” is not as such used in our domestic law, it corresponds in substance to the term “proposed development” in s. 172(1A) of the 2000 Act: see *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 IR 617 at 628, per Finlay Geoghegan J.). It might, for instance, be argued that where ostensibly off-site activities are so closely and functionally connected with the on-site development that they should really be classified as part of the project itself. Thus, for example, the off-site assembly – perhaps even at a location remote from the site – of industrial plant or buildings which are then transported to the site might, perhaps, be such an example.
- 82.** Apart from these special cases, there are also cases where there is a clear and unbreakable inter-relationship between the project itself and certain off-site activities such that a causal relationship between the construction or operation of the project and certain direct or indirect environmental consequences has been clearly established.
- 83.** An example here is supplied by *Ó Grianna v. An Bord Pleanála* [2014] IEHC 632. Here the issue was whether the project consisted of the construction of wind turbines alone or whether the fact that they had to be connected to the national grid had also to be taken into account. Peart J opted for the latter interpretation, saying (at paragraph 27 of his judgment) that:
- “I am satisfied that the second phase of the development in the present case, namely, the connection to the national grid, is an integral part of the overall development of which the construction of the turbines is the first part... The wind turbine development on its own serves no function if it cannot be connected to the national grid. In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the Directive.”
- 84.** This matter was also considered by this Court in *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 IR 617. In that case a division of the major computer company, Apple, proposed to establish a data centre at Athenry, Co. Galway. This, however, was the first part of an overall masterplan for the ultimate re-development of that site. Here the question was whether the EAIR was obliged to have regard simply to the proposed data centre or to the wider project.

85. In her judgment for the Court Finlay Geoghegan J answered this question in the negative. She considered that *Ó Grianna* was dependent on a finding of fact that the project for which planning permission had been granted was ([2019] 3 IR 617 at 636) “functionally or legally interdependent on a further development not included in the application for planning permission which might have environmental effects and in respect of which no EIA had been carried out.” By contrast the data centre at issue in *Fitzpatrick* “could be operated as a single data hall” and, in that sense, was a stand-alone project “in the sense of not being functionally dependent on future phases of the masterplan”: [2019] 3 IR 617 at 637.
86. At all events, in contrast to its the position at an earlier stage in these proceedings, An Taisce has now made it clear – at least for the purposes of this appeal – that it accepts that off-site milk production (whether by Glanbia farmers or otherwise) is not part of the project itself. One is accordingly obliged to ask: what do these words in Article 3(1) actually mean in the context of a case such as this and to what extent must the environmental effects of off-site activities be taken account and assessed by an EIA? There would seem to be two possibilities.

The first possible interpretation: an open-ended meaning

87. The first possible interpretation is to say that these words of Article 3(1)(a) of the EIA Directive should be read in an open-ended fashion. In addition to the present case there would appear to be three other decisions of the High Court which have grappled with this issue.
88. In the first of these, *An Taisce v. An Bord Pleanála* [2015] IEHC 633 (“*An Taisce Edenderry*”) the applicant sought to quash a decision of the Board to grant planning permission for the continued use and operation of a previously permitted peat and biomass co-fired power plant in Edenderry, Co. Offaly, on the basis that the environmental effects of extracting the peat fuel source of the thermal power plant were not properly assessed for the purposes of the EIA Directive. In documents submitted as part of the planning application, it was stated that the source of the peat fuel would be from nearby bogs licensed to two notice parties, Bord na Móna Energy Limited and Bord na Móna Allen Peat Limited respectively. The peat itself was transported by a private rail link which was under the exclusive control of Bord na Móna.

89. In his judgment White J determined that he was satisfied that the environmental effects of extracting the peat fuel source from the third party bogs *did* fall within the ambit of “indirect effects” for the purposes of Article 3(1) of the EIA Directive, and were therefore liable to be assessed: see paragraph 73. In reaching this conclusion, White J accepted that “in assessing indirect effects there has to be a limit or the effects will be too remote” (at paragraph 66), but he nonetheless concluded – applying what he described as a functional inter-dependence test – that the Board should not have “excluded completely the consideration of the indirect effects” of the peat extraction from the two bogs. White J found in this respect that the Board had erred in law.
90. Not surprisingly this decision has attracted a good deal of analysis so far as this case is concerned. In her report the Inspector concluded (at paragraph 8.4.2) that the present case was not analogous:
- “The critical difference with the Edenderry Power Plant [case] is that the source of peat was spatially identifiable on selected bog areas with appropriate infrastructure and was therefore inextricably linked to the project as a whole. This is not the case with the Cheese Factory and the expectation that the indirect effects of c 4,500 independent dairy farms suppliers that are removed from the appeal site be assessed should be limited as the effects are too remote.”
91. For my part, I agree that *An Taisce Edenderry* is a special case where the off-site activities were closely inter-twined with the activities on-site such that both had to be considered together. In many ways this case is nonetheless quite close to the facts of a case such as *Ó Grianna, i.e.*, a case where the linkage between the on-site and off-site activities is so close that one cannot realistically be assessed in isolation from the other.
92. A broadly similar approach, albeit with a different outcome, is evident in the judgment of Allen J in *Kemper v. An Bord Pleanála* [2020] IEHC 601. This case concerned the grant of planning permission for the development of a new wastewater treatment plant, as well as various other facilities, at sites in Fingal. The High Court was asked to determine whether the Board had erred in failing to address the impact on the environment of the eventual use of bio-solids and other materials as fertilizer on lands which were not part of the development site (the bio-solids and fertilizer would be an end-product of the wastewater treatment plant). In his judgment Allen J held (at paragraph 377) that, unlike in *An Taisce Edenderry*, it was “impossible to establish a

link between the [Regional Biosolids Storage Facility] and the lands upon which the material may be spread because the lands are not, and cannot be, identified until the purchaser is identified.”

93. Once, however, one moves beyond the facts of special cases such as *An Taisce Edenderry* a range of difficulties open up. The difficulty, however, with such an open-ended interpretation of Article 3(1) is that it does not seem possible to place any *a priori* limit on the range of indirect effects which would have to be assessed for EIA purposes if such an interpretation were to be accepted. A good illustration of these difficulties is provided by the decision of the High Court of England and Wales in *R (Finch) v. Surrey County Council* [2020] EWHC 3566 (Admin).
94. In *Finch* Holgate J considered broadly the same issue that arises here. The proposed development in that case was the retention and expansion of a drilling site which was used for hydrocarbon extraction. The applicant had sought to challenge under the applicable UK regulation (which transposed the EIA Directive) the non-assessment of greenhouse gases that would be emitted when the crude oil produced from the site was used by consumers (typically as a fuel for motor vehicles). The applicant contended that these emissions amounted to indirect effects under the EIA Directive and were therefore liable to be assessed.
95. Holgate J, however, dismissed this argument, taking issue with the applicant and intervener’s interpretation of “indirect effects” as “environmental effects more remote than direct effects (whether in time or location), but not so remote they cannot be attributed to the development at all.” For his part, such an interpretation could not be correct because it meant that a wide range of upstream and downstream effects fell within the ambit of the EIA Directive which could not properly be regarded as effects *of the project or development*: see paragraphs 98-99 and 122 of the judgment.
96. It is, indeed, this connection to the project or development which Holgate J saw as critical to the question of whether an indirect effect falls within the ambit of the EIA Directive or not. In this respect, he considered the “legal test” to be “whether an effect on the environment is an effect of the development for which planning permission is sought” (paragraph 101), which he suggests can be determined by reference to “the *use of land for development and the effects of that use*” (paragraph 112) (emphasis added). Thus, for Holgate J, “indirect effects” are those consequences which are “less

immediate” than direct effects, but which are nevertheless “effects which *the development itself* has on the environment.” (at paragraph 110) (emphasis supplied).

97. Holgate J illustrated his reasoning by reference to two key CJEU decisions on this matter. The first was the CJEU’s judgment in *Abraham* (Case C-2/07, EU: 2008: 113). As he explained (at paragraph 115):

“The project in that case was for the widening of runways at an airport and the construction of a new control tower, runway exits and aprons, to enable the airport to be used more intensively. The issue was whether the EIA was required to assess the effects of the projected increase in the activity of the airport as a result of the modification. It was in that context that the court decided that the environmental effects requiring assessment were not limited to the direct effects of the works to be carried out but also had to include the environmental impact resulting from the use of the improved airport. These overall effects could properly be regarded as effects of the *development*, namely the increased usage of the airport enabled by the works to improve the existing infrastructure.”

98. The second was the CJEU judgment in *Ecologistas en Accion-CODA* (Case C-142/07, EU:C:2008: 445) which concerned the improvement of the Madrid urban ring road and whether the subsequent use of that ring road could be subject to assessment under the EIA Directive as an indirect effect. Holgate J noted that:

“The CJEU decided that the project was liable to EIA, which could not be avoided by being split into sub-projects, and that the impact of the use of the road as altered should be assessed, and not simply the direct effect of the construction work.”

99. The upshot of Holgate J’s analysis of these cases is that they reinforce the view that, first, an EIA must address the environmental effects, both direct and indirect, *of the project or development* for which planning permission is sought – there is no requirement to assess matters which are not environmental effects of the development or project; and second, that an effect of a project or development is one that is “concerned with the use of land for development and the effects of that use.”

100. For my part, save for one possible caveat, I cannot but agree with these conclusions. It seems to me that if Article 3(1) is given a remorselessly literal and open-ended interpretation there is no principled basis by which the limits of any EIAR assessment could confidently be ascertained. On this view, for example, the significant environmental effects resulting from the consumption or use of the end product would – or, at least, might – also have to be assessed. Would this mean, for example, that carbon emissions resulting from the use of articulated lorries to transport the cheese produced by the new factory to their various destinations in continental Europe would also have to be assessed? If – as seems not unlikely – large quantities of plastic were generated for the purposes of wrapping the cheese produced by the proposed factory at issue in the present case, would the environmental effects of this activity also have to be identified and assessed? If this were so, then this might also entail, for example, an environmental assessment of both the circumstances in which the plastic came to be generated in the first place and how it ultimately came to be disposed of following consumption in the second place. These are just representative examples of potential indirect environmental effects in this wider, open-ended sense, examples of which could easily be multiplied.
101. For good measure I would also point to the fact that a similar view was also taken by the Court of Session (Inner House, First Division) in Scotland in *Greenpeace Limited v. The Advocate General* [2021] CSIH 53. The question there was whether the consumption of oil and gas by an end user ought to be assessed as a direct or indirect significant effect of the exploitation of the Vorlich oil field. The Court of Session held that there was no obligation to assess the ultimate use of the finished refined petroleum products as a direct or indirect significant effect of the project. The Court agreed with the conclusion reached by Holgate J in *Finch* that the obligation to assess the direct and indirect significant effects of a project must be limited to the assessment of the ‘effect of the project, and its operation’ and ‘not that of the consumption and of any retailed product ultimately emerging as a result of a refinement of raw material’ (see paragraphs 63-68).

The second possible interpretation: the indirect effects must be those which the development itself has on the environment

102. The alternative interpretation is to opt for the general approach canvassed in the judgment of Holgate J in the *Finch* case (and, for that matter, the Court of Session in *Greenpeace*), *i.e.*, that they must be direct or indirect “effects which the development itself has on the environment.” This means that matters such as the construction of the plant or emissions from the plant etc. must be identified and assessed, but, generally speaking, not matters such as environmental impacts of the inputs (*e.g.*, milk production) or outputs of the factory (*e.g.*, the environmental consequence of the plastic wrapping of the cheese). This brings me to my caveat in respect of Holgate J’s analysis in *Finch*. There may well, however, be special and unusual cases where the causal connection between certain off-site activities and the operation and construction of the project itself is demonstrably strong and unbreakable. In those special and particular cases the significant indirect environmental effects of these off-site activities would fall to be identified and assessed and, for all the reasons I have already stated, cases such as *Edenderry* and *Ó Grianna* fall into this category.

Choosing as between the two options

103. The difficulty with the first interpretation of Article 3(1) is precisely that it is open-ended . Such an open-ended interpretation of these words leads, however, to conclusions which are not practicable or feasible. In the present case, for instance, it is simply not possible to audit or assess the 4,500 Glanbia farms – which, it may be useful to remind ourselves, are all independently owned and operated – not to speak of the range of other non-Glanbia farmers who may be tempted to enhance their milk production to non-Glanbia producers if Glanbia switch 20% of their existing production away from those producers in the light of the operation of the new factory in the manner I have already described.
104. Besides, were such an open-ended test to be adopted, then in principle there would be few limits to the range of possible inquiry to which those tasked with preparing an EAIR would be put. When pressed on the point during the course of argument, counsel for An Taisce, Mr. Steen SC, was really unable to offer any test by which the limits of this could be ascertained: if the indirect environmental effects of the inputs should properly be assessed, the same might be said of the indirect environmental effects of the outputs, including questions such as the indirect effects of their transportation of the cheese products to market and the end use of these products by customers.

- 105.** In some ways, therefore, to adopt the famous words of Holmes J., I see “hardly any limits but the sky” if such an open-ended interpretation of the Directive were to be adopted: see *Baldwin v. Missouri* 281 US 586 at 595 (1931). It is the fact that such an open-ended interpretation of Article 3(1) would lead to the imposition of an impossibly onerous and unworkable obligation on developers preparing an EIAR that leads me to the conclusion that this interpretation should be rejected.
- 106.** This is underscored by the language of Article 5(1) of the EIA Directive which describes the nature of the information to be included in the EIAR itself. Thus, for example, Article 5(1)(a) requires that the developer provide a description “of the project comprising information on the site, design, size and other relevant features of the project” and Article 5(1)(f) likewise requires that the developer shall include “any additional information specified in Annex IV relevant to the specific characteristics of a particular project or type of project, and to the environmental features likely to be affected.” In a similar vein, paragraph 1(c) of Annex IV, describing the information to be set out in the EIAR, requests: “A description of the main characteristics of the production processes, operational phase of the project (in particular any production process), for instance, energy demand and energy used, the nature and quantity of the materials and natural resources (including water, land, soil and biodiversity) used.” All of these provisions strongly suggest that the information to be supplied must be firmly tethered to the project itself, so that the indirect significant effects to be assessed must be intrinsic to the construction and operation of the project.
- 107.** The alternative interpretation, therefore, seems to me to be the one best suited to the particular circumstances of this case. Important as the EIA Directive undoubtedly is, it was ultimately designed to assist in identifying and assessing the direct and indirect significant environmental effects of a specific project, including (post-2014) the climate change effects of such a project. Yet the proper scope of the EIA Directive should not be artificially expanded beyond this remit and, in particular, it should not, so to speak, be conscripted into the general fight against climate change by being made to do the work of other legislative measures such as the 2021 Act. In this respect, I agree with Humphreys J that these wider indirect environmental consequences of milk production and the dairy sector must really be assessed at a programmatic level by national or sectoral measures in the manner provided for by s. 5 of the 2021 Act.

108. Summing up on this issue, therefore, I take the view that the Board and the Inspector were entitled to find on the evidence that the existing and projected Glanbia milk pool was sufficient to cater for the needs of this factory. To that extent, therefore, it seems at least implicit in the findings of the Board (and the Inspector) that the proposed factory would not have any significant indirect environmental effects, precisely because – as both found – this milk was going to be produced *in any event* by Glanbia farmers and any additional agricultural emissions which might thereby result had already been identified and assessed. In these circumstances, it follows that there will be, in fact, no significant indirect environmental effects as a result of the construction and operation of the factory by reason of the Glanbia milk production.
109. At the same time, it should be acknowledged that having regard to basic economic principles relating to supply and demand, this project is likely nonetheless to strengthen the overall *demand* for milk production, precisely because the 20% of the existing Glanbia milk pool which is currently sold on to other producers will be switched to meet the demands for the new factory. This in turn may well create a market vacuum which will ultimately be catered for by non-Glanbia producers and farmers who may perhaps be tempted to increase their own milk production as a result. Any such assessment must, of course, also be tempered by reason of the other evidence which shows that in any event a yearly 1.5% increase in milk supply is projected by reason of enhanced productivity on the part of all farmers, whether Glanbia suppliers or otherwise.
110. One may thus observe that, viewed from an economic level, any enhanced milk production in the State which follows in the years to come is likely not to be entirely independent of the operation of the factory. Beyond this, however, proof of causality such would satisfy the requirements of the EIA in respect of “direct and or indirect significant environmental effects” remains entirely elusive, contingent and speculative. Its very elusiveness means that it is incapable of measurement or assessment and, hence, cannot be the sort of significant indirect environment effect which Article 3(1) of the Directive must be taken necessarily to contemplate. In these circumstances the present case must be judged to be at the opposite end of the “indirect environmental effects” spectrum when compared with cases such as *An Taisce Edenderry* and *Ó Grianna*.

111. While it is true that this wider economic analysis does not feature in either the EAIR or the Inspector’s report or the Board’s findings, this, in my view, is irrelevant because any environmental effects which thereby result from the strengthening of the overall demand for milk production cannot be said in any realistic interpretation of this phrase to amount to “indirect significant environmental effects” of this project within the meaning of Article 3(1). This is not to deny the existence of these potential effects or to downplay their significance. Still less is it to say that these effects should not be measured or assessed having regard to the long-term commitments to a carbon-neutral society manifested in the 2021 Act. It is rather that these effects are so remote from the present project that they cannot realistically be regarded as falling within the scope of Article 3(1).
112. For these reasons I would reject the challenge to the adequacy of the EAIR in the present case and affirm the decision of the High Court in that respect.

Part V: Appropriate Assessment and the Habitats Directive

113. I now propose to consider the issue of the Habitats Directive (Directive 92/43 EEC of 21 May 1992) and, specifically, whether the Appropriate Assessment (“AA”) required under Article 6(3) of that Directive was satisfactory for this purpose. The requirements of Article 6(3) have been transposed into national law by the provisions of Part XAB of the 2000 Act in general and by s. 177U and s. 177V in particular. Once again, no issue of the transposition of the Habitats Directive arises so far as the present appeal is concerned.
114. The challenge presented by An Taisce under this heading is in many respects – although admittedly not all – similar to that advanced with respect to the EIA, specifically with regard to the potential impact on the various Natura sites by the adverse effects of milk production in the approximately 4,500 Glanbia farms. I propose presently to consider the separate grounds of objection raised by An Taisce but before doing so it is appropriate to say something about the specific nature of the obligations imposed on the national authorities by Article 6(3) of the Habitats Directive.

The obligations imposed on national authorities by Article 6(3) of the Habitats Directive

115. The obligation for an AA arising under Article 6(3) is in respect of a “plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon”. Such a plan or project must then be subject “to appropriate assessment of its implications for the site in view of the site’s conservation objectives.” One must, of course, stress that the project in the present case which requires the AA is the cheese factory itself and not the 4,500 Glanbia farms or, for that matter, those non-Glanbia farms which may be tempted to increase their milk production as a result of the switching of a large volume of Glanbia milk into meeting the proposed factory’s requirements.

116. The general test in this regard is that articulated by the Court of Justice in *Sweetman* (Case C-258/11, EU:C: 2013: 220) (at paragraph 44 of the judgment):

“So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have *lacunae* and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the works proposed on the protected site. It is for the national court to establish whether the assessment of the implications for the site meets these requirements.”

117. The practical implications of this for the functioning of the Board were well articulated by Finlay Geoghegan J in *Kelly v. An Bord Pleanála* [2014] IEHC 400 when she said (at paragraph 48 of the judgment):

“In accordance with the CJEU decision in *Sweetman*, it is for the national court to determine whether the appropriate assessment (including the determination) was lawfully carried out or reached, and to do so, it appears to me that the reasons given for the Board’s determination in an appropriate assessment must include the complete, precise and definitive findings and conclusions relied upon by the Board as the basis for its determination. They must also include the main rationale or reason for which the Board considered those findings and conclusions capable of removing all scientific doubt as to the effects of the proposed development on the European site concerned in the light of its conservation objectives. In the absence of such reasons, it would not be possible for a court to decide whether the appropriate assessment was lawfully concluded

or whether the determination meets the legal test required by the judgments of the CJEU.”

118. Finlay Geoghegan J went on to point out (at paragraph 49) that the statutory obligation to carry out an AA in accordance with Article 6(3) of the Habitats Directive is one which went to the jurisdiction of the Board and, in contrast to the situation regarding the grant of planning permission, was not one which involved a purely discretionary judgment and assessment by that body.

119. Finlay Geoghegan J then held that an appropriate AA had not, in fact, been carried out by the Board in respect of the proposed windfarm. She noted, for example, (at paragraph 80) that:

“In relation to the potential hydrological/hydrogeological impacts of the construction of the proposed development on Natura 2000 wetlands systems in the vicinity of the site, and in particular, certain turloughs, the Board has not conducted any assessment which includes complete and precise findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the works proposed on the habitat of the Natura 2000 sites in the light of its conservation objectives, having regard, in particular, to the potential indirect effects and lacunae in the information supplied identified by its own Inspector.”

120. This point was also made by Clarke CJ in his judgment for this Court in *Connelly v. An Bord Pleanála* [2018] IESC 31 (at paragraphs 8.15 and 8.16); [2018] 2 ILRM 453 at 472):

“Thus, it seems to me as a result of the foregoing analysis that the overall conclusion which must be reached before the Board has jurisdiction to grant a planning consent after an AA is that all scientific doubt about the potential adverse effects on the sensitive area have been removed. However, there seems, as a matter of EU law, to be a separate obligation to make specific scientific findings which allow that conclusion to be reached. This is apparent from the above passages from *Kelly* and the European case law therein cited.

The analysis in *Kelly* shows that there are four distinct requirements which must be satisfied for a valid AA decision which is a necessary pre-condition to a planning consent where an AA is required. First, the AA must identify, in the

light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. Second, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site. Third, on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects. Fourth and finally, where the preceding requirements are satisfied, the Board may determine that the proposed development will not adversely affect the integrity of any relevant European site.”

- 121.** As the decision in *Kelly* itself illustrates this does not *as such* mean that an applicant for judicial review is *obliged* to adduce scientific evidence challenging aspects of the developer’s NIS or, for that matter, the assessment carried out by the Board’s Inspector. While the *legal* burden of demonstrating the invalidity of any grant of planning permission in cases arising under the Habitats Directive will always rest with the applicant, it is clear from the Court of Justice’s decision in *Sweetman* that the *evidential* burden rests with the Board to demonstrate that it has conducted an AA which meets the requirements of Article 6(3). This point was, in any event, confirmed by the judgment of Finlay Geoghegan J in *Kelly* and by that of Clarke C.J. in *Connelly*.
- 122.** This issue arose in the High Court following the first judgment. In that first judgment Humphreys J stated (at paragraph 26):
- “In the present case the main consequence of not having pursued the point in the planning process is that there was no scientific evidence put before the board to contradict the Natura Impact Statement. Consequently, it cannot be maintained now that the board acted in a way which left open scientific doubt when there was no such doubt on the materials which it had.”
- 123.** This point was, however, clarified by Humphreys J in the second judgment in which he refused to grant the appropriate certificate under s. 50A(7) of the 2000 Act where he stated (at paragraph 5):
- “That does not mean that no applicant who does not produce its own evidence can challenge a Natura Impact Statement (NIS). It just means that this particular

applicant cannot because there was not otherwise before the board any “materials which it had” that left open scientific doubt. Those materials could include materials put before the board by the developer and by other parties. For the avoidance of doubt, the board is not obliged to accept an NIS simply because it is uncontradicted. The NIS could have inherent flaws on its face, but I didn’t expressly say that at para. 26 of the No. 1 judgment because that was not demonstrated here and, therefore, was not relevant. You can’t cover everything.”

124. I respectfully agree with the analysis of both Finlay Geoghegan J in *Kelly* and that of Humphreys J as expressed in the second judgment in this case. For my part I consider that such an analysis flows from the requirements of Article 6(3) as interpreted by the Court of Justice in *Sweetman*. This being so we can now turn to the question of considering whether an appropriate assessment was carried out in the present case.
125. The evidence which was before the Board consisted principally of the Natura Impact Statement (“NIS”) dated September 2019, the appeal lodged by An Taisce against the grant of planning permission, the responses of the parties and the report of the Inspector.
126. It is first necessary by Article 6(3) of the Habitats Directive to conduct a screening process and to identify the special areas of conservation (“SAC”) which would be potentially affected by the proposed development. While the actual Slieverue site is not itself situate on an SAC, the NIS identified a range of SACs within the 15km of that site. Two sites in particular – the Lower River Suir SAC and the River Barrow and River Nore SAC – are located within 3km of the boundary of the Slieverue site and the Inspector found (at paragraph 12.4) that “given the current hydrological connection between the site and the Lower River Suir SAC and the River Barrow and River Nore SAC further consideration will be given to these Natura 2000 sites to assess potential adverse effects resulting from the proposed development.” For similar reasons, the Inspector concluded (at paragraph 12.3) that in view of considerations of distance, the lack of hydrological connectivity and the lack of impact pathways, a range of other sites (e.g., the Tramore Back Strand SPA) “have been screened out from further consideration.”
127. In its direction of 25th June 2020 the Board agreed with this conclusion, saying that “the only European sites in respect of which the proposed development has the potential to

have a significant effect are the Lower River Suir SAC (002137) and the River Barrow and River Nore SAC (002162).” No issue, therefore, arises in relation to Stage 1 of the appropriate assessment.

- 128.** As far as the Stage 2 part of the process is concerned, the Inspector set out in detail the various Qualifying Interests of the two sites concerned. Thus, for example, she identified that the site specific objectives of the Lower River Suir site included maintaining the favourable conservation condition of species such as otter while restoring the favourable conservation condition of Atlantic salt meadows (which are salt-tolerant plants which grow close to tidal estuaries), various species of lampreys (which are eel-like fish) and salmon.
- 129.** The Inspector then went on to assess the potential impairment of water quality during the construction phase (at paragraphs 12.22 *et seq.*) before concluding (at paragraph 12.26) that the implementation of the mitigation measures which she proposed would not “have any adverse effects on water quality” within these two river SACs “or species for which they are designated.”
- 130.** The Inspector next conducted an analysis of the potential impairment of water quality during the operation phase (at paragraphs 12.27 *et seq.*) arising from the adverse effects of treated process effluent. She considered that these effects could be avoided by a range of measures which she then identified in relation to both the surface water and process water discharge. A key part of this was that there would be a dedicated pipe which would connect with an Irish Water outfall pipe. The combined effluent would then be treated and would discharge into the Lower River Suir. The Inspector then concluded (at paragraph 12.27):

“Average discharge from the proposed development will amount to >0.09% of the average flow of the Lower River Suir. Based on this flow, together with the [best available technology] limits, which will be applied to the discharge from the proposed development...it can be concluded that the treated process effluent will not have an adverse impact on the water quality in the Lower River Suir [SAC] or the River Barrow & River Nore SAC or species for which they are designated.”

- 131.** The Inspector then turned to the question of the potential indirect implications on these two Natura sites from the operation of the milk production. She concluded (at paragraphs 12.28 to 12.30) as follows:

“In order to combat adverse effects within the dairy farming milk supply sector, Glanbia is committed to sustainable milk production and has an active Sustainability and Quality Assurance Programme, which is in line with Bord Bia Sustainable Dairy Assurance Scheme (SDAS). The areas of biodiversity and ecology which are considered at farm level assessments include land management, environmental care and carbon footprint, quality and conservation of water, animal health, welfare and biosecurity and the data storage and the responsible use of medicines, pesticides, anthelmintics and other chemicals. Glanbia Ireland is also a supporting partner of the BRIDE (Biodiversity Regeneration in a Dairying Environment) project which aims to design and implement a results based approach to conserve, enhance and restore habitats in lowland intensive farmland. All farms are subject to environmental controls, including controls in the Wildlife Acts and the Habitats and Birds Directive which ensure that they do not significantly adversely affect the integrity of European and other protected sites and so as to ensure the protection of protected species.

The planning application provides a sufficient level of information surrounding the source of milk/milk supply in order to allow for the assessment of the associated indirect impacts to the required extent. There is no evidence of potential for direct habitat loss or fragmentation within designated areas associated with the project or for significant effects on the conservation objectives of any Natura 2000 [SACs].

While it is not practicable to assess potential indirect effects on all Natura sites, it can be concluded in general terms that the continued implementation of the above mentioned programmes and mitigation measures on dairy farms that will supply milk to the proposed development will mitigate potential indirect adverse effects on Natura 2000 sites.”

132. This matter was then considered by the Board in its direction of 25th June 2020 who then concluded:

“...the Board considered that the information before it was adequate to allow the carrying out of an appropriate assessment. In completing the appropriate assessment, the Board considered, in particular, the following:

- (a) the likely direct and indirect impacts arising from the development of the proposed development, both individually, when taken together and in conjunction with other plans or projects;
- (b) the mitigation measures, which are included as part of the current proposal, and
- (c) the conservation objectives for the European sites.

In completing the appropriate assessment, the Board accepted and adopted the appropriate assessment carried out in the Inspector’s report in respect of the potential effects of the proposed development on the aforementioned European sites, having regard to the sites’ Conservation Objectives. In overall conclusion the Board was satisfied that the proposed development, by itself or in combination with other plans or projects, would not adversely affect the integrity of the European Sites, in view of the sites’ Conservation Objectives.”

133. Having considered the appropriate assessment that was carried out in the present case, we may now turn to the three specific grounds of objection raised by An Taisce to the appropriate assessment.

Objection 1: The potential impacts on Atlantic Salt Meadows

134. The first objection is that neither the Board nor the Inspector recorded any conclusion in respect of the potential impacts on Atlantic salt meadows, whether by reason of the operation of the milk supply production or the operation of the factory or both. There is an associated objection to the effect that in the absence of any conclusion, it was unclear whether reliance was placed on mitigation measures to screen out potential impacts on Qualifying Interests such as Atlantic salt meadows. If there was such

reliance, this was said to be contrary to the effect of the decision of the Court of Justice in *People over Wind* (Case C-323/17, EU:C: 2018: 244).

135. In *People over Wind* the Court of Justice held (at paragraph 40) that Article 6(3) of the Habitats Directive precluded the taking into account at the Stage 1 screening stage “of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.” It is, however, perfectly clear that this did not happen in the present case.
136. The Board and the Inspector both referred with approval to the NIS and its associated Tables. Table 6.1 contained in Annex 1 to the NIS addresses the rationale as to why Atlantic salt meadows were screened out:
- “Although the confirmed Atlantic salt meadows occurs ca. 1.2km upstream of the Application Boundary, the potential Atlantic salt meadow is located ca. 40m. south of the Application Boundary. Treated effluent will be piped from the proposed development directly into the existing [Irish Water] outfall, from where it will discharge directly into the Lower River Suir. The increased flowrate will not result in adverse effects to the potential Atlantic salt meadow due to the fact the existing IW discharge pipe is located over 130m. from the nearest potential Atlantic salt meadow and is discharging into an estuarine environment which is a highly dynamic environment. Therefore, this habitat will not be affected. No further assessment is required.”
137. It is thus clear that the only scientific evidence before the Board was that any fluvial discharges from the proposed development would be discharged from a site more than 130m from the nearest Atlantic salt meadow and that this habitat *would not be affected*. It follows that there was no question of any reliance on mitigation measures in order to reach this particular Stage 1 “screening out” conclusion in a manner which would engage the *People over Wind* principle.
138. This conclusion also addresses the objection that neither the Board nor the Inspector addressed the potential implications of the plant for Atlantic salt meadows, since it is plain that they both did so, courtesy of Table 6.1 in Annex 1 of the NIS.
139. It may be convenient when dealing with the next objection if I deal with the implications of the milk supply production issue.

Objection 2: No assessment of the effects of the milk supply production

140. It is true that the NIS did not in terms analyse the impact on the Natura sites of the potential impact of milk production from the individual 4,500 Glanbia farms: see paragraph 7.3 of the NIS. The authors of the NIS evidently adopted this stance because while they concluded that it was not practicable “to assess potential indirect effects on all Natura sites”, they nonetheless took the view that:

“in general terms the continued implementation of the [Glanbia organised farm environmental] programmes and mitigation measures on dairy farms that will supply milk to the proposed development will mitigate potential indirect adverse effects on Natura 2000 sites.”

141. The Inspector took a similar view, saying (at paragraph 12.29 and paragraph 12.30):

“The planning application provides a sufficient level of information surrounding the source of milk/milk supply to allow for the assessment of the indirect impacts to the required extent. There is no evidence of potential for direct habitat loss or fragmentation within designated areas associated with the project or for significant effects on the conservation objectives of any Natura 2000 [site].

While it is not practicable to assess potential indirect effects on all Natura sites, it can be concluded in general terms that the continued implementation of the above mentioned programmes and mitigation measures on dairy farms that will supply milk to the proposed development will mitigate potential indirect adverse effects on Natura 2000 sites.”

142. While it is true that the NIS, the Inspector and the Board all sought to some extent to assess the potential indirect effects of the milk production on the Natura sites, I consider that the short answer to this point is that they were not, as a matter of law, obliged to do so. To repeat, the project to be assessed for the purposes of Article 6(3) was the construction and operation of the cheese factory and *not* the 4,500 Glanbia farms or, for that matter, the thousands of other farms supplying non-Glanbia producers.

Objection 3: The appropriate analysis did not comply with the requirements in *Kelly*.

143. Here again the objection is that the NIS did not address the potential environmental impacts of milk production at the specific farm level. Yet again, however, it is necessary to stress in response that quite apart from the fact that any obligation to conduct an appropriate assessment of these 4,500 farms would have been completely unrealistic and impractical, the language of Article 6(3) is particularly clear in that the assessment is tied to the project itself, as distinct from the inputs to the project.
144. In this regard it may be recalled that in *Kelly* Finlay Geoghegan J. addressed herself the Article 6(3) implications of the windfarm project which was at issue in that case. She noted that the scientific evidence before the Board had clearly identified matters arising from the construction and operation of the windfarm project which impacted on the integrity of a nearby Natura site (such as, for example, the potential impact on the water fowl and waders by reason of the disturbance of feeding/roosting/commuting area and interference with natural flight lines and potential bird strikes). There was, moreover, no evidence that the Board had conducted any analysis of this issue itself in circumstances where it had disagreed with the findings of its own inspectors.
145. The key point, however, is that this judgment proceeds on the basis that the project was the construction and operation of the windfarm itself. By the same token the obligation on the Board in the present case was to ensure that the environmental effects of the construction and operation of the cheese factory on the two nearby SAC sites that might be affected were appropriately assessed. This, I consider, it has done for all the reasons I have just set out.
146. For these reasons, therefore, I would reject the contention that the Board did not comply with the requirements of Article 6(3) of the Habitats Directive in granting permission for this site.

Part VI: Arguments based on the Water Framework Directive

147. I now turn to consider the arguments advanced by reference to the Water Framework Directive (“WFD”) of 23rd October 2000 (Directive 2000/60/EC). I propose to consider these arguments on their own merits, even though I am conscious of the fact that both

the Board and Glanbia contend that at least some of these issues were never pleaded and properly fall outside the scope of the proceedings. It is equally unnecessary to decide whether An Taisce can raise these points even though they were never raised during the course of the planning process before either Kilkenny County Council or before the Board. Adopting the same approach as Humphreys J did in the High Court, I will assume in An Taisce's favour that it can do so.

- 148.** The essence of the case advanced by An Taisce under this heading is two-fold. First, it contends, relying on the judgment of the Court of Justice in *Bund für Umwelt und Naturschutz Deutschland eV (“Weser”)* (Case C-461/13, EU:C: 2015: 433) that the Board was precluded by Article 4(1) of the WFD from granting permission for the cheese factory. In *Weser* the Court of Justice held that, absent a derogation for this purpose, Member States were precluded from granting authorisation for a particular project where it may cause a deterioration of the status of a body of surface water. The argument here is that the discharges from the cheese factory in the present case would introduce additional pollutants into the river in circumstances where that waterbody had not achieved “good” status for the purposes of Article 28 of the Surface Water Regulations 2009 (SI No. 272 of 2009).
- 149.** It is clear, however, from Table 6.1, Annex 1 of the NIS that these discharges will be into the lower River Suir via an Irish Water outfall pipe which itself is located a few hundred metres from the southern boundary of the factory site. It is not, however, in dispute but that the status of the lower River Suir during this period was “good”. There was accordingly no impediment on *Weser* grounds by reference to Article 4(1)(a) of the WFD to the Board granting permission.
- 150.** The second argument is a variant of a consistent theme running through this entire appeal, namely, that the projected enhanced milk production from Glanbia farms should be regarded as part of a wider project for which development consent has been sought. In other words, it contends that as such enhanced milk production is likely in turn to lead to greater discharges into the various watercourses either on or adjacent to the 4,500 farms that currently supply Glanbia with milk, this was a factor which should at least have informed the Board's thinking having regard to Article 4(1)(a) of the WFD prior to the grant of planning permission for the site.

151. As it happens the term “project” is not even used in the WFD itself. In *Weser*, however, the Court of Justice reasoned that the general obligations devolved on Member States by Article 4(1)(a) to ensure that there was no deterioration in water quality precluded the grant of development consent where it would have the effect of compromising the water quality in question. These comments were, however, made in the context of the grant of three separate development consents for the development of a specific project, namely, the construction of a navigable channel from the River Weser from inland at Brake to the high seas beyond Bremerhaven.
152. In the present case the nature of the project is clear in that it refers to the construction and operation of the cheese factory. It would, with respect, be entirely unrealistic to say that the principles in *Weser* could be applied beyond the confines of anticipated discharges from the factory (whether in the course of construction or its operation) into watercourses. As it happens, the approximately 4,500 Glanbia supplier farms are dispersed throughout the counties of the south-east and south Leinster areas generally. The evidence was that approximately 75% of these farms have watercourses on their lands and, in any event, one may fairly surmise that virtually all of these farms lie proximate to streams, rivers and lakes. The suggestion that the Board should consider and examine discharges from each of these 4,500 farms in order to ascertain compliance with the requirements of Article 4(1)(a) of the WFD prior to granting planning permission in the present case is, again with great respect, simply divorced from reality.
153. That, of course, is not for a moment to suggest that polluting discharges from individual farms into watercourses (whether into watercourses on their lands or adjacent thereto) is not of importance. It is rather to say that these are matters which fall to be considered separately from the grant of planning permission in respect of this cheese factory. They do not fall to be considered in this context because the supply from these farms is not part of the project which is the subject of this application for planning permission.
154. It follows, therefore, that for these reasons I would reject the appeal so far as it concerns alleged non-compliance with the requirements of the WFD.

**Part VII: Whether to make an Article 267 TFEU reference
to the Court of Justice**

155. An Taisce have pressed this Court, if necessary, to make a reference to the Court of Justice concerning the interpretation of Article 3(1) of the EIA Directive so far as it concerns the meaning in particular of the words “the indirect significant effects of a project.” This Court is, of course, a court of last resort for the purposes of Article 267(3) TFEU. Accordingly, in view of the recent decision of the Court of Justice in *Consorzio Italian Management* (Case C-561/19, EU:C: 2021: 799) and the comments of that Court (at paragraph 51 of the judgment) regarding the nature of the obligation to refer which is imposed on courts of last resort, it is appropriate to record why I did not think it necessary to make a reference of any question of the interpretation of EU law to that Court.
156. It is true that the Court of Justice has not had to pronounce on the proper interpretation of the “significant indirect effects” aspect of Article 3(1) of the EIA Directive. There may indeed be instances of where a court of last resort might feel called upon to make an Article 267 reference on this very point, but I do not consider that the present case is really one of them. The difficulty here is that no acute point of interpretation is really presented by this appeal: it really shades into issues of fact and the application of established principles of EU law. If there were two possible conflicting *a priori* interpretations of Article 3(1) the Directive the resolution of which could guide this Court and assist in the disposition of this appeal, it would, of course, be a different matter. Yet none have presented themselves, whether for the purposes of this appeal or, for that matter, in the course of the earlier case-law.
157. For those reasons I consider that the present appeal in substance concerns the application of EU law, rather than any question of interpretation as such. It is for this reason that I consider that no Article 267 TFEU reference is, in fact, necessary.

Part VIII: Overall conclusions

158. In summary, therefore, for the reasons stated, I would dismiss the appeal of An Taisce and uphold the decision of Humphreys J. in the High Court.

Part IX: Costs

159. As this judgment is being delivered electronically, it may be convenient if, for the assistance of the parties, I should here express a provisional view on the issue of costs.

Although An Taisce has lost its appeal and its challenge to the grant of planning permission in respect of the factory has been dismissed, it has nevertheless raised important and practical issues regarding the development consent process. In these circumstances, and quite independently of any arguments that may arise in relation to either s. 50B of the 2000 Act or, for that matter, ss. 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, I consider that it would be appropriate that each side would abide its own costs. (The Attorney General has, in any event, agreed to abide his own costs).

- 160.** The parties are, of course, free to dispute this provisional view. If, however, any party wishes to contend for a different costs order, they should inform the Supreme Court Office within fourteen days of the delivery of this judgment.