THE HIGH COURT
JUDICIAL REVIEW
In the matter of Order 84 of the Rules of the Superior Courts and in the matter of the Planning and Development Act 2000

Record No. 2021/780 JR
Record No. 2021/781 JR

Between

MANNIX COYNE AND ANNE COYNE

Applicants

and

AN BORD PLEANALA,
IRELAND and the ATTORNEY GENERAL

Respondents

And

ENGINENODE LTD

Notice Party

JUDGMENT OF MR. JUSTICE HOLLAND DELIVERED 21 JULY 2023

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INTRODUCTION[1]

1. This is my judgment in a pair of judicial reviews in which the Applicants ("the Coynes") seek to quash decisions ("the Impugned Decisions") of the First Respondent (the "Board"), both made by orders dated 5 July 2021, to grant to the Notice Party ("EngineNode") under

- **S.37 PDA 2000**,[2] on appeal from the decision of Meath County Council, planning permission for development of a data centre and associated development ("the Data Centre") on a 24.5ha site at Bracetown & Gunnocks, Clonee, Co. Meath ("the Site").
- **S.182A PDA 2000**,[3] approval for development, as strategic infrastructure, of a 220kV substation on lands of about 3.6ha adjacent to and south of the proposed Data Centre site, 2 underground transmission cable connections[4] to the national electricity grid (the "national grid") and associated development ("the Grid Connection").

I will refer to the Data Centre and the Grid Connection collectively as the "Proposed Development".

2. The Meath County Development Plan 2013-2019 applies. All relevant lands and the surrounding lands, save for parts of the underground transmission cable routes are, by that plan, zoned "E2/E3" to "*provide for the creation of enterprise and facilitate opportunities for employment through industrial, manufacturing, distribution, warehousing and other general employment / enterprise uses in a good quality physical environment. To facilitate logistics, warehousing, distribution and supply chain management inclusive of related industry facilities which require good access to the major road network*." That the Proposed Development is suited to the zoning is not disputed. Another "*Runway Information Service/Facebook*" data centre lies nearby to the east.

3. The Coynes live adjacent the Proposed Development, with which their residence will share a boundary to their east and north.[5] Mannix Coyne is a building contractor and runs an equine business at his family home. He pleads that he will suffer significant impacts by way of loss of residential amenity, loss of privacy, noise, nuisance and serious disturbance of his equine business. Ann Coyne is his daughter and is a national school teacher. They and Mr Coyne's wife objected to the Proposed Development in the planning process.

4. EngineNode's application to Meath County Council ("the Council") for planning permission for the Data Centre was for a development including an on-site gas-powered energy centre to power

1 Headings are for general guidance only. In particular, my comments and observations are not confined to sections headed "Discussion and decision" or the like.
2 The Planning and Development Act, 2000 as amended.
3 Electricity Transmission lines.
182A.— (1) Where a person (hereafter referred to in this section as the "undertaker") intends to carry out development comprising or for the purposes of electricity transmission, …….. the undertaker shall prepare, or cause to be prepared, an application for approval of the development under section 182B and shall apply to the Board for such approval accordingly.
4 Of 2km and 1.7km respectively.
5 See Figure 1 to Objection of Mannix Coyne to Meath County Council 8 January 2020 and Photomontage Figure 10.1.1 in Appendix 6 to the Data Centre Addendum EIAR. It is possible that I may be wrong and that their house lies one site, as it were, further south. There was some lack of clarity on this issue at trial (Transcript day 4 p110 et seq) but for practical purposes nothing turns on that.

the Data Centre (the "Energy Centre"). The application included an EIAR.[6] The Council did an EIA[7] and decided to grant permission. The Coynes and others[8] appealed to the Board. In response to these appeals, EngineNode decided to source electrical power for the Data Centre from the national grid instead of generating it on-site. So, EngineNode by its response dated 12 August 2020 to the appeals, while not formally withdrawing the planning application as it related to the Energy Centre, advised the Board that it would be acceptable were the Board to omit the Energy Centre from the Data Centre development and instead grant approval under s.182 PDA 2000 for the Grid Connection. For that approval it applied to the Board directly by application dated 7 September 2020.[9] In that context, EngineNode submitted an Addendum to its Data Centre EIAR (the "Data Centre Addendum EIAR"[10]) and an EIAR for the Grid Connection (the "Grid Connection EIAR"). EngineNode's documents in each process cross-referenced the other. No likely significant adverse impacts were identified in the EIARs.

5. The Board allocated both files to the same Planning Inspector (the "Inspector"), who reported to the Board on each. The Board considered both applications together at its meetings of 11 May 2021, 19 May 2021 and 23 June 2021 and made both Impugned Decisions together at its meeting of 23 June 2021. It did so generally in accordance with the Inspector's recommendations and it did an EIA in each application. While the two processes were formally distinct, they were in substance considered and decided together.

6. I will consider the pleadings in due course. However, is also convenient to observe at this point that the primary focus of these proceedings was on the alleged climate change effects of the alleged indirect GreenHouse Gas[11] ("GHG") emissions (specifically CO_2[12]) of the Data Centre from the generation of electricity to power it. CO_2, as a GHG, contributes to global warming and hence to climate change.[13] This essential complaint is made in various legal forms addressed below.

7. It is also convenient to observe here that the Coynes' application for a declaration against the State of failure, in Articles 51 and 54 of the Habitats Regulations 2011,[14] to adequately transpose

6 Environmental Impact Assessment Report for the purposes of the EIA Directive 2011/92/EU as amended by Directive 2014/52/EU.
7 Environmental Impact Assessment for the purposes of the EIA Directive 2011/92/EU as amended by Directive 2014/52/EU.
8 An Taisce, Friends of the Irish Environment, Group Property Holdings and Keypol Ltd. Keypol is a company associated with the Coynes. Mr Coyne has described it as "his" company. Nothing turns on that. EngineNode unsuccessfully appealed a condition imposing a special financial contribution under S.48(2)(c) PDA. Nothing turns on that either.
9 It is clear that EngineNode had, from a much earlier point, contemplated the Grid Connection as they had commenced pre application consultations with the Board in that regard in October 2000 and the board had by decision of 2 June 2020 deemed the Grid Connection strategic infrastructure development within s.182A. Nothing turns on that.
10 The Addendum EIAR primarily takes the form of a list of amendments to the original Data Centre EIAR with which, therefore, it must be read.
11 The most important greenhouse gases are carbon dioxide (CO2), methane (CH4), and nitrous oxide (N2O). (Climate Action Plan 2019 – Executive Summary). The 2015 Climate Act defines "greenhouse gas" as meaning (a) carbon dioxide,(b) methane,(c) nitrous oxide,(d) hydrofluorocarbons,(e) perfluorocarbons,(f) sulphur hexafluoride, or (g) nitrogen trifluoride.
Milieudefensie et al v Royal Dutch Shell – Hague District Court, 26-05-2021, C/09/571932 / HA ZA 19-379 §2.5.4 - the World Resources Institute Greenhouse Gas Protocol categorizes GHG emissions in Scopes 1, 2 and 3: Scope 1 are the direct emissions of the activity. Scope 2 are indirect emissions from the generation of purchased energy, including electricity. Scope 3 are all other upstream and downstream indirect emissions from sources owned or controlled by third parties.
12 Carbon Dioxide.
13 On the present facts, "GHG" and "CO2" can be, and are, used interchangeably in this judgment.
14 European Communities (Birds and Natural Habitats) Regulations 2011.

Article 12 of the Habitats Directive[15] stands adjourned generally.[16] But the State was heard at trial as to Ground 6 – in which the Coynes allege that the Impugned Decisions permit what will be a breach of their human rights by way of deleterious effect on climate change of those CO_2 emissions described above.

8. As ever in judicial review, it is vital to remember that I am concerned only with the legality of the Impugned Decisions: not whether they were right or wrong on their merits. Judicial review is not an appeal on the merits. As MacGrath J said in **Harrington**,[17] "*it is not open to the Court to review such a decision on the basis that others or indeed the Court might have made a different decision*". As Humphreys J strikingly put it in **Holohan**,[18] "*if there is material to support it",* I cannot strike down a decision as to its merits even if, on those merits, I consider it "*clearly wrong*".

9. Some care is needed to ensure that I act only on evidence properly before me. In a general sense, the scientific consensus as to the occurrence of, and the need to adapt to and mitigate, the effects of climate change and the many threats posed by climate change to the environment and to human life and society are undisputed. They and the underlying scientific consensus are also recognised in law – both statutory and as described in **FIE v Ireland**.[19] However, that of itself does not imply that all and every aspect and detail of what lies ahead for the climate and the world for the area around the Site and for the Coynes specifically is agreed, or even known. Some care must be taken to avoid recognising as legal propositions what are in fact findings of fact on evidence in other cases. To pick an example, the Coynes may not slipstream factual findings in cases such as those cited from the Dutch courts or based on documents not in evidence before me. And as a general observation, neither may they extrapolate facts on which there is consensus as to climate change generally - either forward to particular effects on themselves as individuals or backwards to a causative link between those effects on themselves and the Data Centre.

<u>POLICY IN DECISION-MAKING - THE "HAVE REGARD TO" OBLIGATION</u>

<u>Introduction – s.143 PDA 2000 & s.15 of the Climate Act 2015</u>

10. Policies loom large in planning law and climate change law and, as will be seen, in this case. In considering the description of policy which follows, it is important to keep in mind the role of the courts as it relates to policy (which I will consider later in this judgment) and the legal obligations of the Board as they relates to policy.

15 Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
16 Pending the outcome of the reference to the Court of Justice in Hellfire Massy Residents' Association v An Bord Pleanála [2021] IEHC 424.
17 Harrington v Minister for Communications [2018] IEHC 821.
18 Holohan v An Bord Pleanála [2017] IEHC 268.
19 Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General [2020] 2 I.L.R.M. 233, Clarke CJ §§3 & 4.5.

11. By **s.143 PDA 2000**, the Board shall, in performing its functions, "*have regard to*", inter alia,

- *"the policies and objectives for the time being of the Government,*
- *the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State,*
- *the National Planning Framework and any regional spatial and economic strategy for the time being in force."*

12. In addition, **s.15 of the Climate Act 2015** at the relevant time required,[20] inter alia, the Board in the performance of its functions to "*have regard to*":

> *"(a) the most recent approved national mitigation plan,*
> *(b) the most recent approved national adaptation framework and approved sectoral adaptation plans,*
> *(c) the furtherance of the national transition objective, and*
> *(d) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State."*

The Coynes stressed their reliance on (c) and (d).[21]

13. **S.3 of the 2015 Climate Act** defined the "*national transition objective*" as being to "*pursue, and achieve, the transition to a low carbon,[22] climate resilient[23] and environmentally sustainable economy[24] by the end of the year 2050*". It will be seen that this is an important, but very general, strategic and high level statement.

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20 With effect from 7 September 2021, after the date of the Impugned Decisions, and by the Climate Action and Low Carbon Development (Amendment) Act 2021, this obligation was amended to provide in effect that the Board "shall, in so far as practicable, perform its functions in a manner consistent with" an amended list of considerations as follows:
(a) the most recent approved climate action plan,
(b) the most recent approved national long term climate action strategy,
(c) the most recent approved national adaptation framework and approved sectoral adaptation plans,
(d) the furtherance of the national climate objective, and
(e) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.

21 Transcript D2 p75.

22 "Low carbon … economy" is not defined. I understand it to describe an economy in which energy generation using fossil fuels is reduced or minimised so as to reduce or minimise GHG emissions. On that basis, it corresponds to the concept of mitigation of climate change.

23 "climate resilient … economy" is not defined. I understand it to describe an economy in which the capacity to cope with climate change is increased or maximised. On that basis, it corresponds to the concept of adaptation to climate change.

24 "environmentally sustainable economy" is not defined. However in Conway v An Bord Pleanála [2023] IEHC 178 §55 Humphreys J, elucidated the consistent interpretation, clear meaning and legal significance of the closely associated concept of "sustainable development" as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. It seeks to reconcile economic development with the protection of social and environmental balance. He cited Article 3(3)TEU and EU strategy of long-term sustainability in which economic growth, social cohesion and environmental protection are mutually supporting. Humphreys J, described the concept of sustainable development as linked to Article 37 of the European Union Charter of Fundamental Rights which states that "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." Finally for present purposes, Humphreys J described the concept of sustainable development as embedded in Irish law by the definition in S.3 of the Climate Change Act 2015 of the "national transition objective".

<u>The "*have regard to*" obligation</u>

14. Obligations to "have regard to" something – and like obligations - are ubiquitous in statute law.[25] The substance of that to which regard must be had can vary enormously. Often, the obligation will relate to the content of policy documents, guidelines or similar documents – which content may be more or less specific and detailed. Or the obligation may relate to more generally expressed considerations such as, in the case of s.143 PDA 2000, "*the policies and objectives for the time being of the Government*" and "*the national interest*".

15. Arguments as to whether such obligations have been met are a commonplace of planning and environmental judicial review and of litigation more generally. Given the statutory "have regard to" obligations as they apply to the facts of this case, the Coynes' reliance on caselaw[26] as to the obligation to consider all relevant factors is strictly unnecessary but is a helpful reminder that failure to have required regard will often require that an Impugned Decision be quashed and that regard for irrelevancies may have similar effect.

16. The precise meaning of "*have regard to*" can vary with context and legislative contexts do differ.[27] But there is a plethora of caselaw confirming a generally consistent interpretation of the phrase and the obligation generally falls well short of requiring any compliance with or implementation of policies or other matter to which regard must be had.[28] While the general thrust is discernible, it is however notable that the terminology used in the caselaw considering such issues varies - not always consistently - and that the issue of compliance with such obligations is still frequently litigated.

17. In considering what follows, it must be borne in mind that they are general observations as, as has been said, the precise meaning of a "*have regard to*" obligation can vary with context. However, and while it may or may not be decisive in a particular case, given the ubiquity of the phrase and that the legislature will be presumed to have known and intended, when legislating, the general understanding of the phrase, the value in the cause of legal certainty of a generally consistent and well-understood interpretation will weigh appreciably even where contexts arguably differ somewhat.[29]

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25 An unscientific search of the official Statutes website for the phrase "have regard to" produced over 3,000 hits. No doubt searches of slightly different phrases to the same effect would have added to that number.

26 People over Wind v An Bord Pleanála [2015] IEHC 271 §120; Tristor v Minister for Environment & Ors [2010] IEHC 397 §§5.4 & 6.6 – in §6.6 citing Dellway & McKillen v The National Asset Management Agency, [2011] 4 IR 1 (Judgment of the High Court) and Peko-Wallsend v Minister for Aboriginal Affairs [1986] 162 CLR 24.

27 Jennings v An Bord Pleanála 2023 IEHC 14 §217; R (Harris) v Environment Agency [2022] PTSR 1751, [2022] PTSR 1751. In Minister for Immigration and Citizenship v Khadgi [2010] FCAFC 145, the Federal Court of Australia said that "… the expression "have regard to" is capable of different meanings depending on its context".

28 Killegland Estates Limited v Meath County Council [2022] IEHC 393. "the requirement was to "have regard to" those guidelines, not to comply with them …"; Cork County Council v Minister for Housing [2021] IEHC 683. "no kind of compliance is required by a have regard obligation".

29 See generally Dodd on Statutory Interpretation §8.48 as to the Barras Principle – recently discussed in Shadowmill v ABP & Lilacstone [2023] IEHC 157 and cases there cited.

"H*ave regard to*" - Seven general issues.

18. Without attempting to be exhaustive or to suggest bright line distinctions between issues, it seems to me that, as to a "have regard to" obligation, the following issues can arise.

- The relevance to the decision in hand of the matter to which regard must allegedly be had.
- Consultation and interpretation by the decision-maker of the document or other matter to which it must have regard.
- The degree to which, if at all, compliance or implementation is required as to the document or other matter to which regard must be had.
- Short of any such compliance or implementation, the substance of the "regard" which must be had to it.
- Issues of onus of proof of compliance or non-compliance with a "have regard to" obligation.
- Whether and in what degree the regard which has been had must be positively explicit or implicit in the impugned decision and/or as a matter of the duty to give reasons.
- The extent to which, if at all, reasons must be given for non-compliance/non-implementation of the policy in question.

In truth, these issues overlap, and they are in some degree conflated in the caselaw. It is also the case that these issues are, understandably, beset by posited synonyms - as to which agreement is not universal.

The first four issues

19. First, it must be remembered that statutory "have regard to" obligations are often extremely broad in their scope and a document to which regard must be had may be equally broad and more or less detailed. For example, and as has been noted, s.143 PDA 2000 requires regard, inter alia, to "*the policies and objectives for the time being of the Government*", and to the "*national interest*". And both s.143 and s.15 of the 2015 Climate Act impose the "have regard to" obligation on the Board "*in performing its functions*" – which is to say, all its functions.[30] It is difficult to conceive of a more broadly framed obligation, both as to the functions of the Board in which it applies and as to the scope of the matters to be taken into account. Taken literally and theoretically, the Board must have regard to the entire of Government policy in making every decision. In reality, large parts – or even all – of a document to which regard must in theory be had may be more or less irrelevant to the particular decision to be made. However, it would be absurd to require the Board to have regard to irrelevancies. For example, it would be absurd (short of highly unusual facts) to have regard in an application for approval of "electricity transmission lines" to ministerial guidelines as to design of apartments. I pick an absurd example deliberately to demonstrate that the first question in considering an allegation of breach of the have regard to duty is whether the matter to which regard

30 Save as excluded – S.143 excludes functions conferred by Chapter III of Part XXI PDA 2000 - Maritime Development - Other Development in Maritime Area.

was allegedly to be had is arguably relevant to the decision at hand. The trigger is light as, clearly, regard must be had to arguably relevant policies if only to actively decide not to apply them in the decision at hand because, on examination, either they are found to be not in reality relevant or a decision is made not to apply them despite their relevance. Yet despite that light trigger it seems decisions in this regard are reviewable as to their merit only for irrationality. But in any event I cannot see that statutory "have regard to" obligations, however widely framed, absurdly require regard, much less record of regard, to the clearly irrelevant. In fairness, the Coynes did not argue otherwise.

20. Second, it is clear that a decision-maker obliged to have regard to something must, for purposes of making its decisions, fully inform itself of that something[31] - "*consult the document*"[32] - and interpret it correctly.[33] This requires a positive engagement by the decision-maker with that something. *"Hence if the decision-maker fails to even look at the documents or matters to which it is to have regard, … a ground for certiorari arises."*[34]

21. Third, **Glencar**[35] (the case which, as it were, started this interpretive ball rolling and, as far as I am aware is the only Supreme Court decision on the phrase "have regard to"), **McEvoy**[36] and the **Cork County Council** case[37] make clear that "regard" generally does not require implementation or compliance, in whole or in part, with the policy or like matter to which regard must be had. In the **Cork County Council** case Humphreys J said, *"No kind of compliance is required by a have-regard obligation, merely regard."* In **McEvoy,** Quirke J cited the OED[38] as defining "*regard*" as, *inter alia,* "*give heed to; take into account; let one's course be affected by; look upon or contemplate mentally in a specified way … (of a thing) have relation to; have some connection with … (followed by to or for) attention or care*". Quirke J said that *"The most noteworthy feature of these definitions is that the actions connoted by the term "regard" are permissive in nature, i.e. the action involves volition as opposed to taking an action or reaching a conclusion pursuant to prescription with no choice involved."* **Simpson**[39] in 1961, cited in **McEvoy** and other cases including, recently, **S v Minister for Justice**,[40] was the origin of the disavowal any duty to adhere "slavishly" to the matter to which regard must be had. This view seems to me best understood as a dramatic expression of the view that regard generally does not require any implementation or compliance – slavish or otherwise.

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31 McEvoy v Meath County Council [2003] I.R. 208; Board of Management of Temple Carrig Secondary School v An Bord Pleanála [2017] IEHC 452. Pinewood Wind Ltd & Element Power Ltd v The Minister for Housing, [2018] IEHC 697; Merriman & FIE v Fingal County Council [2017] IEHC 695.
32 Higgins v An Bord Pleanála [2020] IEHC 564 §24.
33 Redmond v An Bord Pleanàla [2020] IEHC 151 §94. "A decision-maker cannot be said to have properly had regard to objectives or policies which it has misunderstood."; Killegland Estates Limited v Meath County Council [2022] IEHC 393, regard "presupposes a correct understanding". Tesco Stores Limited v Dundee City Council [2012] UKSC 13 "a planning authority must proceed upon a proper understanding of the development plan … the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them".
34 Killegland Estates Limited v Meath County Council [2022] IEHC 393.
35 Glencar Exploration p.l.c. v Mayo County Council (No. 2) [2002] 1 IR 84.
36 McEvoy v Meath County Council [2003] I.R. 208.
37 Cork County Council v Minister for Housing [2021] IEHC 683.
38 Oxford Dictionary and Thesaurus (Oxford University Press, Oxford, 1995 reprint).
39 Simpson v Edinburgh Corporation [1961] S.L.T. 17, cited in McEvoy.
40 [2020] IECA 74.

22. As to what, short of implementation or compliance, "regard" amounts to, the cases emphasise that the obligation is very limited[41], very light[42] very undemanding[43] and not a heavy burden.[44] It has been said that the obligation is to "consider"[45] or to "reasonably consider".[46] Indeed in **Glencar**[47] the view that regard did not require implementation or compliance was a response to a submission the premise of which was that "*appropriate consideration*" had been given to the policy to which regard was to be had. Mayo County Council had adjourned its decision so that the policy could be considered. Glencar is authority for the absence of a duty to implement – it is not authority for a light burden of regard. Neither, I think, is **Simpson** authority for a light burden of regard – there is appreciable distance between the points on a spectrum represented by slavish adherence at one end and a very light burden of regard the other. Authority for the light burden came later.

23. In **McEvoy**,[48] in which consideration of the relevant guidelines was held to have been "*limited and somewhat unsatisfactory*" and to "*give rise to concern (and indeed unease)*", and even when espousing "*reasonable consideration*", the Court was yet "*not satisfied that the … respondent failed to "have regard to" the guidelines*".[49] This outcome certainly speaks to a light burden of regard. In other cases it has been said that the obligation is that the decision-maker must have the matter to which it must have regard "*present in their minds*"[50] or must apply its mind[51] to or "*look at*"[52] that matter. It has been said that "*to have regard to*" means to "*take into account*"[53] – though in **McEvoy**, Quirke J cited authority from New Zealand,[54] it seems with approval,[55] that those phrases are not synonymous. In that New Zealand case it was said that matters to be taken into account, *"must necessarily ….. affect the discretion"* whereas it was clear from the statutory provision in question in that case *"that the matters to be regarded are not to limit or affect that discretion"* such that *"all or any … may be rejected or given such weight such as the case suggests is suitable*".

24. English law approaches these issues by distinguishing "regard" from "weight". **Fordham**[56] cites the House of Lords[57] to the effect that *"regard must be had to*" a relevant matter but *"the*

41 Merriman & Friends of the Irish Environment v Fingal County Council [2017] IEHC 695.
42 Cork County Council v Minister for Housing [2021] IEHC 683 §39.
43 Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14. §217.
44 Killegland Estates Limited v Meath County Council [2022] IEHC 393.
45 Humphreys J in Cork County Council v Minister for Housing [2021] IEHC 683 describing the approach of the Supreme Court in G.K. v Minister for Justice, Equality and Law Reform [2001] IESC 205, [2002] 2 I.R. 418, though it may be that in GK the approximation of "having regard to" with consideration was a function of the manner in which the GK framed the challenge. Also Killegland Estates Limited v Meath County Council [2022] IEHC 393 §59.
46 McEvoy v Meath County Council [2003] I.R. 208 – though Humphreys J in Cork County Council v Minister for Housing [2021] IEHC 683 appears to consider this a misreading of McEvoy. Also Merriman & Friends of the Irish Environment v Fingal County Council [2017] IEHC 695 §218.
47 Glencar Exploration p.l.c. v Mayo County Council (No. 2) [2002] 1 IR 84.
48 McEvoy v Meath County Council [2003] I.R. 208.
49 McEvoy v Meath County Council [2003] I.R. 208 – see Cork County Council v Minister for Housing [2021] IEHC 683 §37.
50 Merriman & Friends of the Irish Environment v Fingal County Council [2017] IEHC 695 – citing a submission by counsel for the State.
51 Higgins v An Bord Pleanála [2020] IEHC 564 §24.
52 Cork County Council v Minister for Housing [2021] IEHC 683 §57(iii).
53 Cork County Council v Minister for Housing [2021] IEHC 683 §57(i).; R (Harris) v Environment Agency [2022] PTSR 1751, [2022] PTSR 1751 ("take account of").
54 R. v C.D. [1976] 1 N.Z.L.R. 436, though it seems the New Zealand authorities vary - Forret, Joan --- "To "have regard to" or "take into account": does it matter?" [1999] NZYbkNZJur 7; (1999) 3 Yearbook of New Zealand Jurisprudence 117
URL: http://www.nzlii.org/nz/journals/NZYbkNZJur/1999/7.html - but that is not the current state of the law here.
55 "It is clear from the foregoing authorities ….."
56 Judicial Review Handbook 6th Ed'n §56.3.1.
57 Tesco Stores Limited v Secretary Of State For The Environment [1995] 1 WLR 759.

extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker…". Fordham cites[58] the Court of Appeal[59] for the proposition that a decision-maker may give "*no weight*" to a consideration it has "*taken into account*" unless to do so would be irrational.[60] In **Harris**[61] "*have regard to*" was equated with "*take account of*" and "*consider*" but the rider is added: "*a decision-maker may depart from such advice or guidance or code if there is good reason to do so*"[62] and, on a "*natural and conventional approach to the "have regard" duty" may depart "where that can be justified*". I find it difficult to discern from that judgment whether the words "*where that can be justified*" flow specifically from the heightened obligation of regard which arose because the instrument to which regard was to be had was an EU Directive – the Habitats Directive. However on balance I do not think so. It seems to me that the phrase "*where that can be justified*" is not so far from "*if there is good reason to do so*" and tracing back the "*conventional law*" as to the "have regard" obligation to **Khatun**[63] **-** which was cited with approval by the UK Supreme Court in **Nzolameso**[64] - one arrives at the view that: *"… respondents to such a circular must (a) take it into account and (b) if they decide to depart from it, give clear reasons for doing so".* However, "*when considering when and how a decision-maker can depart from guidance or code, the legislative background or context of the document under consideration is important, and must be carefully considered."*[65] Accordingly, it is not clear to me that English authority on this issue, which may be somewhat more demanding of decision-makers, is of great assistance given Irish authority on the issue.

25. For my own part, I am of the view that in Irish Law the burden of regard is, indeed, light and that "regard" and "consider" are synonymous. If it helps, one might add the synonym "advert" in the sense of to turn and apply one's mind to something. Similarly, obligations to have the matter in question "*present in their minds*"[66] or to "apply its mind to"[67] or "look at"[68] the matter in question seem to me synonymous with "regard". The phrase "reasonable regard" seems to me to correctly describe an exercise reviewable, as to its merit, only for irrationality. I think the phrase "appropriate regard" adds little as it merely prompts the question – what is appropriate? – though it at least usefully suggests that there is a standard to which decision-makers will be held.

26. I agree with the view[69] that "*bona fide regard*" merely points to a general duty of bona fides which permeates all aspects of public law decision-making and is not particular to the obligation to have regard. But given the lightness of the burden of regard, the phrase is a useful reminder that, however light its burden, the duty is nonetheless real, mandatory and serious.

58 Judicial Review Handbook 6th Ed'n §56.3.2.
59 R (Swords) v Secretary of State for Communities and Local Government [2007] EWCA Civ 795 [2007] LGR 757. Wilson LJ §52.
60 As the Court of Appeal put it – "perverse or Wednesbury unreasonable".
61 R (Harris) v Environment Agency [2022] PTSR 1751, [2022] PTSR 1751 ("take account of"), citing R (London Oratory School) v Schools Adjudicator [2015] ELR 335 per Cobb J, para 58. [2015] All ER (D) 113 (Apr).
62 Emphasis added.
63 From Harris to London Oratory School to Laws LJ in R (Khatun) v Newham London Borough Council [2005] QB 37 at [47].
64 Nzolameso v City of Westminster [2015] UKSC 22.
65 R (London Oratory School) v Schools Adjudicator [2015] ELR 335 per Cobb J, para 57. [2015] All ER (D) 113 (Apr).
66 Merriman & Friends of the Irish Environment v Fingal County Council [2017] IEHC 695 – citing a submission by counsel for the State.
67 Higgins v An Bord Pleanála [2020] IEHC 564 §24.
68 Cork County Council v Minister for Housing [2021] IEHC 683 §57(iii).
69 Killegland Estates Limited v Meath County Council [2022] IEHC 393.

27. While conscious that it may be seen as a merely semantic distinction which may make little difference in many or most cases, I would respectfully, and admittedly with some diffidence, take a different view of the phrases "take into account" and "take account of". It seems to me that the New Zealand decision[70] cited by Quirke J in McEvoy is correct in suggesting that the phrase "take into account" suggests an obligation to attribute at least some weight in the decision-making process to the factor taken into account. In at least some contrast, it seems to me that a decision-maker obliged to have regard to a factor is free to give no weight to that factor and is judicially reviewable in that regard only for irrationality. One might say that a duty of regard to something implies a duty bona fide to consider whether to take it into account and, if so, what weight to give it.

The remaining three issues

28. The remaining three questions I posed above seem to me particularly interlinked and best considered together. They were:

- Issues of onus of proof of compliance/non-compliance with a "have regard to" obligation.
- Whether and in what degree the regard which has been had must be positively explicit or implicit in the impugned decision and/or as a matter of the duty to give reasons.
- The extent to which, if at all, reasons must be given for non-compliance/non-implementation of the policy in question.

29. It seems to me that one can frame these issues in terms of the obligation to give reasons (recording the regard which was had by the decision-maker to a relevant matter) or in terms of onus of proof of such regard and the difference is often not vital to what are, in the end, questions of practical litigation.

30. It has been said that, given the presumption of validity of impugned public law decisions, the onus of proof of failure to have required regard is on the applicant in judicial review.[71] In general terms that is no doubt the case. In **Evans**[72] Kearns J said of an impugned decision of the Board that "*non-recitation of Guidelines in the reasons does not mean that proper consideration was not given to the Guidelines or indeed to Government policy*" and that "*the applicant has not produced any evidence that the respondent failed to have regard to the Guidelines and there does not appear to me to be any substance in this part of the applicant's challenge."*

70 R. v C.D. [1976] 1 N.Z.L.R. 436.
71 Pinewood Wind Ltd v The Minister for Housing, [2018] IEHC 697; Cork County Council v Minister for Local Government [2021] IEHC 683.
72 Evans v An Bord Pleanála, Unrep. High Court, Kearns J - 07/11/2003 - 2004 WJSC-HC 4037.

31. While I would not necessarily adopt all the views expressed in the Australian case of **Khadgi**[73] (cited by the Coynes), and cases cited therein, as to the "have regard to" obligation and, given the profusion of Irish authority, to do so might merely confuse rather than elucidate (though I do not rule out that, on the facts of another case, Khadgi might prove more generally useful), I find the following useful:

> *"…… A decision-maker is entitled to be brief in his or her consideration of a matter which has little or no practical relevance to the circumstances of a particular case. A court would not necessarily infer from the failure of a decision-maker to expressly refer to such a matter in its reasons for decision that the matter had been overlooked."*

32. But Humphreys J said in a **Cork County Council** case[74] that "*if the evidence doesn't demonstrate*" that the decision-maker has looked at documents or matters to which it is to have regard, a ground for *certiorari* arises and that the onus on the party challenging to prove otherwise by evidence arises "*If the decision states that regard was had to something*".

33. The issues of onus of proof and whether an impugned decision discloses that statutorily-required regard was had to a matter are not unrelated to the issue of adequacy of reasons for a decision. In that context, in **Balz**[75] O'Donnell CJ said:

> *"It is unsettling, for example, that when an issue arises where it is suggested that the Inspector (and therefore the Board) has not given consideration to a particular matter, it should be met by the bare response that such consideration was given (for a limited purpose) and "nothing has been proven to the contrary". Similarly, while the introductory statement in the Board's decision that it has considered everything it was obliged to consider, and nothing it was not permitted to consider, may charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision."*

34. Incidentally, I respectfully differ from any view that Balz was not a considered judgment as to matters such as reasons for decisions. It is very clear that what are required are only main reasons on the main issues. Narrative judgments are not required. But neither should the burdensome nature of giving reasons be exaggerated. It is axiomatic that, as a mental or decision-making process, the Board and other decision-makers will have had their reasons for their decisions. The only burden involved is that of committing them to paper. While that can certainly be burdensome, the burden

73 Minister for Immigration and Citizenship v Khadgi [2010] FCAFC 145.
74 Cork County Council v Minister for Housing [2021] IEHC 683, citing B.C. (Zimbabwe) v International Protection Appeals Tribunal [2019] IEHC 488, Atlantic Diamond Ltd. v An Bord Pleanála [2021] IEHC 322.
75 Balz v An Bord Pleanála [2019] IESC 90 (Supreme Court, O'Donnell J, 12 December 2019).

should not, as I say, be exaggerated given the reasons in question must exist in any case in the decision-maker's mind if a proper decision is to have been made.

35. It is devoutly to be expected that the Board will, explicitly and at least, identify in its decisions, the matters to which it has had regard. Indeed, leaving aside its administrative throat-clearing, that is the course it generally adopts and adopted in this case by listing those matters. And it must be stated that failure to do so may involve appreciable risk to its decision, depending on the circumstances.

36. But even where a decision-maker does not explicitly identify those matters to which it has had regard, and despite the likely unnecessary trouble by way of litigation which may ensue, it may suffice to save an impugned decision if it is discernible on its proper interpretation that, in substance, the Board has had regard to the matters in question. For example, in **Higgins**[76] Humphreys J observed, in dismissing the ground in question,[77] that "*while the inspector's discussion of density .. doesn't specifically refer to .. the 2009 guidelines … at all, it does deal with the issues in substance by considering the proximity of the site to a transport hub. In such circumstances, I don't see any material departure from the objectives that the guidelines are intended to advance*." Haughton J in **Ratheniska**[78] took an analogous view as to a more demanding obligation as to EIA:

> *"…. there is no explicit statement in the impugned decision that the Board has considered the cumulative direct or indirect effects on the environment of the proposed development. However, the court is of the view that the decision falls to be considered in its entirety and if on a fair reading it includes an evaluation of the cumulative environmental effects which it is required by law to consider including those impacts and matters canvassed in the EIS, the Inspector's Report and other documentation before it, then the Board complies with its statutory obligation to carry out an EIA."*
>
> *"Reading the impugned decision as a whole and having regard to the Inspector's Report and contents of the EIS, the court is of the view that the Board did consider and evaluate the environmental impact of the Development including cumulative environmental effects."*

37. It seems to me that the burden of showing that a matter, to which regard was allegedly not had, was arguably relevant to the decision at hand, such that regard had to be had to it, must rest on the applicant in judicial review. But thereafter and given especially the lightness of the obligation to have regard and the freedom of a decisionmaker to give the matter in question no weight, it seems to me unfair, as creating a very high bar, perhaps especially in litigation generally conducted without oral evidence, to require such an applicant, in the absence of illuminatory content in the impugned decision, to prove a negative as to what occurred in the mind of the Inspector and Board members. Such a burden is to be contrasted with the simplicity of the Board's task, and the lightness of the

76 Higgins v An Bord Pleanála [2020] IEHC 564 §11.
77 He quashed the impugned decision on other grounds.
78 Ratheniska Timahoe and Spink (RTS) Substation Action Group and another v An Bord Pleanála [2015] IEHC 18 §92 & 94.

burden it imposes, in demonstrating that regard has been had to a relevant document. Whatever the deficiencies of "recitation" or "box-ticking", they have at least the virtue that a positive act of recitation or ticking the box has occurred. Where it relates to a very light obligation to consider a matter, it does at least serve the purpose of intimating that regard has been had to it, if only in the form of the mental act required to tick the box or recite the identification of the matter in question. O'Donnell CJ's dismissal of "administrative throat-clearing" seems to me to imply, a fortiori, that the absence of even administrative throat clearing by way of box-ticking or recitation - is likewise to be dismissed. And, perhaps unusually given the lightness of the obligation to have regard, such box-ticking or recitation will often suffice as implying that the Board's mind has been addressed to the issue. Or, at least, the Applicant in judicial review will, in that circumstance, face the uphill struggle of proving that the necessary regard was not had. If that box-ticking or recitation has not been done, the issue will turn on a wider consideration of the content of the impugned decision.

38. I agree with **Browne's**[79] gloss on **Evans** to the effect that failure to recite regard to particular guidelines may not be fatal to an impugned decision "*particularly if they were identified in the submissions and planner's report.*" In **Nzolameso**[80] the UK Supreme Court held, as to a code to which regard was required, that:

> *"It must be clear from the decision that proper consideration has been given to the relevant matters required by the Act and the Code. While the court should not adopt an overly technical or 'nit-picking' approach to the reasons given in the decision, these do have to be adequate to fulfil their basic function".*[81]

39. Finally on this issue, it does not seem to me that, on the facts of this case, I need to grapple with the issue of the extent to which, if at all reasons must be given for non-compliance/non-implementation of a policy to which regard has been had. I simply note that **Browne**[82] says that **McEvoy** *"suggests that departure from the terms of a general policy is permissible for bona fide reasons consistent with the proper planning and development of the area. In order to police this limitation, it is essential that the decision-maker be required to state the reasons being relied upon for the departure."* Recently in **Four Districts**[83] Humphreys J observed that

> *"As far as the alleged failure to give reasons is concerned, having regard to something does not in itself impose a requirement to give reasons for not accepting that something, albeit that the something concerned may be one of the main issues, in which case the main reasons would be independently required …"*

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79 Simons on Planning Law, 3rd Ed'n (Browne) §4-136.
80 Nzolameso v City of Westminster [2015] UKSC 22.
81 Lady Hale described that basic function in terms not dissimilar to the requirements of Irish law: "… an obligation to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable or invalid and therefore open to challenge: ……Nor, without a proper explanation, can the court know whether the authority have properly fulfilled their statutory obligations.
82 Simons on Planning Law, 3rd Ed'n (Browne) §4-136.
83 Four Districts Woodland Habitat Group et al v An Bord Pleanála et al Incl Romeville Developments Limited [2023] IEHC 335.

Given, in particular, the overarching rule that, as Humphreys J says, only main reasons on main issues are required, these two observations do not necessarily conflict. I note also that Barrett J in the **Dublin Airport Runway** case[84] suggested that "*There may, of course, be examples of proposals which plainly fly in the face of the Guidelines. In such a case there may well be a requirement that a local authority, in order to be able to demonstrate that it 'had regard to' the Guidelines would need to establish that it had cogent reasons for such a departure."* But, on the facts of this case, I need not tease out the issue further.

The "*have regard to*" obligation – s.15 of the Climate Act 2015 & the Dublin Airport Runway case 2017

40. While I will come in due course to the question of compliance with the obligations imposed by s.15 of the Climate Act 2015, as it proceeds from a consideration of the principles of the "have regard to" obligation, it is convenient to consider the **Dublin Airport Runway** case at this point. It considered a challenge to an extension of the duration of planning permission for a new runway at Dublin Airport. The challenge was based, inter alia, on an assertion that the new runway would lead to an increase in GHG emissions which, in turn, would accelerate climate change. FIE cited s.15 of the Climate Act 2015. As to s.15, Barrett J in the High Court cited **Tristor**,[85] **Glencar**[86] and **Evans**[87] for the rule that "*The statutory obligation to 'have regard to' means precisely that, no more and no less*". He cited **McEvoy**[88] to the effect that regard requires the decision-maker to inform itself fully of, and give reasonable consideration to, those matters to which it is obliged to have regard. Barrett J described as "helpful" a submission for counsel for Fingal that the "*have regard to*" obligation in s.15 is that the relevant matters must be "*present in their minds*" when they are making the decision.

41. Barrett J considered that the purpose of s.15 was to prompt "*a culture of change … But it is not the purpose of s.15 to alter existing statutory tests such that there could be other methods of judicial review in respect of those decisions."* Barrett J held that s.15 did not require that having regard to the matters listed in s.15 in turn required "*concrete steps*" on foot of such regard given *"the very limited obligation to which it is in any event subject by a statutory provision (s.15(1) of the Act of 2015) which merely requires it to "have regard to", and no more."* This chimes with the view, cited above, that "*no kind of compliance*" is required. Barrett J held that FIE's view

> *"….. that the observation by the Council of its obligations under s.15(1) ought to have given rise to a different result is one thing:* (FIE) *is entitled to that view; however, that does not yield as a further or corollary conclusion that the Council did not discharge its obligations under s.15(2) of the Act of 2015. It was open to the Oireachtas to apply a more stringent obligation*

84 Merriman & Friends of the Irish Environment v Fingal County Council & Ors [2017] IEHC 695 (High Court, Barrett J, 21 November 2017).
85 Tristor Ltd v The Minister for the Environment, Heritage and Local Government [2010] IEHC 397.
86 Glencar Explorations plc v Mayo County Council (No. 2) [2002] 1 I.R. 84.
87 Evans v An Bord Pleanála (Unreported, High Court, 7th November, 2003).
88 McEvoy v Meath County Council [2003] I.R. 208.

> *to relevant bodies under s.15(2) but this the Oireachtas elected not to do.*[89] *…….. Merely to depart from what the* (FIE) *would prefer is not necessarily to depart from the objectives referred to in s.15(2).”*[90]

The last sentence in particular of this excerpt seems to me generally applicable to resolution of the policy tensions evident in these proceedings.

The “*have regard to*” obligation – Failed & Failing Policies – Decision on an Issue Argued

42. To state the obvious, the “*have regard to*” obligation implies an entitlement to “*have regard to*” relevant polices and guidelines and, by necessary implication, a general entitlement in the Board to consider, as a matter of planning judgment, that the consistency of a proposed development with such relevant polices and guidelines weighs in favour (though not necessarily determinatively) of the grant of permission.[91] Decisions in accordance with policies will come as no surprise even if they are not mandatory. Kearns J said something similar in **Evans** to the effect that the Board’s “*duty was to inform itself fully and to give reasonable consideration to any regional planning guidelines with a view to accommodating*[92] *the objectives and policies in such guidelines.”*

43. As stated, the “*have regard to*” obligation falls well short of requiring compliance with the policies to which regard must be had. It follows, it seems to me as a matter of logic, that the “*have regard to*” obligation does not require the Board to assume (perhaps in the teeth of evidence to the contrary) that historic policies have been, or that current policies are being or will be, successfully effected. That follows, not least perhaps, as one good reason for not implementing a policy is that its lack of success is already apparent. An analogous issue arose in **Balz**[93] in which it was held that the Board could not lawfully exclude in limine as irrelevant, and must engage with, arguments and evidence that technical guidelines[94] were in substance out of date and no longer fit for purpose.

44. At trial in the present case, and in discussing a hypothetical Government policy issued 5 years ago to solve the present housing crisis within a time span of 5 years, counsel for the Board accepted that, in considering a planning application today, the Board could not simply assume the housing crisis had been solved. He volunteered, in my view correctly, that any other answer would look foolish and that it therefore followed that to assert simply that the Board has no role in assessing the effectiveness with which State policy has been carried into effect is too absolutist a position. It follows that the Board is not absolved from at least examining submissions that stated

89 It is of interest but no interpretive relevance to note that Oireachtas later did apply a more stringent obligation. By the Climate Action and Low Carbon Development (Amendment) Act 2021 and with effect from 7 September 2012, S.15(1) now starts with the words “A relevant body shall, in so far as practicable, perform its functions in a manner consistent with …… ”.

90 I think the references in this passage to s.15(2) may have been intended as reference. to s.15(1). S.15(2) relates to ministerial directions to relevant bodies to make reports to him/her and does not seem relevant.

91 And conversely that the inconsistency of a proposed development with such relevant polices and guidelines weighs against (though not necessarily determinatively) of the grant of permission.

92 i.e. in its decision.

93 Balz v An Bord Pleanála [2019] IESC 90 (Supreme Court, O'Donnell J, 12 December 2019).

94 In that case the The Wind Energy Development Guidelines 2006.

policies clearly have not been, or will not be, successfully effected. However, and as the Coynes correctly agreed, the Board has no roving commission to interrogate the success or otherwise of the implementation of government policy relevant to a decision to be made by the Board. Such a commission would impose an excessive and potentially sclerotic burden on the Board. Just as the "have regard to" obligation is light, it seems to follow that, at least usually, the Board's obligation to consider submissions that a policy has failed is also light and such submissions are likely to be influential only in clear cases. The Board is entitled, at least generally and broadly and unless weighty submissions are made to the contrary, to take it that government policy will generally and broadly be effected, even if its success may not be complete. Its view on those questions (which will often be inherently predictive) and of any implications of the answers for its decision, will usually be a matter of planning judgement and entitled to curial deference.[95]

45. Counsel for the Coynes argued that the Board, both generally and in relying on the intended increase in renewable electricity generation, had failed to consider that Ireland's effecting of its policies as to CO_2 emissions reduction and transition to renewable energy was failing. As he put it, the Board was obliged to ask, as to those policies, "Is that actually happening?" He called in aid a series of exhibited government progress reports, from 2019 to 2021 inclusive, on its carrying into effect climate change policy and CO_2 emissions reduction. However, that point was not pleaded, and the progress reports were only exhibited 9 months after leave was granted and in reply to the Opposition papers. Indeed, the affidavit exhibiting them did not assert Ireland's effecting of those policies was failing. In addition, there was no plea or averment that such failure had been alleged in submissions to the Board.

46. That pleadings are crucial in judicial review is clear from many authorities. That importance is all the clearer in this case as consideration of these issues would offend against the principle against "gaslighting" the Board in judicial review – in this case as to the issue of alleged failure of climate change policies, the alleged nature and extent of such failure and the prospects of recovery of progress, <u>as they allegedly bore on the specific planning application before it.</u> For example, I have seen no suggestion that it was submitted to the Board that Ireland has breached the terms of the EU's ETS[96] "cap and trade" scheme, which has been described as a "cornerstone" of EU climate policy[97] and which governs CO_2 emissions of the kind at issue here – emissions from electricity generation. In any event, I would, as a judge, be entirely ill-equipped to consider such issues. I appreciate that the Coynes' argument was not that I should do so but was that the Board had not. But that observation illustrates why, if it was sought to ventilate the issue in judicial review, it should have been pleaded that such issues had first been raised with the Board in the planning process.

47. In those circumstances, I respectfully decline to consider whether Ireland's effecting of its policies as to CO_2 emissions reduction and transition to renewable energy is failing.

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95 The Board did not resist that proposition – Day 3 p21 et seq and D4 p114. (references in this form are to the transcript of the trial).
96 Emissions Trading System. See further below.
97 Milieudefensie et al v Royal Dutch Shell – Hague District Court, 26-05-2021, C/09/571932 / HA ZA 19-379. §4.4.45. See further below.

CLIMATE CHANGE & DATA CENTRES – GENERAL INTRODUCTION, LEGISLATION & POLICY

48. These judicial reviews are grounded in considerable part in the fact of climate change. The State has said:

> *"The climate crisis is without doubt the defining challenge of our generation"*[98]
>
> *"Climate change is undoubtedly one of the greatest challenges facing all states. Ireland is no different."*[99]

49. Clarke CJ in **FIE v Ireland**[100] briefly described the history, causes and science of climate change, in terms which I need not repeat in full here. Suffice it to record his observations that:

- The broad underlying scientific evidence as to the causes of, and problems created by, climate change is not in dispute.
- There is a consistent and almost linear relationship between CO_2 emissions,[101] which trap in the atmosphere the heat emitted by the earth (the greenhouse effect), and projected global temperature increases over the next 80 years. The greater the quantity of such emissions, the more global warming is exacerbated.
- Climate change is already having a profound environmental and societal impact in Ireland and the world and is predicted to pose further risks to the environment, in Ireland and globally.
- The consequences of failing to address climate change are very severe - with potential significant risk both to life and health in Ireland and globally. They include likely risk from: extreme weather likely to cause death, injury, ill health and disrupted livelihoods; inundation of large areas of land due to sea level rises; increases in-heat related mortalities and morbidity, food-borne disease, infectious disease, skin cancers and mental health effects.
- Urgent action is required to address climate change. That urgency is increased by the risk of reaching temperature rise "tipping points", perhaps not identifiable until too late, at which abrupt and irreversible climactic changes may occur.

A useful general account of climate change and its dangers is also found in **Urgenda**.[102]

98 Climate Action Plan 2019 First Progress Report Executive Summary.
99 Friends of the Irish Environment v Ireland, Supreme Court, [2020] 2 I.L.R.M. 233.
100 Friends of the Irish Environment v Ireland, Supreme Court, [2020] 2 I.L.R.M. 233.
101 And certain other gaseous emissions.
102 The Netherlands v Urgenda, Supreme Court of the Netherlands - Number 19/00135 20 December 2019 - ECLI:NL:HR:2019:2007

The EIA Directive 2014, S.171A PDA 2000 & Climate Change

50. The EIA Directive has gone through three main iterations. The first, in 1985,[103] unsurprisingly, said nothing of climate change (though **Article 3** did require assessment of significant effect on "climate"). Likewise, the second Directive issued in 2011[104] to codify amendments to the 1985 Directive and replace it. In 2012, the Commission proposed[105] to amend the EIA Directive. The proposal repeatedly mentioned climate change: inter alia *"As the revised EIA Directive can play a crucial role in achieving resource efficiency (e.g. by introducing new requirements for assessing issues such as biodiversity and climate change which are related to the use of natural resources)" "and adapt the EIA to challenges (i.e. biodiversity, climate change, disaster risks, availability of natural resources)".* The **2014 EIA Directive**[106] ensued and took the form of an amendment of the 2011 Directive. It introduced to the EIA Directive the explicit term "climate change". The EIA Directive also and repeatedly expresses concern for such factors as biodiversity, human health, quality of life and landscape as part of a broad understanding of the concept of the environment.

51. One must bear in mind the warning of Hogan J in the **Kilkenny Cheese** case[107] that, notwithstanding its wide scope and broad purpose and the consequent requirement that the EIA Directive be purposively interpreted – see **Kraaijeveld** [108] – the proper scope of the EIA Directive should not be artificially expanded beyond its remit – which is to assist in identifying and assessing the direct and indirect significant environmental effects of a specific project – and 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 Climate Action and Low Carbon Development Act.[109]

52. Nonetheless, and as to climate change, the following are notable in the EIA Directive 2011 as amended in 2014 and the Coynes rely on them:

- *"Recital (6 **[110]) Directive 2011/92/EU should also be revised in a way that ensures that environmental protection is improved, resource efficiency increased and sustainable growth supported in the Union. To this end, the procedures it lays down should be simplified and harmonised.*

- *"Recital (7**) Over the last decade, environmental issues, such as resource efficiency and sustainability, biodiversity protection, climate change, and risks of accidents and disasters, have become more important in policy making. They should therefore also constitute important elements in assessment and decision-making processes.*

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103 Directive 85/337/EEC.
104 Directive 2011/92/EU.
105 Brussels, 26.10.2012; COM (2012) 628 final; 2012/0297 (COD).
106 Directive 2014/52/EU.
107 An Taisce - National Trust for Ireland v An Bord Pleanála, et al incl. Kilkenny Cheese Limited [2022] IESC 8; [2022] 1 I.L.R.M. 281.
108 Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland. Case C-72/95. European Court reports 1996 Page I-05403.
109 See below: Hogan J was speaking of the 2021 amending Act but his comments must apply equally to the 2015 Act.
110 ** denotes a recital introduced by the 2014 amending Directive 2014/52/EU.

- *Recital (13**) Climate change will continue to cause damage to the 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.*

- *Article 3.1. 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: ….. (c) …….. climate.*

- By Article 5, what is required of an EIAR is that it *"include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment."*

- *ANNEX III*[111] *1. Characteristics of projects The characteristics of projects must be considered, with particular regard to:…… (f) the risk of major accidents and/ or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge;*

- *ANNEX IV*[112] *1(c)&(d). A description of the main characteristics of the operational phase of the project",* including, its "*energy demand and energy used*" and "an *estimate, by type and quantity, of expected … emissions"*

- *ANNEX IV 4. A description of the factors specified in Article 3(1) likely to be significantly affected by the project: …… climate (for example greenhouse gas emissions, impacts relevant to adaptation) ……..*

- *ANNEX IV 5. A description of the likely significant effects of the project on the environment resulting from, inter alia: ……….. (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;"*

53. More generally, Article 5 and Annex IV require, as before, that the EIAR describe:

- difficulties (for example technical deficiencies or lack of knowledge) encountered compiling the required information and the main uncertainties involved.

- the likely significant effects of the project - including *"direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium- term and long-term, permanent and temporary, positive and negative effects of the project. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project."*

111 Criteria to determine whether the projects listed in Annex II should be subject to an Environmental impact assessment.
112 Information for the EIAR.

54. The EIA Directive is transposed to Irish Law by **Part X PDA 2000**,[113] of which **S.171A PDA 2000**[114] describes EIA as a process consisting of

- preparation of an EIAR,
- consultations with the public and prescribed bodies,
- examination by the Board of the information in the EIAR, any supplementary information provided by the Applicant for permission and information received via the consultations and, where appropriate, its own supplementary examination,
- the Board's drawing a reasoned conclusion on the significant effects on the environment of the proposed development taking into account the results of the examination,
- the integration of the reasoned conclusion into the decision on the proposed development.

55. **S.171A PDA 2000** also describes EIA as including an examination, analysis and evaluation, by the Board, that identifies, describes and assesses, in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of the proposed development on, inter alia, human health and climate. While the phrase "climate change" does not appear, the requirement to consider significant effects on climate necessarily encompasses it - not least as s.171A must be interpreted in accordance with the requirements of the EIA Directive to which it gives effect. In considerable part, the remainder of Part X elaborates on these basic requirements of EIA and its application to development consent processes – as does **Part 10 PDR 2001**.

56. **Article 94** and **Schedule 6 PDR 2001**, in stipulating EIAR content, include in the factors to be described if likely to be significantly affected by the proposed development, *"climate (for example greenhouse gas emissions, impacts relevant to adaptation)".* **S.2 PDA 2000** defines "*adaptation to climate change*" as the taking of measures to manage the impacts of climate change.[115] Schedule 6 PDA 2000 requires that the EIAR describe the likely significant effects on the environment of the proposed development resulting from, inter alia, risks to human health and the impact of the proposed development on climate (for example the nature and magnitude of greenhouse gas emissions). It also requires that the EIAR describe the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the proposed development. It also requires details of difficulties (for

113 As amended to reflect the 2014 Directive. S.1A PDA 2000 identifies the EIA Directive as amongst those to which the PDA gives effect.
114 I have simplified the description to its essentials.
115 S.2 of the 2015 Climate Act defines "adaptation" more extensively as "any adjustment to—
(a) any system designed or operated by human beings, including an economic, agricultural or technological system, or
(b) any naturally occurring system, including an ecosystem,
that is intended to counteract the effects (whether actual or anticipated) of climatic stimuli, prevent or moderate environmental damage resulting from climate change or confer environmental benefits;"

example technical deficiencies or lack of knowledge) encountered compiling the required information, and the main uncertainties involved.

57. Notably, by **Annex IV of the EIA Directive** and **Schedule 6 PDR 2001** the description in an EIAR shall take *"into account the environmental protection objectives established at European Union level or by a Member State of the European Union which are relevant to the proposed development".* It follows that that the Board is entitled to take them into account in EIA. It appears to me that this implies that it is permissible in EIA of a project to consider schemes such as the Emissions Trading System described later in this judgment.

Climate Action and Low Carbon Development Act 2015, & the National Mitigation Plan 2017

58. The Long Title to the Climate Action and Low Carbon Development Act 2015 ("the 2015 Climate Act") describes it as an Act to provide, inter alia, "*for the approval of plans by the Government in relation to climate change for the purpose of pursuing the transition to a low carbon, climate resilient and environmentally sustainable economy*". The amendments of that Act in 2021 did not apply at times material to these proceedings. The following is a brief account of parts of the 2015 Climate Act at it stood at the date of the Impugned Decisions.

59. As noted above, **s.3** of the 2015 Climate Act established a "*National Transition Objective*" consisting of the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of 2050. To the end of enabling the State to pursue and achieve the National Transition Objective, **ss.3, 4 and 5** of the 2015 Climate Act required the Government to approve and periodically update a National Mitigation Plan,[116] and a National Adaptation Framework.[117] I have footnoted their definitions but, roughly, mitigation means reducing harm to the climate, including by reducing GHG emissions, and adaptation means adapting to the effects of climate change. National Mitigation Plans must include "*policy measures that, in the opinion of the Government, would be required in order to manage greenhouse gas emissions and the removal of greenhouse gas at a level that is appropriate for furthering the achievement of the national transition objective"* and "*sectoral mitigation measures*"[118] for reducing GHG emissions and enabling the achievement of the National Transition Objective. **S.6** provides for a Sectoral Adaptation Plan.

116 More fully named "National Low Carbon Transition And Mitigation Plan". By S.1, "mitigation" means human intervention aimed at reducing harmful influences on the earth's climate system, including action aimed at reducing emissions and creating or enhancing sinks.
117 More fully named "National Climate Change Adaptation Framework". Adaptation is the term used to describe responses to the effects of climate change. Adaptation can be thought of as learning how to live with the consequences of climate change. By S.1,"adaptation" means any adjustment to—
(a) any system designed or operated by human beings, including an economic, agricultural or technological system, or (b) any naturally occurring system, including an ecosystem, that is intended to counteract the effects (whether actual or anticipated) of climatic stimuli, prevent or moderate environmental damage resulting from climate change or confer environmental benefits;
The IPCC defines adaptation as 'adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.'
118 The word "sector" must refer to a sector of something but those somethings are not defined in the 2015 Climate Act. However the phrases "sectors of the economy" and "sectors of society" do appear in the Act and, it seems to me, accord with a sensible view of what is likely to be in issue for the purposes of the Act.

60. The Government adopted a National Mitigation Plan in July 2017. In July 2020 it was quashed by the Supreme Court in **FIE v Ireland**[119] as insufficiently specific in its terms to allow a reasonable and interested member of the public to know how the Government intended to achieve the National Transition Objective by 2050. The 2021 amendment of the 2015 Climate Act deleted the concept of the National Transition Objective, substituting for it the concept of the "National Climate Objective" and a different substructure of plans and strategies for its attainment.

61. **S.15 of the 2015 Climate Act** required,[120] inter alia, the Board in the performance of its functions to "*have regard to*":

> *"(a) the most recent approved national mitigation plan,*
> *(b) the most recent approved national adaptation framework and approved sectoral adaptation plans,*
> *(c) the furtherance of the national transition objective, and*
> *(d) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State."*

62. As has been seen, the 2015 Climate Act, and in particular s.15, were considered in the **Dublin Airport Runway** case.[121] I will consider both s.15 and that case further in due course.

National Planning Framework – February 2018[122]

63. The Impugned Decisions record that, in arriving at its decision, the Board had regard, inter alia, to the National Planning Framework ("NPF").

64. Though this is another Government document which, frustratingly, does not state its publication date on its face, it can be discerned[123] that the NPF, for which **ss. 20A to 20C PDA 2000** provides, received Government approval in February 2018. Presumably it was published about that time. It states[124] that it is "*the Government's high-level strategic plan for shaping the future growth and development of our country out to the year 2040. It is a framework to guide public and private*

119 Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General [2020] 2 I.L.R.M. 233.
120 With effect from 7 September 2021, after the date of the Impugned Decisions, and by the Climate Action and Low Carbon Development (Amendment) Act 2021, this obligation was amended to provide in effect that the Board "shall, in so far as practicable, perform its functions in a manner consistent with" an amended list of considerations as follows:
(a) the most recent approved climate action plan,
(b) the most recent approved national long term climate action strategy,
(c) the most recent approved national adaptation framework and approved sectoral adaptation plans,
(d) the furtherance of the national climate objective, and
(e) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.
121 Merriman & Friends of the Irish Environment v Fingal County Council & Ors [2017] IEHC 695 (High Court, Barrett J, 21 November 2017).
122 Ireland 2040 Our Plan – National Planning Framework » The National Planning Framework (npf.ie).
123 NPF p7.
124 See generally §1.1.

investment, to create and promote opportunities for our people, and to protect and enhance our environment…" and "*As a framework document it sets in train a process by which more detailed planning documents must follow: spatial planning, infrastructure planning, social and economic planning. It also outlines certain principles that these plans will have to follow."* The NPF expresses its goals as National Strategic Outcomes ("NSO") to be achieved via National Policy Objectives ("NPO").

65. Regional Spatial and Economic Strategies ("RSES"[125])must support the implementation of, and they and Development Plans must be consistent with, the NPF and its NSOs.[126]

66. Echoing the 2105 Climate Act, the NPF espouses *"a national transition to a competitive low carbon, climate resilient and environmentally sustainable economy by 2050, through harnessing our country's prodigious renewable energy potential."*[127] While no doubt not an exhaustive description of the means of achieving the national transition objective, the prominence of renewable energy is notable in this description. It is one of many references to renewable energy in the NPF. Another states: *"In planning Ireland's future energy landscape and in transitioning to a low carbon economy, the ability to diversify and adapt to new energy technologies is essential."*[128] §7.5 and NPO42 are devoted to offshore renewable energy and elsewhere[129] the NPF states that *"Our transition to a low carbon energy future requires*[130] *…. a shift from predominantly fossil fuels to predominantly renewable energy sources …"*

67. NSO5 of the NPF seeks a "*Strong Economy Supported by Enterprise, Innovation and Skills*". As to "*Digital and Data Innovation*" NSO5 states, inter alia, that:

- "*Data innovation is recognised as important for future growth. Harnessing the potential of the data economy can bring considerable benefits in terms of productivity, new services and knowledge creation*."

- "*Ireland is very attractive in terms of international digital connectivity, climatic factors and current and future renewable energy sources for the development of international digital infrastructures, such as data centres. This sector underpins Ireland's international position as a location for ICT*[131] *and creates added benefits in relation to establishing a threshold of demand for sustained development of renewable energy sources*."

- *"There is also greater scope to recycle waste heat from data centres for productive use, which may be off-site."*

125 As relevant here, the Regional Spatial and Economic Strategy for the Eastern and Midlands Region, 2019.
126 S.10(1A) & S.23 PDA 2000.
127 P12.
128 P77.
129 P122.
130 Inter alia.
131 Information & Communications Technology.

NSO5 will be achieved, inter alia, through "*Promotion of Ireland as a sustainable international destination for ICT infrastructures such as data centres and associated economic activities*."

68. It will be noted that the NPF explicitly states policy favouring data centres and associates it with the general move to renewable energy sources. Government policy, as expressed in the NPF, clearly suggests that these objectives are compatible.

The Data Centre Statement – June 2018

69. Government policy on data centres is also set out in the Government Statement on the Role of Data Centres in Ireland's Enterprise Strategy 2018[132] (the "Data Centre Statement"). Certiorari of this Statement is not sought in these proceedings.

70. The Impugned Decisions record that, in arriving at its decision, the Board had regard, inter alia, to the Data Centre Statement. The Coynes cited it at length but only a relatively brief account is possible here. Inter alia, the Data Centre Statement:[133]

- Records that in October 2017, the Government agreed to a strengthened Strategic Policy Framework for the continued development of data centres in Ireland, as part of objectives for wider economic growth and regional development and reflecting the strategic importance of data centres in Ireland's Enterprise Strategy. The strategic approach aims, inter alia, to "*Drive Ireland's ambition in the digital economy as a location of choice for investment and a seed-bed for technology entrepreneurship across a range of sectors and activities*" and "*align enterprise electricity demand with generation capacity and transmission planning*".

- Outlines the role data centres play in Ireland's ambition to be a digital economy hot-spot in Europe. Data centres are central to the digital economy. Data centre presence in Ireland raises its visibility internationally as a technology-rich, innovative economy. In turn, this places Ireland on the map as a location of choice for a range of sectors and activities that are increasingly reliant on digital capabilities including manufacturing, financial services, animation, retail and global business services. Data centres directly contribute to job creation, and they also generate significant added economic benefit by providing a range of services to other firms that undertake production, research and development, marketing, sales, service, and support activities in locations with no physical/geographic connection to the data centre.

- States that, as large consumers of electricity, data centres pose particular challenges to the future planning and operation of a sustainable power system. The Government recognises these challenges and will take steps to mitigate them.

132 Government Statement on the Role of Data Centres in Ireland's Enterprise Strategy, prepared by the Department of Business Enterprise and Innovation in June 2018.
133 What follows is taken largely from the Executive Summary of the Statement.

- States that a plan-led approach will develop a range of measures to promote regional options for data centre investment, minimising the need for additional grid infrastructure. A balance will be maintained between the distributional impacts of higher energy costs on the economy and the longer term economic impacts of utility-intensive enterprise investment.

- States that the increased renewable electricity requirement linked to energy intensive investments will be mainly delivered by the development of the new Renewable Energy Support Scheme (RESS).

- States that, with a view to ensuring timely decision-making in the planning process, the Government intended to reclassify data centres over certain size thresholds as strategic infrastructure development. (This has not occurred.)

- States that this plan-led approach will allow Ireland to optimise the benefits that these strategically important investments can bring to our society and ensure that Ireland continues to be an attractive and competitive location for digital economy investments.

- States, as to power supply to Data Centres, that "*A consistent and supportive whole of government approach will be brought to the realisation of the transmission and distribution assets required to support the level of data centre ambition that we adopt".*

71. Elaborating on the foregoing, the Data Centre Statement notes the relevant content of the NPF and states that:

- The Data Centre Statement outlines the Government's desire for a plan-led approach to data centres in alignment with the NPF for the '*promotion of Ireland as a sustainable international destination for ICT infrastructures such as data centres and associated economic activities'* and "*provides insights on the economic and societal benefits arising from data centres, while acknowledging the need to consider cost implications, particularly in relation to energy and renewables*."

- Ireland has robust laws governing planning and environmental considerations. Ireland's focus on quality and sustainable growth reinforces our attractiveness as a location for data centre investment by corporations that have a high regard for corporate social responsibility and environmental sustainability over the longer term.

- Companies that have invested (or plan to invest) in data centres in Ireland are involved in other activities including data analytics, customer experience services and technical support. A number have attracted additional activities to Ireland, and have doubled their employment since 2010 to almost 10,000. Direct jobs in data centres are generally well-paid and secure. The presence of a data centre and related economic activities positions Ireland strategically within

the corporation,[134] ensuring that Ireland is continuously considered as a location of choice for additional mobile project investments.

- The development of data centres contributes to enterprise and regional policy objectives and is strategically important element of Ireland's future economic prospects.

- It is important that Ireland retains the ongoing capacity to meet a range of energy intensive industry demands over time.

- Data centres can provide benefits to the electricity system due to their typically consistent, as opposed to 'peaky' demand profile which can provide system support at night.

- *"…….. it is important to acknowledge that data centres pose considerable challenges to the future planning and operation of Ireland's power system. Such challenges arise in terms of renewable energy policy/objectives, generation adequacy including maintaining local and regional security of electricity supply, community acceptance and electricity customer costs. By recognising these challenges, the Government can take steps to mitigate them so that Ireland optimises the benefits that these strategically important investments bring*."

- Additional renewable generation will be required. The National Mitigation Plan provides a framework to guide investment decisions to reduce greenhouse gas emissions. Renewable electricity support schemes (in place and under development) aim to incentivise the growth of renewable electricity technologies. (The then-proposed RESS is cited). It is welcomed that data centre developers emphasise meeting energy requirements from renewable sources, and data centres will likely play a role in creating a market for renewable energy development. Data centres' desire for 'green' electricity supply could stimulate supply and technology innovation in the renewable energy sector that attracts investment in Ireland and increases the pace of transition to low carbon technologies.

- "*A consistent and supportive whole of government approach will be brought to the realisation of the [electricity] transmission and distribution assets required to support the level of data centre ambition that we adopt*."

- As to network investment needs and long-term scenario planning, EirGrid is undertaking consultation on possible energy scenarios having regard to, inter alia, energy and climate change policies. The statement envisages a Renewable Electricity Policy and Development Framework, the primary objective of which will be to maximise the sustainable use of renewable electricity resources shaped, inter alia by the growing renewable electricity demand linked to energy-intensive investments including increased data centre activity.

72. The Data Centre Statement concludes that:

134 Presumably this is a reference to the company which owns or uses the particular data centre.

"The Government endorses, supports and promotes the appropriate and timely delivery of data centres across the regions. It reaffirms that it is Government policy and in the national interest, that these developments are delivered in the most efficient and timely way possible, based on the best available knowledge and informed engagement on their impacts. ……….. while ensuring that our sustainability goals are also reached."

Eastern & Midlands Region Regional Spatial & Economic Strategy June 2019[135]

73. The Impugned Decisions record that, in arriving at its decision, the Board had regard, inter alia, to the RSES.[136] RPO 8.25 of the RSES seeks to support the national objective to promote Ireland as a sustainable international destination for ICT infrastructure such as data centres and associated economic activities at appropriate locations.

Climate Action Plan – June 2019

74. The Impugned Decisions record that, in arriving at its decision, the Board had regard, inter alia, to the Climate Action Plan 2019.[137]

75. The Climate Action Plan 2019 is a non-statutory plan.[138] While not a criticism per se, it is unclear to me why, having mapped in the 2015 Climate Act an intended policy structure to address climate change, the Government appears to have based its strategy (though not entirely) on a non-statutory plan. However it is clear that, within the meaning of S.143 PDA 2000, the Climate Action Plan 2019[139] is in any event relevant Government policy to which the Board must have regard.

76. It is impossible not to be struck by the paucity of reference in the Climate Action Plan 2019 to the Climate Act 2015.[140] Nonetheless, the Board argues, and I accept, that while it (in my view unhelpfully) does not explicitly cite the "National Transition Objective" and its legal basis in the Climate Act 2015, the Climate Action Plan 2019 is in substance an expression of that objective and

135 Adopted 28 June 2019.
136 Adopted pursuant to Part II, Chapter III PDA 2000.
137 "Climate Action Plan 2019 To Tackle Climate Breakdown", published by the Department of Environment, Climate and Communications in June, 2019.
138 An Taisce v ABP & Kilkenny Cheese [2021] IEHC 254: "….it is a non-statutory plan made without a strategic environmental assessment." The Executive Summary of the Plan includes the following: "Under the Programme for Government a Citizens Assembly was established to examine the challenge and it has signposted the way for radical reform. An All Party Committee … held lengthy hearings and has issued a comprehensive set of recommendations. This report has since been unanimously endorsed by the Dáil, while at the same time declaring a Climate and Biodiversity Emergency. This is a strong foundation on which to build a Climate Action Plan committed to achieving a net zero carbon energy systems objective for Irish society and in the process, create a resilient, vibrant and sustainable country. The Government will take the lead on this agenda through this Plan in defining a roadmap to this goal and initiating a coherent set of policy actions to get us there."
139 "Climate Action Plan 2019 To Tackle Climate Breakdown", published by the Department of Environment, Climate and Communications in June, 2019.
140 See pp 39 & 143.

explicitly cites the objective of "*transition to a competitive, low-carbon, climate-resilient, and environmentally sustainable society and economy by 2050*" [141] – phraseology which contains the elements of the definition of the National Transition Objective. The Climate Action Plan 2019 includes the following, which also informs my view:

a. It is "*a Climate Action Plan committed to achieving a net zero carbon energy systems objective for Irish society*".[142]

b. "*the accelerating impact of greenhouse gas emissions on climate disruption must be arrested. The window of opportunity to act is fast closing, but Ireland is way off course … [w]e are close to a tipping point where these impacts will sharply worsen. Decarbonisation is now a must if the world is to contain the damage and build resilience in the face of such a profound challenge*."[143]

c. It cites *"… the proposals contained in this Plan to reduce Ireland's greenhouse gas emissions, …"*[144] and invokes Ireland's "*renewed climate ambition*", stating "*We shall only achieve the transition if we make much greater changes in the way we meet our needs for power, heat, travel, land use, and use of resources*."

d. "*Ireland will support the ambition emerging within the European Union to achieve a net zero target by 2050, the plan commits to evaluate in detail the changes required to adopt such a goal in Ireland. We have also sought a pathway to 2030 which would be consistent with a net zero target by 2050 …*"[145]

e. *"…… continued emissions of greenhouse gases will cause further warming and changes to our climate"* and it refers to the "*limited window for real action to reduce emissions to ensure that current and future generations can live sustainably in a low-carbon and climate-resilient world*."[146]

f. "*This Plan builds on the policy framework, measures and actions set out in the National Mitigation Plan, Project Ireland 2040*[147] *and the draft National Energy and Climate Plan*."[148]

g. "… our clear ambition is to deliver a step-change in our emissions performance over the coming decade, so that we will not only meet our EU targets for 2030, but will also be well placed to meet our mid-century decarbonisation objectives. This Plan underpins this ambition by setting out clear 2030 targets for each sector and the expected emissions savings that will result. … To realise the necessary abatement, we have taken critical policy decisions with the publication of this Plan, including a new commitment that 70% of our electricity needs will come from renewable sources by 2030."

141 P17. See also p8, 10, 16, 17, 23, 30, 43, 48, 54 & 142. This is not a complete list of such references.
142 P8.
143 P8.
144 P9.
145 P10.
146 P15.
147 Reference to Project Ireland 2040 includes reference to the NPF.
148 P16

h. Annual updates to the Plan "*will be informed by the latest analysis, performance against our targets, and any new or corrective actions that we may need in order to stay on track towards our overall 2030 targets and our ultimate objective of achieving a transition to a competitive, low-carbon, climate-resilient, and environmentally sustainable society and economy by 2050. It is the latter two goals that are the most significant: meeting our overall 2030 target, and being on a trajectory towards a low-carbon, sustainable economy by 2050. Therefore, the individual targets and actions in this Plan will be updated and revised each year to ensure we achieve these goals*."[149]

i. The Climate Action Plan 2019 notes[150] that the EU approach to reducing GHG emissions splits them into two categories: those, including emissions from electricity generation, covered by the Emissions Trading System ("ETS"[151]) managed at EU level and the rest – the "non-ETS" (or "Effort Sharing"/"ESR"[152]) sector dealt with by Member States through legally binding targets set at EU Level for emissions reductions.

j. "*The Government supports the adoption of a net zero target by 2050 at EU level. The Climate Action Plan puts in place a decarbonisation pathway to 2030 which would be consistent with the adoption of a net zero target in Ireland by 2050. The Plan also commits to evaluating in detail the changes which would be necessary in Ireland to achieve this target. In 2014 Ireland adopted a National Policy Position for an 80% reduction in* CO_{2eq}[153] *emissions by 2050 compared to 1990 levels for the electricity generation, built environment, and transport sectors.*"[154]

k. It introduces Indicative Sectoral Targets for Ireland to 2030.[155] Electricity generation is to provide the greatest percentage reduction in GHG emissions via closure of coal-fired power plants and transition to wind energy.

l. Chapter 6 of the Climate Action Plan 2019 emphasises the importance of carbon pricing in terms which seem to me broadly reflective of the National Transition Objective. Inter alia, it records, in substance though not in terms invoking the polluter pays principle, that charging a price for carbon emissions, which reflects the growing damage they are inflicting, discourages emissions and makes carbon abatement more profitable. It states:

> *"Carbon pricing will have a key role to play in the transition to a low-carbon economy .. as an important tool for Ireland to achieve its long-term decarbonisation objectives in a cost-effective manner by 2050.*

149 P17.
150 See Climate Action Plan 2019 §2.
151 As set out, in the first place, in the ETS Directive 2003/87/EC and transposed by the European Communities (Greenhouse Gas Emissions Trading) Regulations 2004 as amended, most recently by the European Union (Greenhouse Gas Emissions Trading) (Amendment) Regulations 2020.
152 The "Effort Sharing Regulation" - Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013.
153 GreenHouse Gases are measured in "CO2 equivalents".
154 P23.
155 Figure 4.3.

> *Ireland is one of a minority of countries globally to have already implemented economy-wide carbon pricing through the EU Emissions Trading System (ETS) and the carbon tax. We are committed to carbon pricing as a core element of the suite of policy measures to reduce greenhouse gas emissions in a sustained manner over time. Recent reforms to the EU ETS are working to increase the price signal in that sector, and will complement our initiatives to reduce emissions in the electricity and industry sectors. We are working proactively with our EU partners to ensure the ETS rules are fit for purpose into the future. …"*

m. The Climate Action Plan 2019 introduces[156] the concept of the "*Marginal Abatement Cost Curve for Ireland*" ("MACC") which seeks to graphically identify the most cost-effective means, including by technologies (including fuel switches) and associated levels of adoption, to reduce emissions in line with Ireland's 2030 decarbonisation targets. As was said of the MACC in the **Kilkenny Cheese** case,[157] it reflects Government policy that environmental targets are to be met at lowest economic cost. *"Thus, one can classify potential policy measures on the basis of a curve … ranging from those where the low-carbon option involves costs savings as compared with business-as-usual, ranging to cost-neutral measures, cost efficient measures where there is an economic price tag, but it is less than the cost of carbon credits, and at the top of the curve, cost-prohibitive measures where the cost of reducing a unit of emissions is more than the cost of the equivalent carbon credit."* This necessarily implies national policy choices, balancing environmental and economic considerations, as to how decarbonisation is to be achieved. Broadly, the MACC strongly favours wind power.

77. The Climate Action Plan 2019 devotes Chapter 7 to Electricity. Inter alia, it states:

a. It is important to decarbonise electricity by harnessing our significant renewable energy resources.

b. There is a "*need for a significant step-up in ambition over existing policy, not only to meet our 2030 targets, but to set us on course to deliver substantive decarbonisation of our economy and society by 2050*".

c. 30.1% of electricity was produced from renewable sources in 2017. The target is to increase that to 70% by 2030 - one of the world's highest levels of renewable penetration.[158] Achieving it will be challenging, measures adopted to date will not suffice and it requires a significant step-up in ambition over existing policy to meet our 2030 targets and to deliver substantive decarbonisation of our economy and society by 2050.

d. While decarbonising electricity is at the heart of our strategy and we have a good record of renewable deployment, <u>we have to do it against a background of very rapid projected</u>

156 §4.2
157 An Taisce v ABP & Kilkenny Cheese [2021] IEHC 254.
158 This content from Executive Summary at pp11, 13 & 16. & §7.2 & §7.3.

growth in electricity demand. EirGrid recently projected that by 2027 as much as 31% of Ireland's electricity could be powering data centres. Demand for electricity is forecast to increase by 50% above existing capacity in the next decade in line with economic forecasts.[159]

e. Ensuring we build renewable, rather than fossil fuel, generation capacity to help meet this demand is essential.

f. Our ability to decarbonise our electricity system will be key to our ability to decouple economic growth from emissions growth. While ongoing action on energy efficiency can help offset some energy demand growth, ensuring the deployment of increasing renewable generation capacity will be fundamental to our success.

g. §§7.2, 7.3 and 7.4, as to Targets and Actions, are framed predominantly in terms of decarbonisation of electricity generation (by transition to renewables) rather than in terms of limiting demand for electricity.

h. The Renewable Electricity Support Scheme (RESS) is the key "flagship" policy measure designed to deliver the 70% renewables target, inter alia by "transformative" specific support for offshore wind.

i. §7.4 - "Actions" - cites detailed implementation maps, set out in the accompanying Annex which lists 183 actions, broken down to 619 individual measures to deliver, inter alia, on the 70% renewables target, Ireland's EU 2030 targets net zero emissions by 2050. The Plan states that "*Delivering such an integrated set of actions and policies will require a deep level of collaboration across Government"*. Notably, Action 20 is:

> *"Implement energy actions under the Government Statement on the Role of Data Centres in Ireland's Enterprise Strategy to ensure that large demand connections are regionally balanced to minimise grid reinforcements."*

78. The Climate Action Plan 2019 devotes Chapter 8 to Enterprise. Inter alia, it states:

a. If enterprise is to contribute to the overall objective, and particularly for the Irish ETS sector to meet the EU target of 43% emissions reduction by 2030, relative to 2005 levels, a dramatic turnaround from the sector's recent trend of a 41.2% increase in emissions between 2011 and 2017 is required.

b. Further work will also be required to align the expected rapid growth in energy demand from data centres with grid infrastructure plans.

159 My emphasis.

c. Building on the 2018 Government Policy Statement on The Role of Data Centres in Ireland's Enterprise Strategy, the IDA will seek to ensure new large-scale enterprise investments are made consistent with this Plan and aligned with the build-out of the grid[160] to maximise renewable sources.

79. In light of the foregoing content and in terms of the duty imposed by s.15 of the Climate Change Act 2015, I accept the Board's submission that its having explicitly had regard to the Climate Plan 2019 necessarily implies in substance having had regard to the furtherance of the national transition objective, and the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.

<u>Post-June 2019 – Policy & Progress Reports</u>

80. The stated intention of the Climate Action Plan 2019[161] was quarterly monitoring and delivery reports and annual publication of a progress report, and that the Plan would be updated annually, first in 2020. It does not seem that it was. No doubt for good reason, what ensued were more-or-less quarterly progress reports[162] and a document entitled "Interim Climate Actions 2021".[163] It was described as published to ensure continued domestic climate action while the Climate Action Plan 2021 was being prepared. Interim Climate Actions 2021 replaced the Climate Action Plan 2019 Annex of Actions. The Climate Action Plan 2021 ensued, replacing Interim Climate Actions 2021 and was in turn succeeded by the Climate Action Plan 2023.[164] Frustratingly, given they ought to be readily discernible in all State publications as an automatic matter of good administration, many of these documents do not bear, or obviously bear, publication dates.[165]

81. The Coynes cite the "Climate Action Plan 2019 First Progress Report" as acknowledging that "*The climate crisis is without doubt the defining challenge of our generation"* and that "*To date, Ireland has been a climate laggard, and repeatedly ranked as the worst performing EU member state in the annual Climate Change Performance Index.[166] Progress towards decarbonisation has been slow, though evidence of the climate crisis has never been more pressing or well received."* The Coynes cite the Interim Climate Actions 2021, First Progress Report Q1 2021 May 2021[167] as relevant to my decision as it was the last progress report before the Impugned Decisions. They cite it to the effect that Ireland ranked lowest of 15 comparable EU countries on their delivery of the UN's Sustainable Development Goals on the environmental index, showing that we need to catch up with other countries regarding climate policy implementation.

160 i.e. the National Grid.
161 §5.2 Delivery of the Climate Action Plan.
162 Exhibited from 1st Progress Report, Ireland's Action Plan, 2019 to 3rd Progress Report, Interim Climate Actions, 2021.
163 Not exhibited but cited in Interim Climate Actions 2021, First Progress Report Q1 2021 May 2021. The Interim Climate Actions 2021 is cited as containing 250 climate actions for delivery, broken down into 561 measures.
164 I mention the Climate Action Plans 2021 & 2023 for completeness but they are not here relevant.
165 The period to which a document relates generally precedes the publication date, by a greater or lesser period of time.
166 I am not told what this is or by whom it is published or with what authority. But the general idea is reasonably clear.
167 Interim Climate Actions 2021, First Progress Report Q1 2021 May 2021.

Comment on the Foregoing, Climate Change & Data Centres, Separation of Powers & FIE v Ireland

82. It is inescapable from the NPF, the Data Centre Statement, the RSES and the Climate Plan 2019 that Government policy and objectives, broadly but quite clearly, seek to promote Ireland as a destination for new data centres as a means of "underpinning" Ireland as a location for Information & Communications Technology enterprises. The Coynes fairly and properly accepted that policy was *"the more data centres the better"* (no doubt that exaggerates somewhat) while *"acknowledging the considerable challenges they pose"* and "*while ensuring our sustainability goals are also reached"*.[168]

83. No doubt one could dispute whether or in what degree data centres "underpin" Ireland's attractiveness as a location for Information & Communications Technology. But that is a political and strategic judgement for the Government, not the Courts, to make. I can take judicial notice of the broad proposition that the Government, and many more besides, regard the Information & Communications Technology sector as vital to the national economic interest. To put it crudely, it is Government policy to attract more data centres to Ireland and that policy is grounded in the Government's view that data centres underpin a sector of the economy vital to the national economic interest. It is also Government policy that electricity generation, as to both quantum and the transition to renewable energy sources in furtherance of climate change mitigation, while achieving its own targets, will accommodate itself to that ambition.

84. It is equally inescapable that Government policy seeks to address climate change in a wide variety of ways. While measures such as increased energy efficiency are mentioned, it is quite clear that the Climate Plan 2019 predominantly approaches reduction of CO_2 emissions of electricity generation via its decarbonisation - by transition of the National Fuel Mix towards renewable sources. While policy does advocate energy efficiency there is no suggestion of general or significant reduction or even restriction of overall demand for electricity or of economic growth underlying that demand. Indeed, the Climate Plan 2019 explicitly envisages "*very rapid growth in electricity demand*" – "*by 50% above existing capacity in the next decade*". It is policy to decouple economic growth, not from electricity demand but, via decarbonisation of electricity generation, from emissions growth.

85. In that context it is further clear that Government policy, as stated in the Climate Plan 2019 an d the Data Centre Statement, explicitly recognises the high electricity demand of data centres and the challenges posed thereby. It notes EirGrid's projection that by 2027 as much as 31% of Ireland's electricity could be powering data centres and, far from seeking to restrict development of data centres, envisages the work required to align the expected rapid growth in energy demand from data centres with National Grid infrastructure plans. By noting these challenges in the Climate Plan 2019, Government policy clearly places its favouring of development of Data Centres in the context of its policy to address climate change, the need to reduce GHG emissions and the move to increased renewable electricity generation. It envisages that, as concerns data centres, these issues will be addressed by having the data centres powered by renewable energy, for which additional

168 Transcript Day 2 p28.

renewable energy generation capacity will be required. Indeed, it views data centres as likely to stimulate the market in renewable energy. The reference to EirGrid demonstrates that it is envisaged that power supply to data centres will be, at least in part, from the National Grid.

86. The clear conclusion to be drawn is that it is Government policy that continuing development of data centres is desirable in itself and is not merely reconcilable with but explicitly cited in national climate policy, as expressed in the Climate Action Plan 2019, to the effect that "*rapid growth in energy demand from data centres*" is "*expected*". The policy to cater for that electricity demand, rather than suppress it, is clear.

87. It does not seem to me possible to deny that these are in fact the Government's policies and objectives as to Data Centres. It follows that, by s.143 PDA 2000, the Board must have regard, in performing its functions, to those policies and objectives.

88. EngineNode, my view correctly, characterise the Coynes' application as, without directly challenging or seeking to quash Government policy as to data centres, as found in such as the Data Centre Statement and the Climate Action Plan 2019, to in effect reject or overturn that policy, and conclude that data centres are incompatible with the State's climate change obligations. Ordinarily an applicant in judicial review who specifically complains, as the Coynes in effect do, that the Board not merely had regard to but granted permission in part in furtherance of Government policy to which it must have regard, while not seeking to quash those policies,[169] faces a very uphill task indeed.

89. Doubtless some – few or many, right or wrong - reasonably and vehemently disagree with those policies.[170] Politically, the content of these policies, and their implementation since adoption, is no doubt controversial. It is clear that data centres, as a general proposition, have their proponents and opponents - both, no doubt, often motivated by sincere and reasoned views and the latter emphasising their heavy electricity use as likely to imperil the effort to reduce GHG emissions and address climate change. But, in a representative constitutional democracy, these policies are the Government's to make pursuant to law. In consequence of the constitutional separation of powers, the Courts have no function in reviewing them other than as to their legality as opposed to their merit. Short of irrationality - a concept which has a particular and restricted meaning in the law of judicial review - the Courts have no function in reviewing these policies on their merits. Generally, those who would have them changed must look to Leinster House and Merrion Street, not to the Four Courts.

90. Generally, the attainment of objectives to reduce GHG emissions and address climate change are fundamentally political projects and responsibilities, involving considerable discretion as

169 And I do not suggest the Coynes could have done that.
170 See An Taisce v An Bord Pleanála & Kilkenny Cheese [2021] IEHC 254 §43.

to methods and requiring the democratic validity and imprimatur essential to their acceptance and implementation. The Courts have no role in resolving those disagreements as to policy and, at least broadly, as to methods of policy implementation. Generally (though the line between policy and law is not always bright and they do interact), the Courts' role starts only when the Oireachtas makes policy into law. And as was said in **Kilkenny Cheese**,[171] *"the mere fact that something can be characterised as policy does not give it immunity from judicial scrutiny if .. there is some justiciable standard."* For example, while the Coynes' reliance on the climate change progress reports in their acknowledgment of the importance of the climate change challenge and poor progress in addressing it is interesting background to the present case and could conceivably weigh against discretionary refusal of relief in judicial review, such acknowledgment does not, per se, identify any duties justiciable in these proceedings.

91. By no means is the State's response to climate change a law-free zone. **FIE v Ireland** so demonstrated in that the National Mitigation Plan 2017 was struck down by reference to the requirements of the 2015 Climate Act - essentially for lack of the specificity and transparency and longevity[172] required by, in particular, s.4 of the 2015 Climate Act. Clarke CJ observed that *"Most legislation has some policy behind it."* and *"What might once have been policy has become law by virtue of the enactment of the 2015 Climate Act."* But Clarke CJ significantly observed that *"There are many issues at the level of both policy and practice as to how the problems associated with climate change can, or should, be tackled."* There is great *"room for debate about the precise measures which will require to be taken to prevent the worst consequences of climate change materialising … in determining the measures required, the Government enjoys a very wide degree of discretion."*

92. In rejecting the proposition that there was an unenumerated personal constitutional right to a healthy environment (an issue further addressed below), Clarke CJ in **FIE v Ireland** cautioned against blurring the separation of powers by permitting issues more properly political and policy (for the legislature and the executive) to impermissibly drift into the judicial sphere. If judges identified rights simply because they considered them "a good thing", the separation of powers between the judicial and the other powers of the State would be truly blurred.

93. Finally, and as to the substantive merits of Government policy, just as it is no part of my proper role to disapprove of policy, neither is it my proper role to approve of it. For the avoidance of doubt, I do neither.

171 An Taisce v An Bord Pleanála & Kilkenny Cheese [2021] IEHC 254 §44 & 45.
172 Clarke CJ said: "A compliant plan is not a five-year plan but rather a plan covering the full period remaining to 2050. While the detail of what is intended to happen in later years may understandably be less complete, a compliant plan must be sufficiently specific as to policy over the whole period to 2050."

THE IMPUGNED DECISIONS

94. As stated, the Board granted permission for the Data Centre and did so generally in accordance with the inspector's recommendation. It is to be constructed in a minimum of four phases and the permission will last for 10 years. The Data Centre will primarily comprise four two-storey data storage buildings (identified as DC1, DC2, DC3, and DC4) with a combined floor area of circa 92,172m^2 and a two-storey office building with a floor area of 736 m^2. It will include standby diesel generators to cover power failures.

95. As to matters it considered, the Board's decision contains the "*administrative throat-clearing*" catch-all formula "*charitably dismissed*" by O'Donnell CJ in **Balz**:

> *"In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions."*

96. The Board records that it had regard, inter alia, to the

- National Planning Framework 2018[173] ("NPF").
- Climate Action Plan 2019.
- Government Statement on the Role of Data Centres.
- Relevant RSES.
- Submissions made in the application and appeal.
- Likely consequences for the environment.
- Proper planning and sustainable development of the area.
- Report and recommendation of the Inspector.

Not listed here are the matters to which, by s.15 of the Climate Act 2015, the Board was required to have regard.

Data Centre - EIA

97. In EIA, the Board

- considered that the Data Centre EIAR and EIAR Addendum report and supporting documents submitted by EngineNode were adequate to their purpose and agreed with the Inspector's examination of the information in them and in the submissions made in the application.

173 National Planning Framework - Ireland 2040, published by the Department of Housing Planning and Local Government in February, 2018.

- recorded consideration for this purpose of all submissions and of the inspector's report – with the latter of which it agreed.

- identified and listed what it considered would be the main significant direct and indirect effects of the proposed development on the environment and considered them acceptable
  - In doing so, it did not explicitly identify climate change due to Scope 2[174] CO_2 emissions resulting from the generation of the electric power needed to operate the Data Centre.

- adopted the report and conclusions of the Inspector in itself concluding that, if mitigated as proposed, "*the effects of the proposed development on the environment, by itself and in combination with other plans and projects in the vicinity, would be acceptable*".

<u>Data Centre - Proper Planning & Conditions</u>

98. As to planning matters, the Board considered that "*the proposed development would accord with national, regional and local planning and related policy, would not have an unacceptable impact on the landscape or ecology, would not seriously injure the visual or residential amenities of the area or of property in the vicinity, and …. would, therefore, be in accordance with the proper planning and sustainable development of the area."*

99. Condition 1 of the Data Centre Permission is in the generally usual form. It provides:

> *"1 The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further information received by the planning authority on the 25th day of February 2020, and the documents received by the Board on the 12th day of August 2020, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.*
>
> *Reason: In the interest of clarity."*

Condition 4 provides for the omission of the Energy Centre and the agreement with the planning authority of landscaping of the site of the omitted Energy Centre.

174 I explain this concept below.

100. As has been and will be seen, the documents received by the Board on the 12th of August 2020 included EngineNode's response to the Appeals,[175] the Addendum to the Data Centre EIAR and an AWN[176] report addressing similar subject-matter. They assume omission of the Energy Centre (and provide revised layouts accordingly) and hence assume connection to the National Grid.

The Grid Connection

101. As stated, the Board also granted S.182 Approval for the Grid Connection. It did so generally in accordance with the inspector's recommendation. The list of matters to which it had regard is the same as that listed in its Data Centre decision. Its decision as to EIA is in the same terms as those of the Data Centre EIA, as is that regarding the proper planning and sustainable development of the area.

INSPECTOR'S REPORTS

102. I will refer to the Inspector's reports in more detail in dealing with specific grounds of challenge to the Impugned Decisions. However, it will assist to observe at this point that the Board on 19 May 2021 considered the Inspector's first reports, dated 16 April 2021, in both applications.[177] The Board deferred its decision, requesting that the Inspector "*update*" her reports to provide, inter alia, for an "updated" EIA "*to address the issue of energy/climate including commentary on the Data Centre Addendum EIAR*"[178] and the "*cumulative impact assessment*".[179] Given her first reports post-date and mention the Data Centre Addendum EIAR, and as I am unaware of any documents having come to the Board or any relevant consideration coming to its attention after the date of her reports dated 16 April 2021, it must be inferred that the request to "*update*" the reports was a euphemism for a request to address matters the Board considered inadequately addressed in the Inspector's first reports. Euphemism is not helpful in such circumstances.

103. The Board's directions are laconic as to what updating was required. It must be inferred that someone briefed the Inspector as to the substance of those concerns with a view to enabling the Inspector to address them. I criticise neither the direction nor the briefing, but they have the result that the substance of the Board's concerns as to EIA falls to be discerned from a comparison of the two reports. I will compare them when considering the challenge in that regard. Meanwhile, I will outline certain aspects of the Inspector's second report on the Data Centre.[180] I will address her updated report on the Grid Connection when considering Module C below.

175 By John Spain Associates, Planning Consultants.
176 Consultants to EngineNode – they prepared the EIARs. Their report is at Appendix 3 of the Spain Response dated 12 August 2020 to the Appeals – It is entitled "Response to Environmental Grounds of Appeal Prepared by AWN Consulting".
177 See Affidavit of Pierce Dillon 22 February 2013 §16.
178 As has been stated, the Addendum EIAR was prepared to reflect the omission of the energy centre element of the Proposed Development.
179 The basis on which an update was sought in the Grid Connection application was less extensive, but nothing turns on the difference.
180 Unless otherwise indicated, reference to her reports hereafter are to her second reports.

Inspector's Report 28 May 2021 – Data Centre

104. The Inspector recommended that permission for the Data Centre be granted.[181] She cites[182] reasons and considerations and a proposed decision[183] later echoed in the Impugned Decisions. She notes[184] An Taisce's submissions and Third Party observations raising concerns, inter alia as to energy intensive development, climate change impacts, electricity emissions & renewable energy sources required and as to the EIAR conclusions as to CO_2 emissions.

105. As to Policy,[185] the Inspector notes, inter alia,

- The Climate Action Plan 2019 – citing its identification of risks of climate change, its plan to tackle climate breakdown and achieve net zero greenhouse gas emissions by 2050 and that 70% of all electricity generated will be from renewable sources by 2030.

- The NPF and RSES and the Data Centre Statement – citing their provisions as to data centres cited above and NSO6 as to the creation of a strong economy.

- The Development Plan[186] - which is extensively cited in respects I need not repeat here.

106. The Inspector notes six third party appeals.[187] Those by An Taisce and FIE are recorded as including the following assertions:

- Growth in the storage of electronic data is a major global climate and resource consumption issue. Ireland already hosts a disproportionate amount of Western Europe's data infrastructure.

- Prematurity in advance of the plan contemplated by the plan-led approach envisaged in the Data Centre Statement.

- Excessive power demand.

- Ireland's bid to attract data centres places significant pressure on the National Grid.

- Inadequate EIA – including as to mitigation of carbon impact of development and greenhouse gas impact of energy required, impact on climate mitigation targets for energy and on the security of water supply.

181 §9.
182 §10.
183 She does not by name identify it as such but that is what it is.
184 §3.6 & 3.7.
185 §5.
186 Meath County Development Plan 2013-2019.
187 By 1. An Taisce 2. Group Property Holdings 3. Key Pol Ltd. 4. Amy Coyne 5. Mannix Coyne 6. Friends of the Irish Environment.

- Inadequate consideration of cumulative Impacts of Data Centres, which by 2028 will consume 28% of Ireland's electricity – and which are dealt with on a case-by-case basis. It is insufficient to look at the proposal at a micro level when renewable energy and greenhouse gas targets are set nationally.

- No independent oversight on the fossil gas "lock-in" that the development of new gas dependency in data centres will cause.

The Coyne appeals are recorded as agitating concerns, inter alia, as to

- Energy usage and GHG emissions.

- Impact on climate change, non-compliance with targets for 30% reduction in emissions; with the Runway Information Service/Facebook Data Centre[188], the proposal will increase national CO_2 emissions from 1.8% to 2.5%.

- Ireland is set to miss its EU 2020 emissions target of 20% reduction by achieving only 5%.

- The high price in terms of emissions and energy demand considering very little return in employment terms.

For completeness, it should also be observed that many grounds of objection related to issues not litigated in these proceedings.

107. The Inspector notes EngineNode's response to the Appeals as including that

- Assessment of the cumulative impact of all data centres at national & sectoral levels is the role of SEA and higher-level policies and not to be addressed by a particular proposal.

- GHG emissions will be imperceptible (less than 0.04% of total EU wide ETS[189] market on 2018 figures[190]).

Subsequent submissions are recorded as largely addressed to themes already canvassed including energy demand, GHG emissions, climate impacts and cumulative impacts.

108. The Inspector's Data Centre Planning Assessment[191] is recorded as considered in conjunction with the substation application. As to the principle of development, in the respect here relevant the Inspector notes the Government policies supporting the development of data centres which I have

188 Nearby.
189 See below.
190 See EngineNode's response to the Appeals.
191 §7.

set out above and a very broadly supportive Development Plan economic development strategy zoning of the Site and other policies. Accordingly, the Inspector was "*satisfied that the proposed development of a data storage facility which would comply with relevant national, regional and local planning policy, is acceptable in principle*."

109. The Inspector's Planning Assessment considers "*Climate change, energy demand & omitted energy centre*",[192] in terms I will address when considering the challenge in that regard. I will similarly address the Inspector's report on EIA.[193] As stated, I will address the Inspector's updated report on the Grid Connection when considering Module C below.

MODULES A, B & C

110. The Coynes, for purposes of the trial, helpfully grouped their pleaded Grounds in themed modules,[194] as follows:

- Module A – CO_2 Emissions – Grounds 5, 4 and 6 – EIA & Climate Change Act.
- Module B – Omission of the Energy Centre – Ground 3.
- Module C – Project-splitting - Ground 1 of both Judicial Reviews. This was the only Module in which the judicial review of the Grid Connection approval featured.

MODULE A – GROUNDS 4, 5, & 6 - CO_2 EMISSIONS & EIA

G4, 5, & 6 - CO_2 Emissions & EIA – Introduction

111. Grounds 4, 5 and 6 essentially address the question of CO_2 emissions from the generation of electrical power needed to enable the National Grid to power the Data Centre via the Grid Connection. Essentially, the Coynes say the project was granted permission with only the barest regard to, and no assessment of, the environmental impacts from CO_2 emissions of the Proposed Development.

112. It is not disputed that those CO_2 emissions are GHG emissions. The reduction of GHG emissions at a planetary scale is essential to mitigate climate change. The quantum of GHG emissions from the generation of electricity to power the Data Centre turns on the quantum of power it will draw (which is not in dispute) and on the extent to which that power will be generated by combustion of fossil fuels – essentially gas – or from renewable sources – essentially wind.[195]

192 §7.1.7.
193 §8.
194 This should not be taken to indicate a modular trial. It merely describes the grouping of similar grounds for purposes of analysis and submissions.
195 And, to some extent, solar.

113. GHG emissions are conventionally[196] categorised in Scopes 1, 2 and 3. Scope 1 encompasses the direct emissions of the activity or project under consideration; Scope 2 encompasses indirect emissions of the activity or project from specifically the generation of purchased energy, including electricity; Scope 3 consists of all other upstream and downstream indirect emissions from sources owned or controlled by third parties. This division into "scopes" seems to be for practical purposes and is not legally mandated. But it did provide a considerable part of the framework of analysis used in **Milieudefensie**.[197] It seems useful both as a shorthand description of categories of emission and, in this case, as Scope 2 in effect isolates for identification purposes the posited indirect emissions at issue.

114. While degree of control of emissions will inevitably vary as between emitters, **Milieudefensie** illustrates that Scopes 1, 2 and 3 can, at least sometimes, be differentiated by degree of such control. The Court said:

> *"It is not in dispute that through its purchase policy the Shell group exercises control and influence over its suppliers' emissions. These are the Scope 2 emissions of the Shell group as a whole. This means that through the corporate policy of the Shell group RDS is able to exercise control and influence over these emissions."*

115. So, for example, in the present case, EngineNode submitted to the Board a letter dated 12 August 2020 [198] asking it to give weight to EngineNode's "*ambition .. to contribute to the addition of clean energy to the national grid .. making a positive contribution to Ireland's renewable and low-carbon energy objectives*" and the fact that it was *"actively considering options to source and supply a power supply agreement … with Irish renewable* energy *generators/suppliers".* Such an agreement *"would be sought in the Irish market which is evolving but which we expect to positively develop in line with projected improvements in renewable generation capacity in Ireland over the coming years" would be* "*subject to agreement*" with a renewable energy generator/supplier and would *"be achieved after one or more of the proposed data storage facilities become operational, according to market demand and conditions."* Naturally, such a highly tentative letter did not result in a planning condition on this issue. There is no reason to doubt the bona fides of this letter, or to criticise it for being tentative (for all I know, it may not be practical to be more certain at this point). Its tentative terms do not exclude it from consideration in EIA - an essential element of which is to identify and address uncertainty – though they will inevitably affect any degree of weight and reliance which might be placed upon it or the purpose for which reliance may be placed on it. Indeed, that letter did not explicitly feature in the Inspector's considerations - which assumed power supply from the National Grid in accordance with the National Fuel Mix.[199] To that extent, the Inspector assumed a worse-case, if not a worst-case, scenario.

196 E.g. Climate Action Plan 2021 p72; Milieudefensie et al v Royal Dutch Shell – Hague District Court, 26-05-2021, C/09/571932 / HA ZA 19-379 §2.5.4 citing the World Resources Institute Greenhouse Gas Protocol.
197 Milieudefensie et al v Royal Dutch Shell – Hague District Court, 26-05-2021, C/09/571932 / HA ZA 19-379.
198 EngineNode to An Bord Pleanála 11 August 2020 - Appendix 7 to the Spain Reply dated 12 August 2020 to the appeals.
199 See below.

116. My purpose in mentioning the letter here is to illustrate the point made in **Milieudefensie** as to the potential for difference between the level of control of an emitter over its Scope 2 and Scope 3 emissions and the potential usefulness of that distinction. However, these are only general observations. For example, an emitter may, in particular circumstances, have considerable market power over its upstream suppliers other than of energy, and thereby on their emission-producing activities, even though those suppliers' emissions would be in Scope 3 from the point of view of the emitter under consideration.

G4, 5, & 6 - ETS, Non-ETS/ESR, National Fuel Mix, Incentives and Policy

117. It will assist in understanding what follows, to note[200] that, in its approach to reducing GHG emissions across the EU by 43% by 2030, from 2005 levels, the EU has split GHG emissions into two categories: those covered by the ETS and the rest – the "non-ETS" or "Effort Sharing"[201] sector. The ETS[202] covers emissions from electricity generation and large industry and they are dealt with at EU level.[203] The ETS is a "cap and trade" system. The cap is an EU-wide limit on total ETS emissions which reduces over time by 43% in 2030 as compared to 2005 emissions.[204] Within that cap, emission "allowances" are allocated[205] to emitters which, broadly, use those they need to cover their emissions and can sell any surplus to those whose allowances fail to cover their emissions. They can buy allowances if they are about to exceed their own. The **Milieudefensie** judgment[206] describes the ETS in similar terms and states that *"By creating CO_2 scarcity through the ETS system, the EU aims to reduce in absolute terms the total emissions in its member states. The EU views the ETS system as the cornerstone of its climate policy and as an important tool to cost-effectively limit CO_2 emissions."* The non-ETS sector covers all other GHG emissions – primarily from agriculture, transport, the built environment, and small industry - by way of emission reduction targets binding on Member States. Ireland must achieve a 30% reduction of non-ETS emissions by 2030 (from 2005 levels).[207] The ETS is by no means without its critics as to its effectiveness – see for example **Kingston et al**.[208] But inasmuch as ETS represents the law, such criticisms are essentially political.

118. It will also assist to note the concept of the "National Fuel Mix". This refers to the proportions in which the electricity supplied to the National Grid is generated by different fuels.

200 See Climate Action Plan 2019 §2.
201 The "Effort Sharing Regulation" Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013.
202 As set out, in the first place, in the ETS Directive 2003/87/EC and transposed by the European Communities (Greenhouse Gas Emissions Trading) Regulations 2004 as amended, most recently by the European Union (Greenhouse Gas Emissions Trading) (Amendment) Regulations 2020.
203 In 2019 ETS covered about 45% of EU emissions - about 29% of Irish emissions.
204 Original data Centre EIAR §9.2.1.
205 By auction or allocated for free (outside the power-generation sector).
206 Milieudefensie et al v Royal Dutch Shell – Hague District Court, 26-05-2021, C/09/571932 / HA ZA 19-379. §4.4.45. See further below.
207 See the "Effort Sharing Regulation (ESR)" - Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013.
208 Kingston et al, European Environmental Law, Cambridge, 2017 p289 et seq

Some fuels are renewable (e.g. wind) and some not (e.g. coal). As part of the national response to climate change, the plan is to shift those proportions considerably in favour of renewables over time, to a 70/30 split in favour of renewables by 2030. So the National Fuel Mix is expected to vary over time. Ceteris paribus[209] and as the Data Centre is to be powered from the National Grid, the CO_2[210] emissions associated with powering the Data Centre will be a function of the National Fuel Mix and decrease as that mix transits to renewable.

119. These proceedings are not concerned with non-ETS targets as to electricity generation – the only posited source of CO_2 emissions due to the Data Centre are covered by the ETS. As ETS limits imposed at EU level reduce over time, in accordance with a schedule set by it, Ireland will either have to adjust its National Fuel Mix towards renewable generation to avoid exceeding its allowances or it will be forced to buy allowances from those who more successfully have done so and have a surplus of ETS allowances. This incentivises Ireland to adjust its National Fuel Mix towards renewable generation. Ireland's policy commitment to that adjustment is clear.

G4, 5, & 6 - EU Climate Change in EIA Guidance 2013

120. I have outlined above the genesis and content of the 2014 EIA Directive as to climate change. Between its 2012 proposal to amend the EIA Directive, in part to better address climate change, and the adoption of those amendments by the 2014 Directive, the EU Commission in 2013 issued "*Guidance on integrating climate change and biodiversity into EIA*" (the "EU Climate Change in EIA Guidance 2013"). That guidance was not pleaded as relied upon by any party nor exhibited but was cited in the EngineNode reply of 12 August 2020 to the Appeals[211] and was discussed at trial. In addition, the 2017 EPA Draft Guideline on EIAR Content, as to climate, commends the EU Climate Change in EIA Guidance 2013 to the reader - as do the finalised 2022 EPA Guidelines on EIAR Content[212] published after the Impugned Decisions and before trial in this case. Accordingly, I will briefly consider some of the 2013 EU Guidance.

121. In **MRRA**[213] it was observed that such EU Commission Guidance is not, and does not purport to be, binding[214] nor an aid to interpretation of the EIA Directive nor even necessarily the official opinion of the Commission. But the DoHPLG[215] **EIA Guidelines 2018**,[216] issued under **S.28 PDA 2000** – such that the Board must "*have regard*" to them – identify "*Other important guidance documents that should be consulted*" as including the 2017 EPA Draft Guideline on EIAR Content and three 2017

209 Leaving aside, for example, the possibility that agreements with power suppliers will result in the Data Centre being powered by renewable sources to a greater degree than that reflected in the National Fuel Mix.
210 Carbon Dioxide.
211 §5.16 & 5.17.
212 P31
213 Monkstown Road Residents' Association v An Bord Pleanála & Others including Lulani Dalguise Limited [2022] IEHC 318
214 E.g. Ui Mhuirnin v Minister for Housing Planning and local Government [2019] IEHC 824 (High Court, Quinn J, 5 December 2019)
215 Environmental Impact Assessment – Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment (2018; DoHPLG).
216 §1.14.

EU Commission EIA Guidance documents.[217] Their aim is to provide "*practical insight*" "*for use by Competent Authorities, Developers, and EIA practitioners*".[218] It was observed that in those circumstances it is unsurprising that such Guidelines are widely considered likely to reflect EIA law and as at least indicative of good practice in its implementation. Also, the Supreme Court in **FIE v Ireland**[219] Baker J took the view that Commission Guidance on SEA[220] *"….. is undoubtedly a document of high importance, and it was prepared with the aim of helping Member States to implement the Directive so as to meet its requirements, and gain the benefits expected from it."*

122. Accordingly it seems to me that one may at least consider Commission Guidance of this kind as a reputable view, akin to that to be found in a legal textbook or learned article. Possibly that is too timid a view, but it suffices for present purposes. Here is not the place for analysis of the legislative history and context of the Directive and comparison of the Commission's 2012 proposal, the 2013 Guidance and the outturn by way of the 2014 EIA Directive and any extent to which the Directive differed from the proposal. However, as the 2013 Guidance was based on the 2011 Directive and as the 2014 Directive amplified or made explicit, rather than shrank, the obligation to assess climate change in EIA, it seems generally unlikely that the 2013 Guidance overstates the practical implications of the 2014 Directive.

123. The EU Climate Change in EIA Guidance 2013 states that the impact of the project on climate and climate change (i.e. mitigation aspects) should[221] be considered in EIA.[222] **Table 6** lists examples of main climate change and biodiversity concerns to consider in EIA - including "*indirect GHG emissions due to increased demand for energy*". Under the heading "*Understanding Key Climate Mitigation Concerns*"[223] the 2013 Guidance states:

> *"When it comes to mitigation, the main concerns focus on GHG emissions. Implementing a project may lead to, for example: …….*
> *• an increase in energy demand leading to an indirect increase in GHG emissions; …….*[224]

124. **Table 7** of the 2013 Guidance lists examples of "*basic questions that could be asked by EIA practitioners when identifying major climate change mitigation concerns*" and includes:

Main concerns related to:	Key questions that could be asked at the screening and/or scoping stage of the EIA

217 On, respectively, Screening, Scoping and EIAR preparation.
218 Monkstown Road Residents' Association v An Bord Pleanála & Others including Lulani Dalguise Limited [2022] IEHC 318 §115 citing, by way of example, EU Commission Guidance on EIA Screening 2017, p10 – Preface.
219 Friends of the Irish Environment CLG v Government of Ireland [2022] IESC 42 (Supreme Court, Baker J, 9 November 2022).
220 Strategic Environmental Assessment.
221 By which is means "must".
222 P29.
223 P29 §4.1.2.
224 The text continues: "This guidance does not include any specific methodologies for calculating GHG emissions as part of the EIA procedure. However, Annex 3 provides links to carbon calculators and other methodologies, including to the methodology for calculating absolute and relative GHG emissions piloted by the European Investment Bank (EIB)." The EIB tool assesses the carbon footprint of projects it finances. Most EIB projects emit GHGs into the atmosphere, either directly or indirectly through purchased electricity and/or heat. Also, GHG emission calculators are generally based on GHG equivalents for certain indicators, such as energy consumption.

Indirect GHG emissions due to an increased demand for energy	• Will the proposed project significantly influence demand for energy? • Is it possible to use renewable energy sources?

Table 10 lists examples of alternatives and mitigation measures related to climate change mitigation concerns and includes:

Main concerns related to:	**Examples of alternatives and mitigation measures**
GHG emissions related to energy	…….. • Make use of renewable energy sources.

Very generally, these examples suggest the relevance in EIA, in considering climate change issues in cases such as the present, of State policy to transition to renewable energy generation.

125. As to "*Assessing Significant Effects*"[225] the 2013 Guidance states that many assessment approaches used in EIA have the capacity to address climate change.[226] "*There are, however, three fundamental issues that you should consider when addressing climate change and biodiversity: the long-term and cumulative nature of effects, complexity of the issues and cause-effect relationships and uncertainty of projections."* There follows a consideration of all three issues, the premise of which is that EIA should address them. I would add that this premise must itself be premised on climate change having been scoped into the EIA as a likely[227] significant effect.

126. The 2013 Guidance states that EIA, to properly address climate change, should take into account its complexity (including of causal relationships) and long-term direct and indirect impacts and consequences. EIA should describe the sources of, and characterise the nature of, uncertainty.[228] Judging an impact's magnitude and significance must be context-specific. The contribution of an individual project to GHGs may be insignificant on the global scale but may be significant on the local/regional scale, in terms of its contribution to set GHG-reduction targets.[229]

127. Finally, it is worth noting[230] some of the "bullet points" tabulated in 2013 Guidance as "*Critical challenges for addressing climate change … in EIA*":

- *Manage complexity. Consider the complex nature of climate change and biodiversity and the potential of projects to cause cumulative effects.*

225 §4.4.
226 Annex 3 lists several tools and approaches used or piloted to support EIA assessment.
227 In the attenuated sense in which EU EIA Law uses the word "likely" for EIA scoping purposes.
228 The Guidance records that the European Climate Adaptation Platform: CLIMATE-ADAPT offers Uncertainty Guidance.
229 P40.
230 Slightly edited.

- *Be comfortable with uncertainty, because you can never be sure of the future. Use tools such as scenarios (for example, worst-case and best-case scenarios) to help handle the uncertainty inherent in complex systems and imperfect data. Think about risks when it is too difficult to predict impact.*

- *Base your recommendations on the precautionary principle and acknowledge assumptions and the limitations of current knowledge.*

- *Be practical and use your common sense!*

The guidance also states that *"considering a range of possible uncertain futures and understanding the uncertainties is part of good EIA practice and permits better and more flexible decisions."*[231]

In other words, it is no error to acknowledge and assess uncertainty and risk as best you reasonably can. Error may well lie in ignoring them.

G4, 5, & 6 - The EIARs as to GHGs, CO_2 & Climate Change

128. As to the requirements of **Articles 3 and 5 and Annex IV of the EIA Directive**, and as will be seen, the application documents and the Inspector's report in this case explicitly describe and quantify the "*energy demand*" of the Data Centre and the "*nature and magnitude"* of its GHG emissions as allegedly indirectly resulting from power generation.

129. It seems to me of some importance to note that, as has been seen, by **Article 5** what is required of an EIAR is that it *"include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment."* In **Abraham**,[232] AG Kokott noted that while a Member State's discretion is not unlimited in this regard, *"It is true that the information under Article 5(1) and Annex III is necessary only where the Member States consider that the information is relevant and that a developer may reasonably be required to compile that information."* In **IL v Land Nordrhein-Westfalen**[233] AG Hogan expressed this in the phrase, "*within the limits of what may reasonably be required of a private operator".* In **Namur-Est**[234] the CJEU said that the developer must supply the information specified in Annex IV, in so far as relevant to the case and *"the developer may reasonably be required to compile it".* It must follow that any investigative obligation on the Board must similarly be limited by what is reasonable. Although, what could be reasonably expected of the Board may differ from what could be reasonably expected of a developer and, at least in principle,

231 §4.4.3. It also cites the European Climate Adaptation Platform: CLIMATE-ADAPT as offering Uncertainty Guidance as to adaptation to climate change.
232 Case C-2/07 Abraham and Others [2008] ECR I-1197.
233 Case C-535/18.
234 Namur-Est Environnement ASBL v Région Wallonne, Cimenteries CBR SA, Case C-463/20 §8. See also Larkfleet Ltd v South Kesteven DC [2014] EWHC 3760 (Admin).

what could reasonably be expected of one developer may differ from what could reasonably be expected of another.

The Original Data Centre EIAR – October 2019

130. The Original Data Centre EIAR considered the proposal as including the then-intended on-site gas-powered Energy Centre so its premises, as to CO_2 emissions, no longer apply. However, the Coynes rely on that EIAR in some respects and the following are notable.

131. **§9** addresses climate change. It briefly describes the international agreements and targets in that regard - including EU targets for GHG emission reduction.[235] It identifies a potential impact to climate during the operational phase of the Data Centre in the form of an increase in CO_2 emissions leading to an exceedance of Ireland's annual emissions allocation under EU Decision 2017/1471.[236]

132. As to predicted impacts on climate, **§9.8.2.2** of the Original Data Centre EIAR[237] asserts inter alia that

- the Proposed Development was designed to minimise impact on climate.
- based on the 2016 National Fuel Mix,[238] and assuming the then-intended on-site natural gas-powered Energy Centre, the Data Centre would produce 0.54% of Ireland's CO_2 emissions at 2017 emission rates[239] – which it characterised as not significant.
- *"Overall, the impact to climate as a result of the proposed development will be negative, long-term and imperceptible."*

133. The Original Data Centre EIAR also asserts that:

> *"Cumulative climate impacts will occur as a result of the facilities energy requirements. The Runways Information Services Limited development is supplied from the National Grid and a standard national fuel mix based on 2016 data has been used in this assessment. The CO_2 emissions from electricity to operate the facility will not be significant in relation to Ireland's national annual CO_2 emissions. Together, the proposed development and the Runways Information Services Limited development (including the operational site and recently permitted and under construction development) will consume 180MW of power each. This will result in a cumulative 3,154 GWh annually. This translates to approximately 1.1 Mt of CO_2eq per year. This equates to a cumulative impact that is approximately 1.8% of Ireland's national annual CO_2 emissions ……….. If the proposed development was to be supplied from the National Grid rather than the on-site energy centre, the cumulative CO_2 emitted would increase to 1.5*

235 §9.2.1.4 Climate Agreements.
236 §9.5.2.2 - Commission Decision (EU) 2017/1471 of 10 August 2017 amending Decision 2013/162/EU to revise Member States' annual emission allocations for the period from 2017 to 2020.
237 §9.8.2.2.
238 i.e. reflecting the proportions of renewable and non-renewable electricity generation.
239 citing 'Ireland's Final Greenhouse Gas Emissions 1990 — 2017 (EPA, 2018).

> *Mt CO_2eq which would equate to approximately 2.5% of Ireland's national CO_2 emissions. This is considered a long-term, negative and imperceptible impact on climate."* [240]

Notably, this figure of 2.5% of Ireland's national CO_2 emissions for the cumulation of the Data Centre and the RISL/Facebook Data Centre was based on both being supplied from the National Grid and on the 2016 National Fuel Mix which, as relates to the transition to renewable energy sources since 2016, is likely to be appreciably out-of-date. No-one has suggested any greater cumulative figure.

EngineNode's Responses to Appeals - 12 August 2020

134. EngineNode's response to the Appeals[241] is dated 12 August 2020. It is accompanied by, inter alia, the Addendum to the Data Centre EIAR and by an AWN[242] Report of the same date addressing similar subject-matter. I note that they assume the omission of the Energy Plant and, hence, assume connection to the National Grid.

<u>AWN Report</u>

135. The AWN Report responds to submissions by An Taisce and Amy Coyne to the effect that:

- A 0.54%[243] impact on Ireland's CO_2 emissions is not imperceptible.
- Cumulative impacts include the impact of all data centres in Ireland, and not just the adjacent RISL facility.
- The Data Centre is non-compliant with Ireland's commitment to EU targets for emissions reduction of 30% relative to 2005 emissions.[244]

136. AWN responds as follows:

- Electricity providers form part of the EU-wide GHG Emission Trading Scheme (ETS) set up by the ETS Directive.[245] Their GHG emissions are excluded in determining compliance with the targeted 30% reduction in the non-ETS sector - i.e. electricity-associated GHG emissions do not count towards the EU Effort Sharing "Decision"[246] target (that Ireland reduce its <u>non-ETS</u>

240 §9.10.2 p25.
241 By John Spain Associates, Planning Consultants.
242 Consultants to EngineNode – they prepared the EIARs.Consultants to EngineNode – they prepared the EIARs. Their report is at Appendix 3 of the Spain Response dated 12 August 2020 to the Appeals – It is entitled "Response to Environmental Grounds of Appeal Prepared by AWN Consulting".
243 This had been the impact assuming the Energy Centre. Its omission increases the figure to 0.97%.
244 In fact the 30% target is for non-ETS emissions – see Original Data Centre EIAR §9.2.1.
245 Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC.
246 This appears to be a reference to Regulation 2018/842 – known as the "Effort Sharing Regulation". Its title is Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013.

emissions by 30% from 2005 levels by 2030[247]). Any increase in electricity generation due to data centres will not impact Ireland's meeting the EU Effort Sharing Decision. There follows a brief explanation of ETS as it relates to power generation and the compulsory use of ETS revenues (at least 50% of such revenues and, in practice, more) to address climate change.

- On 2018 figures, the Data Centre's CO_2 emissions will be less than 0.04% of the total EU-wide ETS market - which is imperceptible.

- Wider Irish energy policy to 2030 envisages emissions from the energy industries sector decreasing by 34% - including increasing renewable energy generation[248] to about 70%[249] of electricity consumption. This is predicted to reduce CO_2 emissions by electricity generation from 331 gCO_2/kWh in 2019[250] to 100 gCO_2/kWh in 2030.[251]

- Data centres are typically significantly more efficient than on-premises servers (up to 84% by some calculations) and the associated GHG savings are not included in the GHG emissions total. (EngineNode's response repeats this assertion[252])

- Overall, it is predicted that data centres will peak at 2.2% of total Irish GHG emissions[253] in 2024 and will fall or level off thereafter.[254]

Spain Response

137. §3 of EngineNode's response[255] sets out the planning policy context.[256] §4 requests the omission of the Energy Centre for reasons including to allay concerns stated in the Appeals. §5 sets out the substantive responses and §5.3 et seq addresses "*Energy Use and Climate Change (Including Cumulative Impact)*". It includes the following:

a. An Taisce and Friends of the Irish Environment ("FIE") argue that data storage permissions are being granted on a case-by-case basis, without addressing wider cumulative impacts in terms of energy use. They focus on the cumulative assessment of secondary effects arising from energy usage and demand precipitated by data storage facilities.

247 This is taken from the EngineNode response, not the AWN document, but is implied by AWN and it is convenient to note it here.
248 Mainly by wind energy.
249 Up from an assumed 36.3% in 2020.
250 Assuming a typical fuel mix for that year.
251 The Addendum EIAR (§9.2) cites a figure of 375 gCO2/kWh in 2018. Whether that is a discrepancy or is accounted for by progress in moving to renewables as between 2018 and 2019 is unclear. While I suspect it is a discrepancy, that is not for me to decide and there is no evidence that any such discrepancy undermines the general point that the carbon intensity of electricity generation is expected to reduce by a divisor of 3+.
252 Citing US research to the effect that cloud-based datacentres can achieve 3.6 times the energy efficiency of more distributed and fragmented enterprise datacentres due inter alia to a more efficient and complete utilisation of servers, leaner electricity infrastructure, and more recent server technologies.
253 Includes but not limited to CO2.
254 While it is not a criticism, it bears noting that this is from an industry, not a regulatory, source - Host In Ireland (May 2020) Ireland's Data Hosting industry 2020 Q1 Update.
255 By John Spain Associates, Planning Consultants.
256 As including the NPF, the RSES and the Development Plan.

b. The assertion of case-by-case grants of permission is disputed - both generally and as applicable to the Proposed Development. Such permissions have reflected an approach balanced between site-specific factors, environmental considerations and national, regional, and local planning policy,[257] which supports delivery of ICT infrastructure including data storage facilities.

c. Various regional and national plans and programmes that set the framework for local planning policy and development consent applications (including for data storage facility proposals) have been subjected to SEA.

d. There is a significant number of non-minor sources of carbon emissions in Ireland and the approach advocated by the An Taisce appeal, as to cumulative effects at national and sectoral scales, is principally the role of SEA and higher-level policies. It is not relevant for EIA of projects. It would require an extremely onerous, open-ended and spiralling series of assessments and measurements not mandated by the EIA Directive.

e. Contrary to An Taisce's contention, nothing in the EIA Directive required the EIAR to assess, by way of a national or sectoral approach, the cumulative impacts of the proposals in combination with developments as geographically disparate as all data centres in Ireland.

f. The Opinion of AG La Pergola in **Case C-392/96 Commission v Ireland** is cited for the proposition that there must be a manageable geographic limit to cumulative assessment - involving projects in reasonable geographic proximity to each other. **Case C-404-09 Commission v Spain** (the "Alto Sil/Brown Bear" case) is cited to the effect that it was critical in that case that the three open-cast mines were near each other and for a "condition" of proximity which served an important purpose relevant to the Directive[258] - by enabling the identification and measurement (cumulatively) of effects on specific environmental factors.[259]

g. The EU Climate Change in EIA Guidance 2013 is cited as to the challenges of addressing climate change and biodiversity in EIA, given the complexity of climate change and the uncertainties of identifying cause-effect relationships as they bear on what a developer can realistically provide as to climate change. Hence the emphasis in guidance on providing the information that is available to developers. This will include information such as the direct GHG emissions of the project (as provided) and other proximate sources (in terms of climate, it is appropriate to review the nearby facility[260]) as well as the national GHG emissions and reduction targets. EngineNode have met this requirement.

h. EngineNode cites the AWN Report
   - as justifying the EIAR to the effect that the impact of the proposed development will "*equate to an overall long-term negative and imperceptible impact on climate*".

257 Summarised in §3 of the response as including the NPF, the RSES and the Development Plan.
258 As will be seen, I do not accept this characterisation of those decisions.
259 e.g. a specific population of flora or fauna in a region, a host habitat, a transit route, a critical area or environmentally sensitive location etc.
260 I take this to be a reference to the RISL/Facebook Data Centre.

- as to the ETS/non-ETS distinction and also asserts that, in terms of the EU-wide ETS and in broader climate terms, the impact of the Proposed Development will be imperceptible at 0.02% of the EU ETS market – assuming inclusion of the Energy Centre.

i. EngineNode responds[261] to An Taisce's assertion of a disproportionate concentration of the world's data centres in Ireland by citing strong Government policy to attract data centres to Ireland and the competitive advantage of northern Europe for their location. This relates in part to the mild climate, which reduces heating and cooling requirements. Ireland is an optimal location for data centres – including optimal as to their carbon demand. It cites precedent planning decisions to the effect that data centres' economic and employment creation benefits outweigh any negative environmental impacts and cites IDA research in 2018 recording that data centre development has contributed significant employment and €7.13 billion to the Irish economy since 2010.

j. EngineNode[262] reminds the Board of its obligation under s.15 of the Climate Act 2015 to have regard to the matters listed therein and of the quashing of the National Mitigation plan by the Supreme Court.[263] It cites the Dublin Airport Runway case[264] for Barrett J's view of the "*very limited obligation*" imposed by s.15.

k. EngineNode concludes that the Board can uphold the Data Centre planning permission while having due regard to the 2015 Act.

138. As has been stated also included with EngineNode's response to the appeals is the letter from EngineNode to the Board dated 12 August 2020 to the effect that it "*is actively considering options*" to source renewable energy for the Data Centre. I repeat that I have no reason to doubt the bona fides of the ambition and intention stated in this letter. Indeed, I imagine that, on its (disputed) premise of the operation of the Data Centre, all protagonists would agree with it as entirely creditable. However that EngineNode "*is actively considering options*" falls far short of a commitment, enforceable in planning law, to sourcing only renewable power for the Data Centre. That is far from a criticism of the letter[265] nor do I suggest it is irrelevant in EIA – it is merely that, it is difficult to see what weight might be given to it, by the Board in a regulatory process, or in these proceedings. The Board's analysis was properly based on the prospects for the National Fuel Mix rather than on the ambitions and intentions disclosed. In fairness, the contrary was not argued.

261 §5.40 et seq.
262 §5.55 et seq.
263 Friends of the Irish Environment v Ireland, Supreme Court, [2020] 2 I.L.R.M. 233.
264 Merriman & Friends of the Irish Environment v Fingal County Council & Ors [2017] IEHC 695 (High Court, Barrett J, 21 November 2017).
265 And that agreements would not yet be in place between EngineNode and renewable energy power suppliers is entirely understandable - perhaps even inevitable.

EIAR Addendum August 2020 (Data Centre)

139. The EIAR Addendum notes that, with the omission of the Energy Centre, the Site will be powered from the National Grid.[266] §9.2[267] considers CO_2 emissions and includes the following:

- Electricity will be purchased from energy suppliers including power stations and renewable generation sources such as wind power.

- There will be indirect CO_2 emissions associated with electricity to power the Site. Those CO_2 emissions will not be significant in relation to Ireland's national annual CO_2 emissions.

- The Data Centre will ultimately consume up to 1,577 GWh of electricity annually. Assuming the 2018 National Fuel Mix, which produced 375g CO_2/kWh,[268] this translates to approximately 591,300 tonnes of CO_2eq per year.[269] Latest EPA figures[270] indicate that total CO_2 emissions in Ireland were about 60.93 million tonnes CO_2eq in 2018. So the Data Centre will contribute about 0.97% of Ireland's CO_2 emissions - assuming the 2018 National Fuel Mix.

- However, as the percentage of renewable energy in the National Fuel Mix increases from 2018, such that its CO_2 emissions will decrease from 375g CO_2/kWh in 2018 to 100gCO_2/kWh in 2030,[271] the Data Centre's indirect CO_2 emissions will likewise decrease.[272]

- Importantly, as electricity providers are in the ETS to 2030 at a minimum, their GHG emissions are not covered by the targeted reduction in the non-ETS sector and so will not affect whether Ireland meets its non-ETS (i.e. "Effort-Sharing") target.

140. The foregoing considers and analyses the Data Centre's indirect CO_2 emissions exclusively in terms of the ETS to 2030. It does not consider their substantive environmental effect on global warming and climate change. It is also notable that it treats these Scope 2 GHG emissions, in themselves, as indirect effects for EIA purposes.

141. §9.3 of the Addendum to the EIAR as to CO_2 emissions[273] considers cumulative impacts of the operational phase of the Data Centre solely in terms of GHG emissions from the operation[274] of

266 The backup diesel generators associated with the data halls will be used for very limited scheduled testing and highly infrequent emergency operation.
267 Amending §9.8.22 of the original EIAR.
268 The AWN Document of 12 August 2020 (see above) cites a figure of 331 gCO2/kWh in 2018. Whether that is a discrepancy or is accounted for by progress in moving to renewables as between 2018 and 2019 is unclear. While I suspect it is a discrepancy, that is not for me to decide and there is no evidence that any such discrepancy undermines the general point that the carbon intensity of electricity generation is expected to reduce by a divisor of 3+.
269 This is not in dispute. It is based on a 2019 Sustainable Energy Authority of Ireland report 'Energy In Ireland' which states the average CO2 emission factor for electricity generated in Ireland in 2018, assuming a typical fuel mix in the national power generating portfolio was 375 gCO2/kWh.
270 Environmental Protection Agency - 'Ireland's Final Greenhouse Gas Emissions 1990 – 2018' (EPA, 2020).
271 This 100g figure is taken, not from the EIAR Addendum, but from AWN document 12 August 2020.
272 I infer that the level to which this refers is the absolute level rather than the percentage of Ireland's CO2 emissions.
273 Amending §9.10.2 of the Data Centre EIAR.
274 i.e. emergency operation and scheduled testing.

the standby generators in the Data Centre and the neighbouring RISL/Facebook data centre. They are clearly of little consequence. It does not consider any question of cumulative impact of indirect CO_2 emissions associated with electricity to power the Site with other sources of CO_2 emissions. As recorded above, these were considered in the original Data Centre EIA based on the 2016 National Fuel Mix and to the effect that *"If the proposed development was to be supplied from the National Grid rather than the on-site energy centre, the cumulative CO_2 emitted … would equate to approximately 2.5% of Ireland's national CO_2 emissions. This is considered a long-term, negative and imperceptible impact on climate."* [275] No-one has suggested any greater cumulative figure.

G4, 5, & 6 - Inspector's Reports

142. I have described above the Board's Order as to its Data Centre EIA. For reasons explained above, the substance of the Board's concerns as to EIA fall to be discerned from a comparison of the Inspector's two reports in the Data Centre Application dated 16 April 2021 and 28 May 2021 respectively.

143. §5 of the Inspector's first Data Centre Report addresses the policy context. It suffices to consider §5 of the Inspector's second Data Centre Report in that regard. I have described and analysed that policy context earlier in this judgment. The inspector considers:

- The **Climate Action Plan 2019**. She notes that it seeks to tackle climate breakdown and achieve net zero GHG emissions by 2050 and includes a commitment that 70% of all electricity generated will be from renewable sources by 2030.
- The **NPF 2018**. She notes that it seeks to support the development of ICT[276] infrastructure, with particular reference to data centres. She cites NSO5[277] as seeking to create a strong economy supported by enterprise, innovation and skills which is underpinned by a range of objectives related to job creation, enterprise and innovation.
- The **Eastern & Midlands Region RSES 2019**. She cites it as seeking to support the development of ICT infrastructure. She cites RPO 8.25[278] as seeking to promote Ireland as a sustainable international destination for ICT infrastructure such as data centres and associated economic activities at appropriate locations.
- The **Data Centre Statement 2018**. I have referred to its content above. Inter alia, the Inspector notes the intention to deliver "*the increased renewable electricity requirement*".
- The **Development Plan** – inter alia as to the zoning of the Site as allowing for such as Data Centres.

275 §9.10.2 p25.
276 Information & Communications Technology.
277 The Inspector refers to NSO6 but as she specifies its content it is clear that she intends NSO5.
278 The Inspector refers to RPO8.23 but as she specifies its content it is clear that she intends RPO8.25.

144. §7 of the Inspector's first Data Centre Report sets out her "Planning Assessment". It includes the following:[279]

"Climate change: The concerns raised by several parties (incl. An Taisce, Friends of the Irish Environment, Mannix Coyne & Amy Coyne) in relation to the perceived conflict in government policy in relation to dealing with climate change and the promotion of energy dependent technology developments (incl. data centres) are noted. Although data centre energy usage is acknowledged, I am satisfied that this issue will be addressed as Ireland moves towards meeting its objective of providing 70% of its energy from renewable sources by 2030.

Cumulative impacts: The concerns raised by several parties (incl. An Taisce & Friends of the Irish Environment) in relation to the consideration and assessment of cumulative impacts on a national and regional scale with respect to a number of issues (incl. climate change mitigation targets, energy consumption, water resources & data centres) are noted. However, I would not concur with this view and I am satisfied that the assessment of cumulative impacts in-combination with other plans and projects in the surrounding area is appropriate.

Energy centre omission: Concerns were raised that the energy centre would have been used as a source of power for the early stages of the development and the applicant has not indicated an alternative source consequent on its omission. It is noted that the data centre would be connected to the national grid via the proposed substation and transmission lines (ABP-308130-20)."

145. **§7** of the Inspector's second Data Centre Report sets out her "Planning Assessment". It includes **§7.1.7** which reads, in part as follows:

"Climate change, energy demand & omitted energy centre".

The data centre would be connected to the national grid via the concurrently proposed substation and transmission lines (ABP-308130-20). Under the original proposal to MCC a proportion of the energy required to serve the facility would have been generated by the on-site energy centre, however the applicant subsequently requested its omission in response to the Third Party appeals. It is noted that the proposed development would continue to provide 80 x standby/ backup generators in the 4 x data centre blocks irrespective of the energy centre omission.

The concerns raised by several parties (incl. An Taisce, Friends of the Irish Environment, Mannix Coyne & Amy Coyne) in relation to the perceived conflict in government policy in relation to dealing with climate change and the promotion of energy dependent technology developments (incl. data centres) are noted. The further concerns raised by several parties (incl. Mannix Coyne, Amy Coyne, Key Pol Ltd. & An Taisce) in their response to the omission of the energy centre are also noted. They state that the development will have a high demand for energy

279 §7.1.7 entitled "Other issues".

and that the applicant has not indicated an alternative energy source consequent on the omission of the data centre. They state that this could result in a substantial increase in demand for electricity, over and above what was anticipated in the original application, and that this fundamental change should warrant a refusal of permission.

I acknowledge that data centre energy usage can be significant, and that the omission of the energy centre could result in an increase in demand for electricity from the national grid. The original EIAR (section 2.3.1) stated that that the energy would be sourced from (a) the national grid, (b) the energy centre, or (c) a combination of both, and that the energy centre would contain 16 x 10MW gas fired generators. Section 9.8.2.2 stated that the development would consume up to 180MW of electrical power which equates to c.1,577 GWh per annum. The Data Centre Addendum EIAR (section 9.8.2.2) reaffirmed the energy consumption figures and confirmed that following the omission of the energy centre the facility would be entirely powered by the national grid. In relation to resultant CO_2 *emissions, the Data Centre Addendum EIAR goes on to state that the existing electricity providers (to the national grid) form part of the EU-wide Emission Trading Scheme (ETS) and that any greenhouse gas emissions from these electricity generators are not included when determining compliance with the targeted 20% reduction in the non-ETS sector, with no adverse impacts on the EU20-20-20 reduction targets anticipated.*

Notwithstanding the anticipated demand for energy to serve the data centre project along with the additional demand consequent on the omission of the energy centre and taking account of the EU-wide Emission Trading Scheme (ETS), I am satisfied that this issue will be ultimately addressed as Ireland moves towards meeting its objective of providing 70% of its energy from renewable sources by 2030 in accordance with the targets set in the Climate Action Plan, 2019. It is also noted that the applicant has request[280] *a 10-year planning permission which would extend the completion date of the project beyond the target year of 2030. It is further noted that the "Government Statement on the Role of Data Centre's*[281] *in Ireland's Enterprise Strategy" states that "The increased renewable electricity requirement linked to energy intensive investments will be mainly delivered by the development of the new Renewable Energy Support Scheme (RESS) which will also reflect falling costs across a range of renewable technologies and an ambition to increase community & citizen participation in renewable energy projects".*

Finally, I am not convinced that the omission of the energy centre on its own would warrant a refusal of planning permission. The overall footprint of the project would be reduced as would the emissions associated with the energy centre element (incl. noise, dust & NO_2*), and there would be less construction traffic movements, along with a corresponding reduction in environmental impacts (Refer to Section 8.0 EIA).*

…

280 Sic.
281 Sic.

Cumulative impacts: *The concerns raised by several parties (incl. An Taisce & Friends of the Irish Environment) in relation to the consideration and assessment of cumulative impacts on a national and regional scale with respect to a number of issues (incl. climate change mitigation targets, energy consumption, water resources & data centres) are noted. However, I would not concur with this view and I am satisfied that the assessment of cumulative impacts in-combination with other plans and projects in the surrounding area is appropriate. The proposed development, as amended by the omission of the energy centre would not give rise to any significant adverse local or cumulative impacts in-combination with other developments in the surrounding area."*

146. §8 of the Inspector's first Data Centre Report sets out her EIA. It includes the following:[282]

<table>
<tr><td colspan="2">EIA - Air and Climate</td></tr>
<tr><td colspan="2">The EIAR did not predict any significant adverse impacts on air and climate .. during the operational phase of the data centre, subject to implementation of mitigation measures.</td></tr>
<tr><td>Submissions</td><td>Concerns raised</td></tr>
<tr><td>Friends of Irish Environment, An Taisce, Group Property Holdings, Mannix Coyne & Amy Coyne</td><td>Dust & traffic emissions
Energy demand
CO_2 emissions & climate change</td></tr>
<tr><td>Potential impacts</td><td>Assessment & mitigation measures</td></tr>
<tr><td>Energy demand
Potential for long terms impacts on achievement of Climate Change & carbon emission reduction targets (EU & National)</td><td>Refer to section 7.1.7 of this report which concluded that a balance will be achieved as Ireland moves towards achieving the 70% renewable energy target by 2030.</td></tr>
<tr><td colspan="2">Cumulative Impacts: ……. none predicted during the operational phase.</td></tr>
<tr><td colspan="2">Conclusion: I have considered all the written submissions made in relation to air and climate, in addition to those specifically identified in this section of the report. I am satisfied that they have been appropriately addressed in terms of the application and that no significant adverse effect is likely to arise.</td></tr>
</table>

147. §8 of the Inspector's second Data Centre Report sets out her EIA. It includes the following:[283]

<table>
<tr><td colspan="2">EIA - Air and Climate</td></tr>
<tr><td colspan="2">The EIAR did not predict any significant adverse impacts on air and climate .. during the operational phase of the data centre, subject to implementation of mitigation measures. The Data Centre Addendum EIAR did not significantly alter the EIAR conclusions, other than to note a reduction in NO_2 emissions as a result of the energy centre omission.</td></tr>
<tr><td>Submissions</td><td>Concerns raised</td></tr>
</table>

282 The tabular form was used in the inspector's report - Irrelevant content omitted.
283 §8.4 Summary of Likely Significant Effects - P73 et seq - The tabular form was used in the inspector's report - Irrelevant content omitted.

<table>
<tr><td>Friends of Irish Environment,
An Taisce & Key Pol Ltd.
Group Property Holdings
Mannix Coyne & Amy Coyne</td><td>Dust & traffic emissions
Energy demand
CO_2 emissions & climate change</td></tr>
<tr><td>Potential impacts</td><td>Assessment & mitigation measures</td></tr>
<tr><td>Energy demand & CO_2:
Potential for long terms impacts on achievement of Climate Change & Carbon Emission Reduction Targets (EU & National) & increased demand in tandem with energy centre omission.</td><td>Refer to section 7.1.7 of this report which concluded that a balance will be achieved as Ireland moves towards achieving the 70% renewable energy target by 2030 under both scenarios (with & without the energy centre).</td></tr>
<tr><td colspan="2">Residual Effects: There will be some increase in dust & traffic emissions during the construction phase however predicted levels are within guidance limit values and residual impacts are not predicted to be significant, subject to the implementation of mitigation measures</td></tr>
<tr><td colspan="2">Cumulative Impacts: The proposed development, as amended by the omission of the energy centre would give rise to some minor cumulative impacts in-combination with the construction of the proposed substation, with no significant cumulative impacts predicted during the operational phase.</td></tr>
<tr><td colspan="2">Conclusion: I have considered all the written submissions made in relation to air and climate, in addition to those specifically identified in this section of the report. I am satisfied that they have been appropriately addressed in terms of the application and that no significant adverse effect is likely to arise.</td></tr>
</table>

148. Having addressed specific cumulative impacts as indicated above, the Inspector's second Data Centre Report also addresses them more generally as follows:[284]

> *"There are several existing, permitted or proposed plans and projects within a 20km radius of the proposed development that have the potential to result in-combination effects with the proposed development on the receiving environment. These are addressed in each of the EIAR chapters and the Data Centre Addendum EIAR. However, the main project[285] relates to the concurrently proposed substation and transmission cables …… which would serve the proposed development, and the recently permitted data storage facility on a nearby site to the S ……, and to a lesser extent the existing business and warehouse developments to the immediate N and NE of the site ……"*

149. The inspector foresees no cumulative effects which might justify refusal of permission. It's fair to say that the foregoing passage amounts to an acceptance of EngineNode's submission that cumulative effect is to be considered by reference to other projects in the vicinity of the site. On that premise, there is no criticism of the 20km radius. Nor do the Coynes point to other projects in

284 §8.5.
285 By which phrase I understand the inspector to identify what she considers to be the project with which the Data centre is most likely to have a cumulative effect.

particular allegedly omitted from the cumulative effects analysis. It is the premise of a geographical constraint on the consideration of cumulative effect which the Coynes impugn. They say that the consideration of cumulative effect of the Proposed Development on climate change was defective in that it falls, they say, to be considered cumulatively with the effect of the Data Centre sector in Ireland generally.

150. As a general observation it seems to me that, while one might reasonably agree or disagree with the merits of the Inspector's consideration of and conclusions on the climate change and energy use issues, it cannot be said that she failed to consider them or that there was no evidence before the Board in support of her conclusions.

GROUND 4 – CLIMATE ACT 2015 – "HAVE REGARD TO"

G4 - Climate Act 2015 - Pleadings

151. The Coynes plead that the Board failed to have any or adequate regard to the 2015 Climate Act generally and in particular to the matters listed in s.15 of the 2015 Climate Act including the National Transition Objective[286] and the objective of mitigating GHG emissions. They plead that the Board does not mention the Act, explicitly or implicitly, save for the Inspector's identifying[287] that An Taisce had brought the Act to the Board's attention. They say there is no evidence that the Board considered the Act - such that the decision must be quashed for failure to have regard to a statutorily mandated consideration.[288] They plead that regard to the non-statutory Climate Action Plan 2019 does not suffice and, in any event, the Impugned Decisions do not disclose how regard was had to this Plan.

152. They plead that the Data Centre will increase national CO_2 emissions by about 1%[289] - in an existential climate emergency. They plead excerpts from the Original[290] and Addendum[291] EIARs and the Inspector's 2nd report[292] which excerpts I set out elsewhere in this judgment and they plead that EngineNode and the Board:

286 Defined in section 3 of that Act as "…the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050 …".
287 Inspector's Report #2 §6.
288 Citing People over Wind v An Bord Pleanála [2015] IEHC 271 §120.
289 Rounding up 0.97%.
290 §9.8.1.2. However this is not relevant to present concerns as it relates to construction phase impacts. They also plead §9.8.2.2 as to flood risk to the site itself – which is of little relevance and omit to plead the remainder of that §9.8.2.2 which addresses CO2 emissions to the conclusion that "The proposed development would contribute approximately 0.54% of Ireland's national annual CO2 emissions assuming an energy supply from natural gas. This equates to an overall, long-term, negative and imperceptible impact to climate." While, as this assumed the on-site energy plant little turns on it, it does undermine the plea that "The only assessment of cumulative impacts is contained at §9.10.2". It recites §9.10.2 of the Original EIAR to the effect that the Data Centre, with the RISL/Facebook Data Centre in its immediate vicinity will yield "approximately 2.5% of Ireland's national CO_2 emissions. This is considered a long-term, negative and imperceptible impact on climate."
291 §9.8.2.2.
292 §7.1.7.

- Identified the volume of CO_2 emissions for the purposes of Article 2(1) of the EIA Directive as only 1%[293] of the national emissions and deemed them insignificant without assessing their impact on the environment. It merely noted the contribution of CO_2 emissions to increased flood risk and relied on the Flood Risk Assessment of the Site.

- Otherwise limited themselves to the observation that, as ETS emissions make no contribution to non-ETS emissions reductions targets, the emissions of the Proposed Development are irrelevant to the emissions reductions targets for 2020 and 2030.

- Did not assess cumulative emissions from permitted data centres locally, regionally or nationally or as between the two immediately proximate data centres[294] that will produce 2.5% of national emissions.

153. Beyond traverses, the Board pleads §9, and in particular §9.2, of the Data Centre Addendum EIAR and §7.1.7 and §8 of the Inspector's 2nd Report as to CO_2 emissions, and the Data Centre Statement and her conclusion that a balance would be achieved as the State moves towards achieving the 70% renewable energy target by 2030. The Board had regard to the Climate Action Plan, 2019, which stated national policy as to GHG emissions reduction by 2030. The substance of this assessment met the obligations of the 2015 Climate Act.

154. Beyond traverses and the Board's pleas, EngineNode pleads that:

- In substance, Ground 4 is an impermissible challenge to the merits of the Impugned Decisions.

- The Board is not required to have regard to the 2015 Climate Act; it is obliged to comply with the 2015 Act, in so far as that Act places legal obligations upon it. The test of compliance is one of substance, not form. It does not matter whether the Act is referred to by the Board. What matters is whether the Board has in substance complied with any legal obligations the Act imposes.

- The nature of the "have regard to" obligation imposed by s.15 of the 2015 Climate Act. It does not require a particular outcome.

- The Board discharged its obligation to 'have regard to' the transition objective and objective of mitigating GHG emissions and adapting to climate change is disclosed by
    - §§5.54-5.62 of EngineNode's response of 12 August 2020 to the appeals.
    - the Inspector's report at §5.1 ('National and Regional policy context, Climate Action Plan 2019'), §7.1.7 ('Climate change, energy demand & omitted energy centre') and §8.4 ('Air and Climate' on pages 73-75) of.

293 Rounded up from 0.97%.
294 i.e. the Data Centre and the RISL/Facebook Data Centre.

- the Board's citation of the Climate Action Plan, 2019.

G4 - Climate Act 2015 – Discussion & Conclusion

155. In my view EngineNode's plea is well-made that the Board's obligation is to comply with the 2015 Climate Act in so far as that Act places legal obligations on the Board. The Board is not obliged in any more general sense to have regard to that Act. The only specific legal obligation called in aid by the Coynes is that imposed by s.15 to have regard to certain listed matters relating to climate change. I have set out s.15 above, but it bears repetition: s.15 required, inter alia, the Board in the performance of its functions to "*have regard to*":

> *"(a) the most recent approved national mitigation plan,*
> *(b) the most recent approved national adaptation framework and approved sectoral adaptation plans,*
> *(c) the furtherance of the national transition objective, and*
> *(d) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State."*

156. The Coynes concentrate on (c) and (d) and stress the word "furtherance" above. I frankly do not think that word deserves the stress placed upon it. Not least, given the lightness of a "have regard to" obligation, the word imposes little additional burden on the Board.

157. EngineNode submits that the test of compliance is of substance not form. I agree. The Board submits that an argument based on the absence of specific reference in its decision to the 2015 Act could succeed only if the substance of the issues addressed in the Inspector's report is ignored as s.15 of the 2015 Act was complied with in that substance.

158. As observed above, s.3 of the 2015 Climate Act defined the "*National Transition Objective*" as being "to *pursue, and achieve, the transition to a low carbon*[295]*, climate resilient*[296] *and environmentally sustainable economy*[297] *by the end of the year 2050*". It will be seen that this is an important but very general, strategic and high-level statement.

295 "Low carbon … economy" is not defined. I understand it to describe an economy in which energy generation using fossil fuels is reduced or minimised so as to reduce or minimise GHG emissions. On that basis, it corresponds to the concept of mitigation of climate change.
296 "climate resilient … economy" is not defined. I understand it to describe an economy in which the capacity to cope with climate change is increased or maximised. On that basis, it corresponds to the concept of adaptation to climate change.
297 "environmentally sustainable economy" is not defined. However, in Conway v An Bord Pleanála [2023] IEHC 178 at §55, Humphreys J elucidated the consistent interpretation, clear meaning and legal significance of the closely associated concept of "sustainable development" as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. It seeks to reconcile economic development with the protection of social and environmental balance. He cited Article 3(3)TEU and EU strategy of long-term sustainability in which economic growth, social cohesion and environmental protection are mutually supporting. Humphreys J, described the concept of sustainable development as linked to Article 37 of the European Union Charter of Fundamental Rights which states that "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." Finally for

159. The Inspector mentions the Climate Act 2015 once only – to record that An Taisce alleged its breach.[298] I accept the Coynes' argument that, of itself, that would not meet the requirements of s.15. The Inspector does not mention s.15 at all or record in terms that he had regard to the matters listed in s.15. The Board did not in its decision mention the Climate Act 2015, s.15 or the duties it imposes, or list as matters to which it had regard the matters which s.15 lists.

160. It is a somewhat wearying and almost invariable feature of planning judicial review that the Board asks that the Court infer what it might have easily made explicit. Counsel for the Coynes acerbically observes that the advice in the song "*You say it best when you say nothing at all*" may be sound as a guide to sustaining a romantic relationship, but has absolutely nothing to recommend it as a means of demonstrating that statutory obligations have been fulfilled. It is true that the law generally, and arguably indulgently, favours the Board in such respects, and it is also true that the complaint of omission is generally made in the 20:20 vision of hindsight. Nonetheless, appreciable delay, cost, trouble and risk in judicial review might well be saved by the Board's being explicit as to what is, it is later driven to argue, implicit. Yet, in the end, I agree with EngineNode that what matters in law is not whether the Board explicitly mentioned s.15 or the matters it lists but is whether, in substance, it complied with s.15.

161. I have already drawn attention to the content of the Inspector's report as it relates to climate change and as viewed primarily through the lens of the Climate Action Plan 2019. I accept the Board's argument that the Climate Action Plan 2019 in substance articulates the National Transition Objective. I need not repeat that analysis here. However, I rely on it in forming my view that the Board, in its Impugned Decisions, interpreted in light of the documents before it, referred in substance to and had regard, as required by s.15, to:

- the objective of mitigating GHG emissions and adapting to the effects of climate change.
- the furtherance of the National Transition Objective.

In particular, it seems to me impossible to read the EIARs and the Inspector's reports without concluding that the Board had regard to what seems clearly to be the central cause of climate change and the focus of the National Transition Objective - namely GHG emissions and their reduction. It is also clear – it was not disputed – that the Board's view that those issues did not warrant refusal was bona fide formed. Whether I or the Coynes would have made the same decisions (I do not suggest I would or would not) is irrelevant.

162. The Board did not explicitly refer to the National Mitigation Plan – but by the time of its Impugned Decisions of 5 July 2021 the National Mitigation Plan 2017 had been quashed.[299] I am not

present purposes, Humphreys J described the concept of sustainable development as embedded in Irish law by the definition in s.3 of the Climate Change Act 2015 of the "national transition objective".
298 Data Centre Report #2 p14.
299 Friends of the Irish Environment v Ireland, Supreme Court 31 July 2020, [2020] 2 I.L.R.M. 233.

told it had been replaced and so must assume there was no such plan to refer to. I cannot see that the Board can be criticised for not having regard to a plan which did not exist. I see no reason to infer from s.15 that all or any functions of the Board were to grind to a halt in its absence – and in fairness, counsel for the Coynes disavowed any such argument.[300] So I will consider this issue no further. If needs be I would refuse relief in this regard on discretionary grounds but primarily I take the view that no illegality is shown.

163. In addition, the Board, in its Impugned Decisions, interpreted in light of the documents before it, did not refer to any National Adaptation Framework or Sectoral Adaptation Plans. In the **Kilkenny Cheese** case[301] Humphreys J adverted to the National Adaptation Framework 2018. But no such national adaptation framework or sectoral adaptation plan was brought to my attention. It is easy to see why. The factual basis of the challenge to the Impugned Decisions is by reference to the alleged indirect effect of the Data Centre in the form of CO_2 emissions of the electricity generation needed to power it. That allegation raises issues of mitigation – reduction of emissions – rather than of adaptation to the effects of climate change. No evidence was lead or suggestion made by any party that any national adaptation framework or sectoral adaptation plan was in fact relevant to EIA of, or the decision to permit, the Data Centre. I mention these issues only for completeness.

164. In my view, and for the reasons set out above, the challenge based on alleged failure to have regard to the 2015 Climate Act generally, and in particular to the matters listed s.15 of the 2015 Climate Act, must fail.

GROUND 5 – EIA – CO_2 EMISSIONS

G5 - EIA - CO_2 Emissions – Pleadings

165. The Coynes plead that:

- the Board failed to identify, describe and assess the environmental impacts of CO_2 emissions due to the Data Centre, and/or
- the Board failed to do so cumulatively with those of other approved data centres (which by 2028 will consume about 30% of Ireland's electricity).
- the Impugned Decisions are contrary to **Article 94 and Schedule 6 PDR 2001**[302] read with **S.171A PDA 2000**[303] and **Annex IV of the EIA Directive**, which require that an EIAR describe the aspects of the environment likely to be significantly affected by the Data Centre and/or **Article 1(2)(g)(iv) of the EIA Directive** which requires a reasoned conclusion in EIA.

300 Transcript Day 4 p163.
301 An Taisce v ABP & Kilkenny Cheese [2021] IEHC 254.
302 Planning and Development Regulations 2001 – 2022.
303 Definition of EIA.

166. The Coynes plead alternatively that, if not required to assess the effect of the Data Centre cumulatively with CO_2 emissions from all other data centres, the Board was at least obliged to assess it with the nearby RISL[304]/Facebook Data Centre - this small area of Clonee potentially producing 2.5% of total national emissions.

167. Beyond traverses, the Board repeats much of its pleas to Ground 4 and pleads that they suffice to meet any obligation to assess indirect effect arising from either s.171A PDA 2000 or the EIA Directive. The Board denies any obligation to assess in EIA the cumulative impacts of all data centres in the State and pleads that it

> *"… considered the environmental impacts of the proposed development by reference to the GHG emissions of the entire State and there was no reason that its assessment should have been restricted by reference to development of a similar type."*

(Note that this plea implies acceptance that the Scope 2 emissions of the Data Centre were indirect effects for EIA purposes.)

The Board pleads that it considered the cumulative impacts of the Proposed Development with those of the RISL/Facebook data centre.

168. Beyond traverses and the Board's pleas, EngineNode repeats much of its plea to Ground 4 and pleads:

- §9 of the Original EIAR (especially §9.8.2.2).
- That the Inspector acknowledged that energy usage would be significant, but, taking account of the ETS, was satisfied that "*this issue will be ultimately addressed as Ireland moves towards meeting its objective of providing 70% of its energy from renewable sources by 2030 in accordance with the targets set out in the Climate Action Plan, 2019"* and that "*a balance will be achieved as Ireland moves towards achieving the 70% renewable energy target by 2030".*
- Assessment of the emissions of data centres generally "*falls to be conducted at a programmatic level*". Alternatively, the Board did consider that issue at §7.1.7[305] of the Inspector's report and EngineNode cites also §§5.3 - 5.54-2 its response of 12 August 2020 to the appeals.

304 Runways Information Services Limited.
305 'Climate change, energy demand & omitted energy centre'.

G5 - EIA - CO_2 Emissions – Submissions

169. The Coynes submit, inter alia that:

- EngineNode identified the volume of CO_2 emissions which generation of electricity to power the Data Centre would produce at 1% of national emissions and deemed them insignificant without assessing their impact on the receiving environment. Essentially, they invoke
  - CO_2 emissions and their impact on climate change and
  - the obligation in EIA to assess impacts on the receiving environment and provide a reasoned conclusion.[306] They cite **Commission v Ireland**,[307] **Abraham**[308] and **Ecologistas**.[309]

- EngineNode did not assess cumulative emissions from
  - the Data Centre and the adjacent RISL/Facebook Data Centre which will produce 2.5% of national CO_2 emissions.
  - permitted data centres locally, regionally or nationally which will, by 2028, consume about 30% of Ireland's electricity.

- The Board likewise did not assess the impact of those CO_2 emissions on the receiving environment - confining its analysis to the observation that as ETS emissions they will not contribute to national non-ETS emissions reduction targets.

170. The Board's submissions acknowledge its obligation in EIA to identify, describe and assess the direct and indirect impacts of emissions (including describing their type and quantity) on the environment.[310] The Board's position at trial,[311] as to the Scope 2 GHG emissions of electricity generation to power the Data Centre, was that

- It had treated them in the Impugned Decisions as if they were an indirect effect of the Data Centre and assessed them on that basis.[312]
- Their having done so does not determine the issue whether the Board was required to have regard to those emissions as indirect effects of the Data Centre.
- Properly considered, not least in light of the **Kilkenny Cheese** case,[313] the Scope 2 GHG emissions of electricity generation to power the Data Centre, are not for EIA purposes, indirect effects of the Data Centre.

306 Citing Article 94 of and Schedule 6 to the 2001 Regulations, S.171A PDA 2000 and Article 1(2)(g)(iv) EIA Directive.
307 Commission v Ireland (Case C-50/09) §37.
308 Abraham v Region Wallonne (Case C-2/07), §44.
309 Ecologistas en Accion-CODA (Case C-142/07) §39.
310 Citing s.171A PDA 2000 and, in particular, Articles 3(1), 5(1) and Annex IV of the EIA Directive.
311 Transcript day 3 p86.
312 Having looked for an updated Inspector's report for that reason.
313 An Taisce - National Trust for Ireland v An Bord Pleanála, et al incl. Kilkenny Cheese Limited [2022] IESC 8; [2022] 1 I.L.R.M. 281.

171. The Board emphasises that EIA is to be of the project for which the planning permission is sought – citing **Fitzpatrick** [314] and **Bund Naturschutz**.[315] They cite the **Kilkenny Cheese** case for the view that the obligation of EIA does not extend open-endedly to all environmental impacts which may have any connection, however remote, to the project. They cite the Inspector's consideration of energy demand, CO_2 emissions and climate change[316] to the effect there was no failure to carry out an assessment as required by the EIA Directive. They cite authority that the Board's decision as to the adequacy of the information before it for purposes of doing EIA is reviewable only for irrationality.[317]

172. In particular, the Board disputes the alleged duty to assess the project cumulatively with all permitted data centres being constructed in the State. It says there is no authority for the proposition, that it would logically imply cumulation with all energy used in the State and that, echoing **Kilkenny Cheese**, the environmental impacts of all data centres in the State are neither tethered to nor intrinsic to the Data Centre. EngineNode makes a similar point but says the Board in fact considered the potential effects of the Data Centre in a national context when noting[318] the Data Centre Statement to the effect that the increased renewable electricity requirement of Data Centres *"will be mainly* delivered *by the Renewable Energy Support Scheme".* EngineNode again relies on §5.0 of its response of 12th August 2020.

173. EngineNode contends that the Coynes, in effect and impermissibly, seek a merits-based review of the Impugned Decisions. It recites what it considers the relevant content of the EIARs & Inspector's reports much as did the Board, and also the Data Centre Statement. It cites **Ratheniska**[319] for the proposition that the Board's decisions in EIA as to the adequacy of the information before it and as to the assessment of its substance and merits are entitled to curial deference and reviewable as to their merits only for irrationality.

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314 Fitzpatrick v An Bord Pleanála [2019] 3 IR 617 §36.
315 Bund Naturschutz in Bayern v Freistaat Bayern (Case C-396/92) [1994] ECR I-3717.
316 Citing §9 of the Data Centre EIAR, §9 of the Addendum Data Centre EIAR and in particular, §9.8.2.2 of the Addendum EIAR and §7.1.7 of the Inspector's 2nd Data Centre Report.
317 Citing Klohn v An Bord Pleanála [2009] 1 IR 59, Ratheniska v An Board Pleanála [2015] IEHC 18, Holohan v An Bord Pleanála [2017] IEHC 268, O'Brien v An Bord Pleanála [2017[IEHC 773 and Kelly v An Bord Pleanála [2019] IEHC 84 and Cork Harbour Alliance for a Safe Environment v An Bord Pleanála [2021] IEHC 203.
318 Inspector's 2nd Data Centre Report §7.1.7.
319 Ratheniska Timahoe and Spink (RTS) Substation Action Group v An Bord Pleanála [2015] IEHC 18 (Haughton J.), at §§73-76. (As it happens, also a case in which the impugned decision was an approval of electricity transmission infrastructure under section 182A PDA 2000.).

G5 - EIA - CO_2 Emissions – Discussion & Decision

“Climate” in the EIA Directive

174. The EIA Directive makes it explicitly clear that “climate” is an issue to be considered in EIA.[320] EIA arises only in the context of development consent - and as to specific projects for which such consents are sought. It is inconceivable that the Directive would have stipulated assessment of effects on climate if those effects were to be, as a matter of principle, irrelevant to development consent decisions. Indeed, the entire purpose of EIA is to ensure that account is taken in development consent decisions of the environmental considerations identified in the EIA Directive. Most notably, in its 2014 iteration and as I have observed above,[321] Recital 7** lists “climate change” amongst the “*important elements in assessment and decision-making processes*”, Recital 13** states that “*it is appropriate to assess the impact of projects on climate (for example the nature and magnitude of greenhouse gas emissions)…*”, and an EIAR must describe, amongst “*the likely significant effects of the project on the environment”, “the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions)… ” including “any indirect, secondary, cumulative, short-term, medium-term and long-term, effects*”.[322] The Supreme Court was well-aware of these aspects of the EIA Directive in its 2014 iteration when deciding the **Kilkenny Cheese** case.[323] Hogan J adverted expressly to Recitals 7** and 13** and observed that *“art.3(1) of the EIA Directive requires that the effect of the development in respect of climate must also now be considered.”*[324]

Indirect & Cumulative Effect – Programmatic Measures

175. It is useful to consider indirect effect with cumulative effect - if only because, on the facts of this case, any effect relevant to EIA in the form of CO_2 emissions from electricity generation would, viewed as an effect of the Data Centre, be indirect, and all cumulative effects on which the Coynes rely are similarly indirect. So, the concerns of this case as to CO_2 emissions from electricity generation are as to effects both indirect and cumulative. Also, the concepts of indirect effect and cumulative effect raise similar issues as to the extent of EIA. They are issues which may be roughly contradistinguished as proximity and remoteness - how to sufficiently consider, and yet practically and realistically limit the consideration of, the theoretically and logically limitless indirect effect and cumulative effect of any project.

176. The word “cumulative” appears once only in the EIA Directive – in the description in Annex IV of the necessary content of an EIAR. Nonetheless, the existence of the obligation is clear – an

320 Recital 7**, 13**, Article 3, Annex III, Annex IV.
321 EIA Directive 2011/92/EU as amended by Directive 2014/52/EU.
322 Annex IV §5(f) et seq.
323 An Taisce v ABP & Kilkenny Cheese [2022] IESC 8; [2022] 1 I.L.R.M. 281. §44 et seq.
324 In their 2013 Guidance on integrating climate change in EIA the Commission appear to have taken the view that the 2011 Directive, in requiring consideration of “climate”, implicitly required consideration of climate change. On that view the 2014 iteration of the Directive emphasise and clarified, rather than introduced, that obligation. However, nothing now seems to turn on any such distinction.

argument that assessment of cumulative effects was merely desirable failed in the **Alto Sil/Brown Bear** case.[325] However, the concept of cumulation, if carried to excess, would prove an unruly horse and render practical EIA impossible as encompassing a potentially vast – arguably illimitable - scope of inquiry. The caselaw is clearly against such a view.

177. The taxonomy of analysis can sometimes tend to confuse.[326] The general understanding of the obligation to consider cumulative effects, which the Coynes invoke, is that the obligation is to consider effects of the project for which permission is sought cumulatively with other projects. Clearly such an obligation exists. But sometimes effectively the same proposition is put in the form of an argument that the same effect of comprehensive EIA is to be achieved, not by requiring consideration of effect cumulative with another project, but by recognising that the "other" project is in fact part of the same project. Typically, the resulting argument impugns "project-splitting". So, for example, in **FitzPatrick**[327] the High Court is recorded as having considered that *"the obligation of the board to assess the cumulative impacts on the environment which were likely to arise from the completion of the two projects for which application was made, i.e. the data centre and substation in combination"* had been satisfied. Yet, on similar facts, the rationale of **Ó Grianna #1**[328] upheld an argument that the wind farm[329] and grid connection[330] *"should be considered as a single project and be assessed as such on a cumulative basis"* such that *"EIS for the entire project can be completed and submitted, and so that a cumulative assessment of the likely impact on the environment can be carried out".* In truth, once one stands back from the matter to take an overview of the requirement of comprehensive EIA, at least sometimes, little may turn on whether two or more "bits" are separate projects or parts of the same project - as long as their effect is considered cumulatively. In reality, the concept of cumulation is applied in both instances.

Fitzpatrick v ABP & Apple 2019

178. **FitzPatrick**[331] is a useful starting point – though I am not here concerned primarily with the data centre and substation combination to which I have just referred. In that case, the Board's permission of the data centre was impugned as having failed to do an EIA of the entire data centre development – that was subject to a masterplan – of which the proposed development formed the first stage. The Applicants submitted that the masterplan was the "project" to be assessed for the purposes of the EIA Directive. The challenge, including the allegation of "project-splitting", failed as the permitted first data centre was neither functionally nor legally dependent on the build out of further data centres envisaged in the masterplan. The EIA had taken account, as far as practically possible, of the proposed build out of a further seven data halls and in particular, the potential impact of such data halls on energy uses and climate change.[332]

325 Infra.
326 If only me.
327 Fitzpatrick v An Bord Pleanála [2019] IESC 23 [2019] 2 I.L.R.M. 247 (Supreme Court, Finlay Geoghegan J, 11 April 2019).
328 Ó Grianna & Ors v An Bord Pleanála [2014] IEHC 632.
329 Analogous to the Data Centre in FitzPatrick.
330 Analogous to the Sub-Station in FitzPatrick.
331 Fitzpatrick v An Bord Pleanála [2019] IESC 23 (Supreme Court, Finlay Geoghegan J, 11 April 2019).
332 It was held that as far as practically possible the EIA of Phase 1 – the specific project for which permission had been sought –

179. Finlay Geoghegan J cited AG Gulmann in **Bund Naturschutz** [333] to the effect that, while Member States in adopting the EIA Directive could have imposed a wider, and arguably more environmentally optimal, scope of EIA, they did not do so:

> *"The principle underlying the directive is unambiguous: an environmental impact assessment is to be carried out for projects in respect of which the public or private developer is seeking development consent"*

Finlay Geoghegan J commented that *"the Advocate General is clear in his opinion about the limits of the obligation imposed by the EIA Directive on competent authorities in Member States. He correctly, in my view, distinguishes between what might be considered environmentally desirable and the option chosen by the EIA Directive."* Importantly, Finlay Geoghegan J agreed that "*The EIA Directive requires an EIA to be carried out of the project or proposed development for which the planning permission is sought*".

Commission v Ireland & Alto Sil/Brown Bear

180. As has been said, EngineNode cite **Alto Sil/Brown Bear**[334] and AG La Pergola in **Commission v Ireland**[335] for the proposition that there must be a manageable geographic limit to cumulative assessment - that projects must be in reasonable geographic proximity to each other - and for a "condition" of proximity which they say, serves an important purpose of the Directive by enabling the identification and measurement (cumulatively) of effects on specific environmental factors.[336]

181. In opining that Ireland had not correctly transposed the requirements for identification of sub-threshold projects requiring EIA, AG La Pergola considered that where separate projects, none of which exceed EIA thresholds, are carried out "*at the same time and in adjoining areas*", their cumulative or incremental effects may cause environmental damage and so they should undergo EIA. The AG considered that EIA must consider cumulative effects *"attributable to the individual project, where the foreseeable impact of its characteristics is* intensified[337] *by a conjunction of circumstances which are themselves relevant to environmental protection, such as the aggregation of the individual project with other projects in the sensitive area of its location."* The decision of the CJEU in the case in substance upheld the complaint as to cumulative assessment – though not in terms commenting on the AG's opinion.

should take account of any current plans to extend Phase 1, but that was different to and did not require EIA of the masterplan.
333 Bund Naturschutz in Bayern v Freistaat Bayern (Case-396/92).
334 Case C-404/09 - Commission v Spain (Brown Bear).
335 Case C-392/96 – Commission v Ireland - Opinion of AG La Pergola.
336 e.g. a specific population of flora or fauna in a region, a host habitat, a transit route, a critical area or environmentally sensitive location etc.
337 Emphasis in original.

182. I read AG Pergola's opinion as identifying circumstances of physical proximity in which consideration of cumulative effect will be required as a matter of factual and expert judgment. I do not read it as delimiting those circumstances as a matter of law or as suggesting that factual cumulation is irrelevant absent physical proximity. The only element of the opinion which could, at a stretch and out of context, be so read is the record of the Commission's position that *"…. the problem of cumulative and incremental effects should therefore be viewed in relation to that of sensitivity of location, that is to say, of the location of projects in areas of potential significance in terms of environmental impact …".* In context, this position is properly seen as a response to a challenge to the admissibility of evidence as to its argument that, in adopting EIA thresholds, Ireland neglected to evaluate characteristics of projects other than their size/capacity. It does not seem to me to have any wider significance.

183. It is no doubt the case that, ordinarily and ceteris paribus, likelihood of cumulative effect increases with geographical proximity and decreases with geographical remoteness. In many cases geographical proximity will, as a matter of factual and expert judgment, appreciably inform the extent of the assessment whether a posited cumulative effect is likely and so requires assessment. But I do not see that practical observations and planning judgements as to the significance of geographical proximity in particular cases should be elevated to the status of legal principle. The issue seems likely to turn greatly on the nature of the effect in the question, the locus at which it occurs (effects can occur at a physical remove from the site of a project – for example, on birds feeding at one location, traversing another and nesting in a third) and the factual prospects of cumulation of those effects with others.

184. Neither does it appear to me that Alto Sil/Brown Bear sets, as a matter of principle, a geographic limit to consideration of assessment of cumulative effect. The Court merely found that geographic proximity required assessment of cumulative effect in that case.[338] AG Kokott considered that what dictates the necessity of assessment of cumulative effects are the "*circumstances of the individual case*" considered in light of the need "*to reach as complete an assessment as possible*".[339] Certainly physical proximity will often be part of the factual determination of the scope of cumulative effect, but it is not the legal test, nor part of the legal test.

185. It appears to me that the CJEU in Alto Sil/Brown Bear states the true criterion: cumulative effects must be considered *"in so far as such an analysis is necessary in order to ensure that the assessment covers examination of all the notable impacts on the environment <u>of the project in question</u>".*[340]

338 CJEU §82.
339 AGO §177 - 179.
340 CJEU §80. Emphasis added.

Strasswalchen

186. **Strasswalchen**[341] is a helpful decision in understanding cumulative effect. It suggests that the issue is not, per se, physical proximity or geography (though they may well be highly relevant as a matter of fact). It is the functional question whether the environmental effects of a project are likely to be greater by reason of the presence and effects of another project (or projects) than they would be in its absence.[342] Indeed that formulation strikes me as a useful description of what is meant by the term “cumulative effect”.

187. Strasswalchen also makes clear that cumulation is not restricted only to projects of the same kind[343] - nor by considerations such as municipal boundaries (or other administrative boundaries) which are, in the functional sense, environmentally irrelevant.[344] I would add that, of course, the effects of projects of the same kind are often considered cumulatively – but that is no doubt primarily because, in practice, similar projects produce similar types of effect such that accumulation is more likely. However, it is the similarity of effects (and hence their generally greater potential to accumulate) that tends to matter - not the similarity of the projects.

188. **Strasswalchen** does not really assist in providing a framework for limiting the scope of inquiry for purposes of identifying projects to be taken into account for purposes of assessing cumulative effect.

189. In summary, I do not see Commission v Ireland, Alto Sil/Brown Bear or Strasswalchen as requiring, as a matter of law, geographic and/or temporal proximity as limits to the scope of cumulative assessment, though the facts and circumstances of a particular case may produce that result.

Kilkenny Cheese, Stichting Natuur & Finch

190. Programmatic measures were relevant to the decision in the **Kilkenny Cheese** case[345] in which, in the High and Supreme Courts, it was held that in EIA of a proposed cheese factory it was not necessary to consider, as indirect effects of cheese production, the climate change implications of GHG emissions by cows used to produce the milk to be used to make the cheese. Those effects were too remote from the operation of the factory to be indirect effects of its operation for purposes of the EIA Directive. They were Scope 3 effects, though the Supreme Court did not identify them as such. Hogan J said:

341 Marktgemeinde Strasswalchen and others v Bundesminister fur Wirtschaft, Familie und Jugend C-531/13 - [2015] All ER (D) 164 (Feb). See both the judgment and the opinion of AG Kokott.
342 CJEU §§45 & 47.
343 CJEU §§45.
344 CJEU §§46 & 47.
345 An Taisce v ABP & Kilkenny Cheese [2021] IEHC 254; [2022] IESC 8; [2022] 1 I.L.R.M. 281.

"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[346]. 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."[347]

191. Humphreys J had said in **Kilkenny Cheese,** citing **Stichting Natuur**:[348]

"41. But the problem from the applicant's view is that the CJEU has already given guidance on the key distinction, which is that between "programmatic" measures and the "procedures for grant of an environmental permit".

42. The applicant's real grievance is with government policy. It objects that, in the face of the climate emergency and despite the enormous contribution of agriculture in general and dairy in particular to the rise in emissions, the State is not only not reducing dairy production, but actively increasing it by a significant amount …"

To paraphrase Humphreys J, the Coynes object that, in the face of the climate emergency and despite the great contribution of data centres to GHG emissions, the State is actively increasing data centre development. So there is at least some analogy between that observation in the Kilkenny Cheese (in which the challenge failed) and the present case.

192. **Stichting Natuur**[349] concerned IPPC permits[350] for the construction and operation of 3 power stations fuelled by coal and biomass. The annual emissions of one would include roughly 2.9% of the Dutch national emission ceiling for SO_2 laid down by the NEC Directive.[351] Together, they would produce 6% and contribute significantly to emissions.[352] In principle, they would not preclude compliance with the emission ceilings if the Netherlands reduced emissions elsewhere but, when the permissions were granted and given the measures adopted by the Netherlands, the national ceilings

346 Climate Action and Low Carbon Development (Amendment) Act 2021.
347 An Taisce v ABP & Kilkenny Cheese [2022] IESC 8; [2022] 1 I.L.R.M. 281 §107.
348 An Taisce v ABP & Kilkenny Cheese [2021] IEHC 254; Citing Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten van Groningen. Joined Cases C-165/09 to C-167/09.
349 Stichting Natuur en Milieu v College van Gedeputeerde Staten van Groningen; Joined Cases C-165/09, C-166/09 and C-167/09, Opinion Of Advocate General Kokott 16 December 2010; Judgment of the Court 26 May 2011.
350 Directive 2008/1/EC concerning integrated pollution prevention and control. The permits in question appear to have been akin to planning permissions for construction and operation of power stations.
351 Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants. (Since replaced by Directive 2016/2284/EU). It established national emission ceilings for four pollutants, including nitrogen oxides and sulphur dioxide, which Member States might not exceed. However, it did not stipulate how Member States were to achieve that objective.
352 There were also issues as to NOX which I can ignore for present purposes.

would probably not be complied with by the relevant deadline. The claimants submitted in essence that the permits should not have been granted or should have been subject to stricter conditions.

193. Simplifying somewhat, the Court ruled that:

- The NEC Directive was based on a purely programmatic approach under which the Member States enjoy wide flexibility as regards the choice of the policies and measures within the framework of national programmes concerning all sources of pollution, in order progressively to achieve a structural reduction of emissions.

- That wide flexibility prevented limits from being placed on Member States in the development of their national programmes.

- Despite the obligation on Member States to refrain from taking any measures, general or specific, liable seriously to compromise the attainment of the result prescribed by a directive, a review of any particular measure must be based on an overall assessment, taking account of all the policies and measures adopted in the Member State.

- While it was for the national court to determine, a simple specific measure relating to a single source of SO_2, permitting the construction and operation of an industrial installation, did not appear liable, in itself, seriously to compromise the result prescribed by the NEC Directive – of limiting emissions by national ceilings.

- Member States were not obliged to condition permissions on compliance with national emission ceilings even where those ceilings were exceeded or risked being exceeded.

194. AG Kokott had helpfully illustrated the difference between programmatic measures and procedures for the grant of an environmental permit:

> *"The NEC Directive adopts a programmatic approach, in prescribing – without reference to any particular emission sources – national emission ceilings.*[353] *According to recitals 11 and 12 in the preamble to the directive, the responsibility for developing compliance strategies lies with the Member States. In contrast, the IPPC Directive targets certain industrial installations as emission sources.*[354] *To prevent or minimise emissions, it prescribes primarily the use of the best available techniques.*[355]

195. It is important to note that the NEC Directive is a different regime both to the ETS and to more general requirements made of Ireland as to GHG emissions. Also, the NTS appears to be more prescriptively imposed at EU level than was the NEC Directive. And the issue in Stichting Natuur, of

353 Citing Article 4 & Annex I of the NEC Directive.
354 Citing the first sentence of Article 1 and Annex I of the IPPC Directive.
355 Citing the second sentence of Article 1, Article 3(1)(a), and the first sentence of Article 9(4) of the IPPC Directive.

interaction between the NEC Directive and the IPPC Directive, is not the issue before me. Nonetheless, a very general analogy with the present case will be apparent in the rejection of a posited requirement to condition a permit for a specific installation by reference to the anticipated breach of emission limits applicable at national level. As to the facts, and bearing in mind that quantitative significance is a technical matter which seems likely to differ as between different types of emission and the particular ill-effects thereof, it is nonetheless notable that permits for, in effect, a 6% increase in SO_2 emissions were not illegal despite the fact that the Netherlands had exceeded, or would exceed, its ceiling for such emissions. Also, the NTS seems appreciably analogous to the NEC regime in that both impose national caps and allow trading mechanisms[356] within which Member States have flexibility, in effect, as to allocation of emissions to specific projects and, in the case of the ETS, as to mitigation of emissions by the move to renewable sources of electricity which do not produce GHGs. Also apparent will be the echo of the general approach taken by Hogan J in Kilkenny Cheese - that procedures under one legal regime should not be expanded beyond that legal regime's proper scope[357] to do the work of another legal regime.

196. Humphreys J in **Kilkenny Cheese**, also described "*two key insights that need to be stressed again and again in both legal and, if one dare say so, policy contexts:*

> *(i). Firstly, … there are no solutions, only trade-offs[358]…. It is all-too-easy …. to isolate one fragment of a problem and, on that distortedly superficial premise, present one's proposed rule (or policy) as the solution, .. a mature and rounded view requires one to look at all of the various trade-offs involved.*
>
> *(ii). Secondly, the role of incentives is crucial, and the consequences and incentives (whether positively intended or not) created by the rule or policy being introduced need to be factored in before the decision is formulated."[359]*

197. The Coynes assert doubt as to the meaning and relevance of the Inspector's reference to "balance".[360] However, it seems to me tolerably clear that what the Inspector had in mind was a balance by way of resolution of the undeniable tension between Government policies, on the one hand, of development of data centres and the consequent significant increase in demand for electricity and, on the other hand, reduction of GHG emissions of electricity generation. It is clear

356 The Dutch had adopted one for NOx – though not for SO2.

357 Though that principle does require that one first discern that proper scope, which may require or permit co-ordination or interaction with other legal regimes.

358 Citing McGinley v The Minister for Justice and Equality [2017] IEHC 549, [2017] 9 JIC 2801 (Unreported, High Court, 28th September, 2017), para 47 and North East Pylon Pressure Campaign Ltd. v An Bord Pleanála [2016] IEHC 300, [2016] 5 JIC 1215 (Unreported, High Court, 12th May, 2016), para. 97.

359 Citing Posner J.: "Justice Antonin Scalia's dissent [in King v Burwell 576 U.S. 473 (2015)].

360 E.g. as recorded above, §8 of the Inspector's second Data Centre Report as to EIA includes the following:

Potential impacts	Assessment & mitigation measures
Energy demand & CO2: Potential for long terms impacts on achievement of Climate Change & Carbon Emission Reduction Targets (EU & National) & increased demand in tandem with energy centre omission.	…… a balance will be achieved as Ireland moves towards achieving the 70% renewable energy target by 2030 under both scenarios (with & without the energy centre).

that the Government has made a judgement, which it has translated into State policy, that these respective policies can both be effected successfully – not least by the transition to renewable sources of electricity generation. As Humphreys J has remarked, it is a "*key insight*" that in such matters "*there are no solutions, only trade-offs".* The resolution of this tension seems to me a paradigm example of such a trade-off in the policy sphere. It is emphatically for the Government and the Oireachtas to decide what those trade-offs ought to be. That is not to suggest that a particular choice is right or wrong - as to which there can be directly conflicting yet reasonable views. It is to emphasise that the balance between, and resolution of, those desiderata of development of data centres and reduction of GHG emissions is an issue of policy to be decided by the executive and legislature rather than by the courts.

198. Returning to the EIA concept of indirect effect, I note that Hogan J in **Kilkenny Cheese** considered two possible interpretations of Article 3(1) of the EIA Directive as to the extent to which the environmental effects of off-site activities must be assessed as indirect effects. He cited the **An Taisce Edenderry** case[361] as accepting that "*in assessing indirect effects there has to be a limit or the effects will be too remote".* Hogan J held that, in finding that the effects were not too remote in that case, White J was dealing with 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*" such that *"one cannot realistically be assessed in isolation from the other".* Hogan J cited "*the broadly similar approach, albeit with a different outcome*" taken in **Kemper**.[362] Hogan J considered that once *"one moves beyond the facts of special cases such as An Taisce Edenderry a range of difficulties open up"* – the difficulty of an *"open-ended interpretation of art.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".* And *"if art.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."* Hogan J saw "*'hardly any limits but the sky'*[363] *if such an open-ended interpretation of the Directive were to be adopted"* and he observed that *"It is the fact that such an open-ended interpretation of art.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."* The pragmatic rationale of this view will be noted.

199. Hogan J cited the English case of **Finch**[364] (Holgate J in the High Court) as an example in which the downstream emissions of the burning by consumers of the hydrocarbons to be extracted from a drilling site were considered too remote to be attributed as indirect effects of the drilling – emphasising that the indirect effects had to be effects of the project itself. Hogan J referred to the citation in Finch of **Abraham**[365] and **Ecologistas**[366] and to the application of Finch by the Scottish

361 An Taisce v An Bord Pleanála [2015] IEHC 633. White J. held that the environmental effects of extracting peat fuel from third party bogs to burn in a power plant did fall within the ambit of "indirect effects".
362 Kemper v An Bord Pleanála [2020] IEHC 601. The environmental effects of spreading on land fertiliser made from by-products of a wastewater treatment plant were not indirect effects of the plant, not least as the lands could not be identified until the fertiliser was sold.
363 Citing Holmes J., Baldwin v Missouri 281 U.S. 586 at 595 (1931).
364 R. (Finch) v Surrey County Council [2020] EWHC 3566 (Admin).
365 Abraham (Case C-2/07) EU:2008:113.
366 Ecologistas en Accion-CODA (Case C-142/07) EU:C:2008:445.

Court of Session (Inner House) in **Greenpeace v Advocate General**[367] on facts, as to alleged downstream effects, not dissimilar to those in Finch.

200. Hogan J held that the information to be supplied in an EIAR "*must be firmly tethered to the project*" and *"the indirect significant effects to be assessed must be intrinsic to the construction and operation of the project."* Hogan J "*cannot but agree with*" Finch as reinforcing 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."*

To this, Hogan J does enter the caveat that there may 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…"*

201. Citing Finch and Greenpeace, Hogan J adopts an interpretation of Article 3 of the EIA Directive as to the obligation to assess indirect effects, to the effect that indirect effects[368] must be "*"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)."*

202. On the facts in **Kilkenny Cheese,** Hogan J held that the Board was entitled to conclude that the cheese factory would be supplied from Glanbia's[369] existing milk supply pool, which would be produced in any event. But he also concluded that the diversion of part of that pool from its present uses to those of the cheese factory would likely create a market vacuum to be filled by increased milk production. In that sense, any enhanced overall demand for milk production in the years to come was likely not to be "entirely independent" of the operation of the factory.

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367 Greenpeace Limited v 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 Scottish Court of Session said, inter alia, "It would not be practicable, in an assessment of the environmental effects of a project for the extraction of fossil fuels, for the decision maker to conduct a wide ranging examination into the effects, local or global, of the use of that fuel by the final consumer." It accepted that "these are matters for decision at a relatively high level of Government, rather than either by the court or in relation to one oilfield project."
368 And, for that matter, direct effects.
369 Glanbia were to own the factory and Glanbia had existing contracts with farmers for supply of milk.

"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 art.3(1) of the Directive must be taken necessarily to contemplate."

"… 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 art.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 art.3(1)."

203. For completeness in this regard, I should mention that the day after the Supreme Court gave judgment in Kilkenny Cheese, endorsing and applying Finch, the UK Court of Appeal upheld the decision of Holgate J in Finch.[370] Strictly, I need not concern myself with any difference between Holgate J and the Court of Appeal as I am bound by the Supreme Court in **Kilkenny Cheese**. But some remarks seem worthwhile.

204. The Court of Appeal, inter alia, considered that:

- the generally interchangeable concepts of "proposed development" and "project" must be understood broadly, and realistically.

- it is crucial that EIA is to address the particular proposed development, not some further or different project.

- some of Holgate J's essential reasoning was to be rejected – essentially finding that whether an effect was an indirect effect of a project was not a matter of law and so downstream GHG gas emissions were not "legally incapable" of being indirect effects of the project.

- the existence and nature of "indirect", "secondary" or "cumulative" effects would always depend on the particular facts and circumstances of the development under consideration. The real question is the degree of connection needed to link a project and a putative effect, which is a "*a matter of fact and evaluative judgment*" for the planning authority and reviewable, as to merit, only for irrationality.[371]

370 [2022] EWCA Civ 187.

371 Lewison LJ observed that irrationality is not the only available public law ground. Humphreys J has made similar observations, for example recently in Four Districts Woodland Habitat Group v An Bord Pleanála, & Romeville Developments [2023] IEHC 335 §35 et seq; Also Reid v An Bord Pleanála [2021] IEHC 230.

- An indirect effect "*must be identifiably an effect of the project in hand".*

- The facts that a potential effect is outwith the control of the developers and/or takes place outside the site are not determinative, but are relevant.

- Where there would have to be a further and separate project to produce the posited indirect effects of the project at hand and where that further and separate project would be subject to its own EIA, those impacts ought to be assessed at that later stage.

205. As to this last observation of the Court of Appeal in Finch, it seems to me that

- it is posited as a useful general observation rather than as a rigid or universal rule.

- the Court of Appeal in Finch was considering downstream rather than upstream effects but it does not seem to me that this is a necessarily distinguishing difference. Nor was it so considered by the Supreme Court in Kilkenny Cheese.

- underlying it is the observation that GHG emissions arguably the indirect effects of project A (for example a data centre) may also be the direct effects of project B (for example a power station) and better regulated as such.

- not only is the prospect (or history) of EIA of an upstream or downstream project relevant (and power station and wind farm developments require EIA) – so too, by analogy, are other forms of environmental regulation directed at reducing environmental effects. Examples include emissions licensing and other, possibly sectoral, controls such as the ETS which reduces GHG emissions of electricity generation.

- it is quite in accordance with the strategic purpose of EIA – of environmental protection and incorporation of environmental considerations in development consent decision-making - that, while not, in EIA, ignoring such emissions as indirect effects of project A, EIA should nonetheless recognise the significance of, and advantages of the environmental regulation of project B. That strikes me as an element of a coordinated approach to environmental protection – or, put colloquially, joined-up thinking.

206. I should add that the proposition articulated by the Court of Appeal in **Finch** that the degree of connection needed to link a project and a putative indirect, secondary or cumulative effect, is a "*a matter of fact and evaluative judgment*" for the planning authority and reviewable, as to merit, only for irrationality has its antecedents in **Brown**[372] and **Bowen-West**.[373]

372 Brown v Carlisle City Council [2010] EWCA Civ 523.
373 Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321.

207. Finally, and for completeness, I note that in June 2023 the UK Supreme Court reserved its judgment in the further appeal of Finch to that court.

GHG emissions of the generation of electricity to power the Data Centre as indirect effects.

208. **Kilkenny Cheese** can be read as suggesting that that the Scope 2 CO_2 emissions of the generation of the electricity input to the Data Centre are not an indirect effect of the Data Centre for purposes of EIA. However, Hogan J in excluding the emissions caused by the production of inputs from the concept of indirect effects, entered a caveat as to special cases. The EIA Directive specifies assessment of effects on "*climate*" by a project the required description of the operation of which includes "*energy demand and energy used*" and the factors likely to be significantly affected as including "*the nature and magnitude of greenhouse gas emissions*" – which it deems to be, of themselves, an "*impact on climate*".[374] It is difficult, in a regime which requires assessment of climate change effects, to see the environmental relevance of "*energy demand*" as excluding the GHG emissions resultant on its generation. Further, and while it is not binding but is influential, the EU Climate Change in EIA Guidance 2013 states clearly that it is necessary in EIA to consider *"Indirect GHG emissions due to an increased demand for energy".* Accordingly, it seems to me that, notwithstanding the logic of the general rule in **Kilkenny Cheese**, GHG emissions of the generation of electricity required to power the Data Centre are a special case of an off-site indirect effect requiring assessment in EIA. In any event, it appears to me that Hogan J specifically regarded "*energy demand and energy used*" – specified at Annex IV §1(c) of the EIA Directive, as "intrinsic" to the project. [375]

209. In my view therefore, the Board properly regarded the Scope 2 GHG emissions of the generation of electricity required to power the Data Centre as indirect effects of the operation of the Data Centre requiring assessment in EIA if likely to be significant, and did not, as it now retrospectively submits, do so in error.

210. That said, the question next arises of what that assessment in EIA must consist. For the reasons which follow, I am of the view that the Board properly conducted that assessment.

a. First it bears recalling that, by **Article 3** of the Directive, EIA is to identify describe and assess effects "*in an appropriate manner in the light of each individual case*". And, as was observed in **Fitzpatrick**,[376] not merely are those effects to be those of the project for which the planning permission is sought, "*the manner in which each individual assessment is to be carried out is fact specific to the individual case*". It appears to me to follow that, as environmental effects may vary widely in type, degree and susceptibility to identification description and assessment, what is "appropriate" in terms of depth and rigour may well vary not merely as between projects but as between the various effects of a project. There is

374 EIA Directive Annex IV §5(f).
375 §106.
376 Fitzpatrick v An Bord Pleanála [2019] 3 IR 617 §36.

no difference in principle. What is "*appropriate*" is always required and is to be attained in light of the precautionary principle and the obligation to perform "*as complete an assessment as possible*".[377] But in practice it would not be surprising if it is found that some indirect and cumulative effects are less susceptible to assessment than are some direct effects. For example, the information reasonably available to the developer as to the latter may be greater or the uncertainties at play may be fewer. And the theoretical difficulties of cumulation of effect – what projects are to be included and what excluded - are well-known and occupied quite some time and effort in this case. So, on reflection, it is clear to me that my suggestion at trial[378] that the EIA Directive requires the same degree of description, examination and analysis of direct, indirect, short-term, long-term and cumulative effects, while perhaps strictly correct in principle, was apt to mislead in practice.

b. The CO_2 emissions in question in this case are not direct emissions of the Proposed Development but are direct emissions of other developments – power stations and wind turbines. Those power stations and wind turbines will have been, in the ordinary way, subjected to development consent procedures - including EIA which will have considered the same CO_2 emissions as direct effects of the power stations and wind turbines. That may or may not be absolutely invariably so,[379] but there can be little doubt but that it is true as a general observation and true also of the development of future generation capacity in the transition to renewable energy sources. That does not per se absolve the Board of assessing the indirect effects of the Data Centre, but it is a factor it can build in to its assessment and in considering the proper depth of its assessment.

c. Electricity is as much an input to the productive capacity of the Data Centre as was the milk an input to cheese production in the Kilkenny Cheese case. Insofar as that analogy stretches – I think it partially does – it suggests that the rationale of the Kilkenny Cheese case should apply to limit the extent of consideration in EIA of the Data Centre of the CO_2 emissions in question in this case. The element of that rationale which remains relevant, despite the identification of the CO_2 emissions of electricity generation as an indirect effect of the Data Centre for EIA purposes, is that the proper scope of the EIA Directive should not be artificially expanded and conscripted into the general fight against climate change by being made to do the work of other legislative measures. As I have said, I agree also with Humphreys J. that wider indirect environmental consequences must be assessed at a programmatic level. The legislative measure Hogan J had in mind was the Climate Act 2021[380] but the same reasoning seems to me to apply to the ETS Directive.[381]

d. Counsel for the Board argues, and I agree, that climate change due to GHG emissions has particular characteristics which require a particular approach in EIA of individual projects. The Scope 2 GHG emissions of a project are not local to the project, nor even are they local

377 Commission v Ireland Case 50/09 §40.

378 Transcript Day 4 p170.

379 One may think, for example, of domestic solar power supplies to the National Grid which will not have undergone EIA – or even of power stations commissioned before EIA was required. But such cases seem likely to form a very small part of the power supply to the National Grid.

380 Climate Action and Low Carbon Development (Amendment) Act 2021.

381 Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union as amended.

to a particular power station. They are produced by the National Grid - likely at multiple and varying locations and in variable quantities depending on the particular power source on-line at a given time. Perhaps more importantly, while the resulting GHG emissions are regarded in the EIA Directive as environmental effects in themselves, in truth the real environmental effects are not the emissions themselves but are effects of the emissions by way of global warming and actual climate change. These are experienced at a planetary level and with no discernible causative relationship to the particular, and proportionately infinitesimal, GHG emissions attributable to the Data Centre. As counsel suggested all, or almost all, GHG emissions attributable to any project individually can likely be similarly regarded as infinitesimal or insignificant. Indeed, it would not surprise me to learn that the emissions of Ireland could, on a planetary scale, be similarly regarded (though this observation is not to be read as in any way implying diminution of Ireland's obligations as to climate change). On the basis that no single source discernibly matters, or in EIA terms, is significant, one could even argue for ignoring the issue in project-specific EIA and addressing it programmatically. But the EIA Directive requires that it be addressed. And, counsel for the Board suggested, as GHG emissions are addressed by way of EU-wide and national regulation, it follows that EIA should consider the Scope 2 GHG emissions of a project by reference to the requirements and objectives of such EU-wide and national regulation. In this regard, I have noted that by **Annex IV** of the **EIA Directive** and **Schedule 6 PDR 2001** an EIAR shall take *"into account the environmental protection objectives established at European Union level or by a Member State of the European Union which are relevant to the proposed development".* It follows that that the Board is entitled to take these objectives, including those set in the ETS and the means of their achievement, into account in EIA.

e. The CO_2 emissions of electricity generation are subjected via ETS to a particular EU-wide scheme which the EU has adopted as the "cornerstone" of its regulation for the control and reduction of such emissions. It is, one might say, "supply-led" not "demand-led" and that regulatory and quantified control of the CO_2 emissions of electricity generation starts with a "cap" on such emissions. So, there is a limited supply of allowances to generate CO_2 emissions and the reduction of such emissions is to be achieved by reduction of that cap progressively over time and at an EU Level. The introduction of data centres, however power hungry, will not affect the quantum of that cap. I am not familiar with how allowances are distributed amongst Member States or emitters within them, but it does not seem to me that that much matters as the effect of the cap is to be achieved at EU level. Demand for electricity, such as from data centres will have to be met within Ireland's cap or by way of purchase of allowances from abroad.[382] Between the rock of demand for electricity and the hard place of the ETS lies Ireland's incentive to meet its commitment to transition to renewable electricity generation. No doubt this is a highly simplified account of matters, but it seems to me to suffice for present purposes. Whether one calls the ETS "programmatic" seems to me inessential to this observation, but the description does seem to me applicable.

f. It is undisputed that, on 2018 figures, the Data Centre's CO_2 emissions will be less than 0.04% of the total EU-wide ETS market. There has been no real dispute of the proposition

382 In fact, as I understand, allowances are allocated or sold to each large emitter individually.

that that is imperceptible. Its absolute amount[383] will inevitably have been, and will be further, reduced by transition to renewables since 2018 and it bears recollection that ETS emissions form only part of EU GHG emissions. Even had irrationality been pleaded, a conclusion that any resultant effect on climate change would not be significant could not have been considered irrational.

g. As to the EU Climate Change in EIA Guidance 2013,[384] it may be that the consideration in the EIA in this case of such matters as the long-term and cumulative nature of climate change effects, complexity of the issues and cause-effect relationships, uncertainty of projections and description of the sources of, and characterising the nature of uncertainty could have been better addressed – if only by confirming the impracticality and unreality of any analysis of those issues, if that was the Board's view. But there is no evidence or even substantive suggestion that, as to the specifics of this Data Centre and its Scope 2 GHG emissions, they could have been better addressed in any way that could realistically have informed the development consent decision. That must be primarily because there is no reason to conclude, even had it been pleaded, that the Board was irrational in its conclusion that the Scope 2 GHG emissions associated with the Data Centre would not, to paraphrase of the Guidance, be significant in terms of its contribution to GHG-reduction targets for Ireland as in effect set by the ETS. That is the overarching conclusion for EIA purposes as it relates to climate change.

   (Without prejudging anything, it may assist to observe that similar conclusions may also suffice as to other projects. But it does not follow from the specific outcome in this case that the precepts of the EU Climate Change in EIA Guidance 2013, in particular Chapter 4, can safely be generally disregarded – as they say, "*Judging an impact's magnitude and significance must be context-specific*." It would at least assist if complexities, difficulties and uncertainties were identified and made express.)

h. As to any posited causative connection between the Scope 2 CO_2 emissions of the electricity generation specifically required to power the Data Centre, and posited effects of those emissions specifically, whether or not cumulatively with others, on climate change or on the Coynes[385] there is not a shred of evidence that any information or data in that regard, beyond that to hand, could reasonably have been required of EngineNode or gleaned elsewhere by the Board within the contemplation of Article 5 of the EIA Directive and the views of the Advocates General in the cases of **Abraham**, and **Land Nordrhein-Westfalen**. One does not have to be a scientist or trained logician to take the view that any prospect of any such information of any consequence being reasonably available is extremely unlikely, if indeed it is possible at all. The concern of Hogan J in Kilkenny Cheese to avoid an "*impossibly onerous and unworkable obligation"* comes readily to mind and I would apply it not merely to the developer in preparing an EIAR but to the Board in doing EIA. While EIA must be "*as complete an assessment as possible*"[386] the Board's satisfaction with the information

383 The percentage is unlikely to vary in line with the absolute reduction. It may even rise. That is because other EU States will also be transitioning to renewables.
384 See §4 generally.
385 See below as to the Human Rights Arguments.
386 Article 3 of the EIA Directive and Case C-404/09, Commission v Spain (Alto Sil/Brown Bear).

available to it in this case could not be described as irrational. Importantly, the precise information required by the EIA Directive as to energy demand and use and as to the quantum of GHG emissions was clearly supplied. It bears noting that in **Bund Naturschutz in Bayern**[387] AG Gulmann pointed out, admittedly in a different context, that what might be the optimal solution in EIA from the point of view of environmental protection may have to yield to the terms of the EIA Directive. As to knock-on effects of such quantified GHG emissions of electricity to be generated to power the Data Centre, – and to adopt the terminology of Hogan J in Kilkenny Cheese – they remain elusive, contingent, speculative and incapable of measurement.

i. In considerable contrast and as to controlling the indirect and cumulative effects of all the projects drawing electricity from the National Grid, the ETS has what seem to me to be very significant advantages over EIA of individual projects.

    i. The ETS automatically captures and reduces (as the cap decreases) in a single process all such significant, indirect and cumulative effects without the necessity of what would, at EU level, be in effect an atomised and inevitably uncoordinated (likely uncoordinatable) process of EIA of very large numbers of individual projects.

    ii. Not merely that, but ETS also automatically captures and reduces the indirect and cumulative effects of non-EIA projects. While non-EIA projects each have less significant effects, in the aggregate of all non-EIA projects those effects can only be highly significant. And while they escape EIA, they do not escape the ETS and by the ETS they are accumulated, for purposes of emission reduction, with the emissions of the EIA projects.

    iii. The ETS avoids the necessity for difficult and inevitably logically deficient judgments in EIA as to
        - what other projects should be considered in assessing cumulative effect.
        - what exactly is the cumulative effect to be considered.

    Why should the Data Centre in the next field be included but not the Data Centre 50 fields away or at the other end of the country, when all draw their power from the same National Grid and will collectively indirectly produce their CO_2 emissions at the same body of locations?[388] And if the logic of cumulation is that all Data Centres draw their power from the same National Grid and so the cumulation of their effect must be considered in each application for development consent of a data centre, would it not follow by the same logic that the cumulation should include, say, all enterprises which draw large[389] quantities of electricity from the grid?[390] The aphorism "'tis all connected" (to the National Grid) may well contain more than a grain of truth and of logic and no

387 Case C-396/92. European Court reports 1994 Page I-03717 AG Gulmann §66 & 67.
388 I understand that the national grid and power generation locations may be organised in a way which undermines this idea in some degree by localising generation to its use - but the broad point seems a good one.
389 Whatever that may mean.
390 Strasswalchen C-531/13 [2015] All ER (D) 164 (Feb) §45 confirms that cumulation is not is not restricted only to projects of the same kind nor can it be restricted by environmentally irrelevant considerations such as municipal boundaries.

doubt should inform strategic/programmatic action. But as a formula for discerning the scope of cumulation for purposes of EIA of individual projects, it is a recipe for unmanageable, impractical and unaffordable EIA.

While satisfactorily expressing a precise, general and practically applicable legal standard for the limits of cumulation in EIA may be impossible (resulting in the Courts', some might provocatively suggest, handing the matter to the very generally expressed expert and planning judgment of the Board), at least in the instance of the CO_2 emissions of electricity generation, that issue has, in appreciable substance, been neutralised by the "supply led" approach of the ETS.

iv. The ETS is, in a sense, in "real time". It applies continuously over time to total CO_2 emissions of electricity generation. On the other hand, it is impossible in development consent after EIA of a Data Centre or other large electricity consumer from the National Grid, to condition its operation on a particular National Fuel Mix or like criterion as to the proportion of renewable generation supply to the National Grid. So, in this respect and in appreciable degree, an EIA represents a prediction at a fixed point in time which may prove, with time, to have been more or less accurate in hindsight.

v. It must be remembered that what is to be considered in EIA is always the effect of the project. As stated, cumulation has been described as the answer to the question *"whether the environmental impact of the [project] could, due to the impact of other projects, be greater than what it would be without the presence of those other projects."* – **Strasswalchen.**[391] In that context, the concept of significance of effect seems to me to have a part to play in the analysis. Significance is not a "hard-edged concept" and determination of significance by planning authorities is entitled to curial deference. EIA has been said to seek to address "major" effects – though care is required to avoid giving the word an exaggerated meaning. In these regards see **Tromans**,[392] **MRRA**[393] and **Shadowmill**.[394] While, unlike EngineNode, I confess to having found it very striking that, in a State of just over 5,000,000 people, as much as 2.5% of its demand for electricity could derive from two relatively small (in a physical sense) adjacent installations. Even 1% from the proposed Data Centre alone on a 24.5ha site seemed striking to me. I hasten to say that "striking" does not imply "alarming" or "significant" and in any event it is the Board's view which counts in that regard, not mine. The Coynes submit that 2.5% - or even 1% is very significant. 2.5% is likely to be an out-of-date figure.[395] However, taking even that 2.5%, it seems to me an impossible task of imagination, science and analysis to reliably conjure a world in which the other 97.5% (or any large part of it) did not exist, so that one could discern the impact of the two adjacent data centres in cumulation with the "other projects" contributing to the CO_2 emissions of Ireland's electricity generators. That would be equally, if not more, so if one confined oneself to the lesser percentage referable to the Data Centre alone. By

391 Strasswalchen C-531/13 [2015] All ER (D) 164 (Feb) §47.
392 EIA, 2nd Edition §3.141.
393 Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318 §118.
394 Shadowmill v ABP & Lilacstone [2023] IEHC 157 §55 & 56.
395 2.5% was based on the 2016 national fuel mix which, as relates to the transition to renewable energy sources, is likely to be out-of-date.

"impact" here I do not mean merely the quantum of CO_2 emissions, which will be readily calculable (and has been calculated in this case). I mean the practical effects of those CO_2 emissions on global warming and climate change – which is the analysis for which the Coynes call. Such effects seem to me to fall firmly into the "*elusive contingent and speculative*" category "*incapable of measurement or assessment"* identified by Hogan J in **Kilkenny Cheese** as not falling within the contemplation of indirect effects found in Art.3(1) of the EIA Directive.

vi. Beyond general and alarming predictions of dire climactic and weather events (which predictions may well be justified) no attempt was made, and I strongly imagine none is possible, to discern a reliable causative link between the CO_2 emissions specifically of the electricity to power the Data Centre and any of those events. ETS avoids the need for such speculations.

vii. The ETS, as the "hard place" described above, inevitably has a quite direct effect on the formulation of national targets for transition to renewable electricity generation sources. These targets are now expressed as Government policy "commitments". While perhaps not legally binding commitments justiciable by a private person, (that was not argued) they are at least expressions of Government policy in notably strong terms. Not merely is the Board obliged by statute to have regard to those policies as informed by ETS, it is entirely unsurprising and proper that the Board should attribute appreciable weight to them as, via the Inspector, it has done.[396] Of course, it may be that litigants and others are sceptical, even rightly sceptical, of the policy, its commitments, the firmness of those commitments, whether they are achievable and whether they will be achieved. But, at least ordinarily, those are political – not legal – concerns.

viii. The success or failure of the ETS will be apparent at an EU-wide level. The Board was entitled to accept that that the Data Centre will not appreciably affect that issue and that even local effects would not be significant. Stichting Natur provides some analogy in this regard. It was considered in that case that a 2.9% contribution to national SO_2 did not look likely to seriously compromise a national emissions ceiling and decision of the question whether it fell within the flexibility afforded to member states. Indeed, the position as to ETS is even stronger to this effect as the cap is an EU-wide cap and there is no suggestion that, on any view, Ireland is in likely to break ETS rules by, for example, emitting CO_2 for which it has neither been assigned nor purchased the necessary allowances. It is true that the ETS will expire in 2030 but it is inconceivable that it will not be replaced – if not by another ETS, then by some other system designed to further reduce CO_2 emissions of emitters now in the ETS. Accordingly, I reject any suggestion of failure to adequately address long-term effects.

396 As has been noted, the Inspector stated "Notwithstanding the anticipated demand for energy to serve the data centre project along with the additional demand consequent on the omission of the energy centre and taking account of the EU-wide Emission Trading Scheme (ETS), I am satisfied that this issue will be ultimately addressed as Ireland moves towards meeting its objective of providing 70% of its energy from renewable sources by 2030 in accordance with the targets set in the Climate Action Plan, 2019."

211. I referred earlier to the description of the ETS in **Milieudefensie.** In an analysis of some present relevance, the Hague District Court also observed in that case that *"The indemnifying effect of the ETS system means that – insofar as it concerns the reduction target of the ETS system – RDS*[397] *does not have an additional obligation with respect to Scope 1 and 2 emissions in the EU that fall under the system."* The Hague District Court also observed that "*the ETS system only covers a small part of the Shell group's emissions. Only for these emissions, RDS does not have to adjust its policy due to the indemnifying effect of the ETS system."* The court's ultimate reasoning was more complex (as to shortfalls between what reductions ETS would achieve and overarching reduction targets it imposed on RDS).

212. However the only GHG emissions in issue in the present case – the Scope 2 emissions of electricity generation to power the Data Centre - are all covered by the ETS. In that light Milieudefensie can be seen to have adopted the reasoning urged in opposition to the Coynes in this case as to the significance of the ETS – which is described in **Milieudefensie** as the cornerstone of EU climate policy and as an important tool to cost-effectively limit CO_2 emissions. Paraphrasing the Hague District Court, one would say that the indemnifying effect of the ETS system means that – insofar as it concerns the GHG cap of the ETS system – EngineNode does not have an additional obligation with respect to Scope 2 emissions of the Data Centre that fall under the system. For these emissions, EngineNode does not have to adjust its policy due to the indemnifying effect of the ETS system. It is not apparent to me that this observation is any the less valid because we are concerned with a prospect of development rather than with an existing enterprise.

213. These observations seem to me to illustrate that, while EIA of a project must consider "*energy demand and energy used*"[398], "*climate",*[399] "*climate change*",[400] *"climate (including GHG emissions)"*[401] and "*the impact of the project on climate (including the nature and magnitude of GHG emissions)*,[402] it suffices in EIA of a particular project, in which its indirect and cumulative effects by way of electricity generation of CO_2 emissions are at issue, to do as was done here. Namely to identify and quantify energy demand and energy used, to identify and quantify the nature and magnitude of nature and magnitude of GHG emissions likely to result from that energy use (recognised in the papers as up to 180mw and 1,577 GWh annually) and to examine and analyse their contribution to national GHG emissions of the electricity generation sector in the context of the ETS and national policy to transition towards renewable electricity generation.

214. It does not appear to me that it is necessary, or even possible, to go further by way of an attempt to discern the cumulative effect of the project on future substantive climate change events, much less effect on a small number of individuals who, irrelevantly for this particular purpose[403] as

397 Royal Dutch Shell.
398 EIA Directive – Annex IV §1.c (EIAR Content).
399 EIA Directive – Art 3.1.c (EIA Content).
400 EIA Directive – Annex III §1.f.
401 EIA Directive – Annex IV §4 (EIAR Content).
402 EIA Directive – Annex IV §5.f (EIAR Content).
403 In this I mean no disrespect to the Coynes.

the effects will be caused elsewhere and occur on a global scale, happen to live beside the Data Centre. I confess to imagining that such an exercise, as to the effects by way of electricity generation of CO_2 emissions due to this project (which, in EIA is always the issue – even as to cumulative effect) would be speculative to the point of uselessness.

G5 - EIA - CO_2 Emissions – Decision

215. I respectfully decline to quash the Impugned Decisions on Ground 5. I do so for the reasons set out above but primarily on the basis that:

- There are no direct CO_2 emissions by the Data Centre (or at least none said to be significant for purposes of these proceedings[404]).
- The Scope 2 CO_2 emissions of the Data Centre are to be considered as indirect effects in EIA.
- The Scope 2 CO_2 emissions of the Data Centre are described and assessed in the EIA in the manner required by the EIA Directive.
- Their assessment in EIA in light of their status as ETS emissions and in the context of the transition to renewable energy generation was in accordance with law.
- The significance of cumulative effect was adequately considered as a proportion of the national emissions of CO_2 by electricity generation.
- The determination that the quantum of any effect would not be significant was impugnable only for irrationality and was not so impugned. But I may as well say that any such challenge would have failed.
- The consequential effects of those CO_2 emissions of the Data Centre on global warming and climate change or on specific individuals are not to be considered as indirect or cumulative effects in EIA as they are remote, elusive, contingent, speculative and incapable of measurement.
- Any effects consisting of or consequential on those CO_2 emissions are in any event, and clearly better, managed via programmatic measures – notably the ETS.

404 There is provision for back-up generators, but their emissions are not in issue.

G5 - EIA - CO_2 Emissions – Goesa

216. While I have not relied on it for my decision, I note that the English case of **Goesa**[405] seems broadly consistent with it. It concerned EIA of an extension to the Southampton airport runway. The details are somewhat particular to English law and procedures. Goesa impugned the planning permission, inter alia, for alleged failure to assess the proposal's impact on climate change, taking into account the cumulative effects of GHGs from the proposal in combination with other projects. A lengthy account is not required here. Simplifying considerably, the Queen's Bench held that

- EIA focused on assessing the significance of an environmental effect, not its acceptability - the latter was a matter of judgement for the decision-maker not a hard-edged point of law;

- as no criteria or thresholds had been set by which to measure the "significance" of the GHG emissions from a particular proposal, and absent guidance for assessing the acceptability of that contribution, whether expressed as a percentage of national budgets or targets or otherwise, acceptability was a matter for the judgement of the decision-maker;

- as a matter of principle, there was nothing unlawful in a decision-maker using benchmarks they considered appropriate[406] to help arrive at what would inevitably be a broad judgement on those issues;

- the authority had been entitled to have regard to the Government's "Airports National Policy Statement" which had allowed for a third runway at Heathrow and expansion elsewhere. (This seems to me at least somewhat analogous to the regard had in the present case to the Data Centres Statement.)

GROUND 6 – EIA - HUMAN RIGHTS

G6 - EIA & Human Rights – Pleadings

217. The Coynes plead that, in granting permission, the Board "breached" their rights to life and bodily integrity and to a healthy environment consistent with human dignity as guaranteed by Article 40.3 of the Constitution and/or the Board's obligations pursuant to s.3 of the European Convention on Human Rights Act 2003 (the "2003 Act"), and Articles 2 and 8 ECHR[407] – all on the basis that planning permission will result in the production of very significant CO_2 emissions.

218. The Coynes plead what can be termed a description of climate change, in particular consequent on CO_2 emissions, and foreseen resultant risks to life and health. The Coynes' case is that the Board may not permit development the environmental consequences of which will significantly

405 R (Goesa Ltd) v Eastleigh Borough Council [2022] PTSR 1473.
406 Such as the statutory carbon budgets or national sectoral figures.
407 The right to life (Article 2) and the right to respect for private and family life and home (Article 8).

contribute to a climate crisis that will expose the Coynes to current and future breaches of their rights as described above.

219. Beyond traverses, the Board pleads that

- Not having raised before the Board their human rights or the pleaded generalised nature and effects of climate change, they are precluded from doing so in judicial review.
- The pleas that the Data Centre will make a '*significant contribution'* to the climate crisis and that it will expose the Coynes to current or future breaches of their rights have no basis in fact.
- The existence of a justiciable personal right to a healthy environment is denied.
- In any event, the decisions were proportionate given the Board's conclusions as to the Data Centre's impacts on the environment.

220. Beyond traverses and the Board's pleas, EngineNode pleads:

- The Coynes' failure to adduce evidence of the risk to the rights they assert posed by the Data Centre.
- That the premise that the Data Centre will produce very significant CO_2 emissions ignores the Government's policy of meeting data centres' electricity demand from renewable sources.
- That the effects of energy consumption on climate change, and human health, fall to be dealt with at a programmatic/national policy level, and are not a basis for impugning development consent for an individual project.

G6 - EIA & Human Rights – The Coynes' Submissions

221. The Coynes observe that, climate change was raised before the Board[408] and submit that, in any event, the Board was obliged to act in accordance with constitutional requirements and the 2003 Act irrespective of whether any party raises this as an issue. They doubt the Board is seriously suggesting that it requires scientific evidence of the severe impacts of climate change in order to consider those impacts. They cite scientific consensus as to the foreseen and present substantive effects (which they recite) of climate change as accepted by the State in **FIE v Ireland**.[409] They cite

408 Citing the Inspector's Data Centre Report §7.1.7 as to the Coynes, An Taisce and Friends of the Irish Environment.
409 Friends of the Irish Environment v Government of Ireland 2020 IESC 49; [2020] 2 I.L.R.M. 233; §§3.1-3.8.

Urgenda[410] and **Milieudefensie**[411] also in submitting that the severe impacts of climate change are undisputed and argue that it is equally inevitable and undisputed that these effects currently impinge and will profoundly impinge on fundamental rights.

222. The Coynes cite **East Donegal Co-op**[412] for the principle that statutory procedures are to be effected having regard to threatened, future and apprehended infringements of constitutional rights. They cite **In re a Ward of Court**[413] for the pre-eminence of the right to life, which **"***importance imposes a strong presumption in favour of taking all steps capable of preserving it, save in exceptional circumstances"*. In consequence, the Coynes say, where it is common case that GHG emissions will lead to profound consequences for the right to life, the appropriate test is whether the Board, as an emanation of the State, can demonstrate that it has taken "*all steps capable of preserving it"*. They plead also the derived right to bodily integrity[414] as requiring the prevention of an act or omission of the Executive which, without justification, would expose the health of a person to risk or danger – asserting that **Frawley**[415] is directly on point. Frawley held "*… that the Executive has a duty to protect the health of persons held in custody as well as is reasonably possible in all the circumstances of the case that the Executive has a duty to protect the health of persons held in custody as well as is reasonably possible in all the circumstances of the case …"* They cite Barrett J in the High Court in the **Dublin Airport Runway** case[416] for a derived, personal, constitutional right to an environment consistent with human dignity and seek to distinguish as obiter the contrary view of Clarke CJ in **FIE v Ireland***.*[417] They also cite MacMenamin J's emphasis on human dignity in **Simpson**.[418]

223. The Coynes rely on **s.3(1) of the 2003 Act** for the duty of the Board to act in a manner compatible with the State's ECHR obligations, citing **Articles 2 and 8 ECHR** and **Urgenda** as to the interaction between the ECHR and climate change. They cite the requirement of the ECtHR that the rights protected by the ECHR be made *"practical and effective"* to protect human beings and the approach to interpreting the ECHR such that the Board's positive obligations under Articles 2 and 8 ECHR extend to taking *"appropriate measures against the threat of dangerous climate change"*. They cite various decisions of the ECtHR[419] as to Articles 2 and 8 ECHR – to some of which I will refer in due course.

G6 – EIA & Human Rights – Submissions of the Board & EngineNode

410 State of the Netherlands v Urgenda Foundation (C/09/456689/ZA) decision of the Hoge Raad (the Supreme Court of the Netherlands) on a cassation appeal.
411 Miliedefensie v Royal Dutch Shell Plc (26th May 2021 C/09/571932 / HA ZA 19-379).
412 East Donegal Co-Operative Livestock Mart Limited v The Attorney General, 1970 IR 1.
413 In re a Ward of Court (withholding medical treatment) (No. 2) 1996 2 IR 79.
414 Cited as recognised in Ryan v The Attorney General 1965 IR 294 and as developed in State (C.) v Frawley 1976 1 IR 365.
415 State (C) v Frawley [1976] IR 365.
416 Merriman & Friends of the Irish Environment v Fingal County Council & Ors [2017] IEHC 695 (High Court, Barrett J, 21 November 2017).
417 Friends of the Irish Environment v Government of Ireland 2020 IESC 49; [2020] 2 I.L.R.M. 233; §8.
418 Simpson v Governor of Mountjoy Prison [2019] IESC 81.
419 European Court of Human Rights.

224. The Board and/or EngineNode submit that Ground 6 should fail as

- the Coynes never argued before the Board that permission would infringe their personal, constitutional or ECHR rights, and so may not do so now in judicial review, citing, inter alia, **M28**[420] and **Highlands Residents**[421] and **Reid**.[422] They say that the requirement to bring all relevant matters to the attention of the Board in the first instance, established in these cases as to environmental issues, is all the stronger where allegations of breach of rights personal to the objector are concerned.

- the Coynes have not established that their personal constitutional rights are likely to be affected by the Proposed Development to an extent that would give them standing to bring such a challenge.

- there is no evidence of how the Coynes' personal rights will be actually adversely affected (beyond insufficient general statements about the effect of climate change on the world and its population generally). Much less have the Coynes shown any severity of such effect or danger - citing **Budayeva***,* **Pavlov** and **Kotov**.[423]

- the Coynes impermissibly conflate general arguments as to general alleged effects of the Data Centre on GHG emissions and climate change on the one hand and, on the other, arguments that those effects will breach the constitutional rights to life and health of specific individuals.

- **Urgenda** is not authoritative as to the interpretation of the Convention given the state of the caselaw of the ECtHR and given the differences between the constitutional positions of Ireland and the Netherlands as to the domestic law status of International Law. In any event, Urgenda addresses national policy not limited functions as to decisions on planning permission applications – as to which **Kilkenny Cheese**[424] is cited.

- the Supreme Court in **FIE v Ireland** [425] rejected the existence of a derived constitutional right to a healthy environment.

- there is no legal basis on which to quash the Board's decisions by reference to alleged breach of the Coynes' personal rights under the EHCR.

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420 M28 Steering Group v An Bord Pleanála [2019] IEHC 929.
421 Highlands Residents Association and Protect East Meath Limited v An Bord Pleanála [2020] IEHC 622.
422 Reid v An Bord Pleanála [2021] IEHC 230 (High Court (Judicial Review), Humphreys J, 12 April 2021).
423 Budayeva v Russia [2008] ECHR 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02; Pavlov & Ors v Russia (Application No: 31612/09) Judgment 11th October 2022, Kotov & Ors v Russia (Application No: 6142/18 & Ors) Judgment 11 October 2022).
424 An Taisce v An Bord Pleanála, et al incl. Kilkenny Cheese Limited [2022] IESC 8; [2022] 1 I.L.R.M. 281.
425 Friends of the Irish Environment v Ireland [2020] 2 I.L.R.M. 233.

G6 - EIA & Human Rights –Submissions of the State

225. As stated above, the State did not plead to Ground 6 but, properly and sensibly on the part of all parties, were heard and made written submissions on the issue. Hoping to avoid unnecessary repetition of the submissions by the Board and EngineNode, the State's submissions can be summarised as follows:

a. the Coynes' real complaint concerns government policy as to climate change and data centres and *"challenging the logic of such documents by the side-wind of a planning judicial review doesn't raise the level of scrutiny of programmatic documents to that applying to individual planning decisions."*[426]
   - I respectfully observe my suspicion that the Coynes may not be in truth very concerned about government policy as much as they are about the particular project permitted on their residential boundary. The point might be better put as an allegation that they mobilise a complaint as to government policy as a means of advancing their objection to the Data Centre. However, the net result of that reformulation does not, of itself, undermine the State's essential point which is of impermissible collateral challenge to government policy.

b. That the scientific consensus as to climate change is accepted by all does not imply acceptance that the Data Centre will, via climate change, infringe the Coynes' personal rights. The Board's plea that the Ground 6 has no basis in fact is adopted.

c. There is no evidence of any such danger posed by the Data Centre to the Coynes

d. The Coynes lack standing to complain of breach of their constitutional rights given the rule in **Cahill v Sutton**,[427] which requires that an applicant must *"show that the impact of the impugned law on his personal situation discloses an injury or prejudice which he has either suffered or is in imminent danger of suffering*" and **Grace**,[428] in which Clarke J observed that this general principle applies across the board in judicial review. The State also cites **Mohan,**[429] **FIE v Ireland**[430] and **O'Doherty & Waters.**[431]

e. The State makes similar standing and substantive points as to Convention rights, citing, inter alia, **Kyrtatos**, **Fadeyeva, Pavlov, Budayeva Brincat, Osman, Hatton, López Ostra, Guerra,** and **Kotov.**[432]

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426 Citing An Taisce v An Bord Pleanála, et al incl. Kilkenny Cheese Limited [2021] IEHC 254, Humphreys J at [44] – [45] and Stichting ECLI:EU:C:2011:348 to the effect that individual planning applications are not a suitable venue for challenging a broader and higher-level government policy and commitment to attaining certain climate goals, which are more appropriately addressed through programmatic measures. I have considered these cases in this regard earlier in this judgment.
427 [1980] I.R. 269, 284.
428 Grace v An Bord Pleanála [2020] 3 IR 286, 300.
429 Mohan v Ireland [2021] 1 IR 293.
430 Friends of the Irish Environment v Ireland [2020] 2 I.L.R.M. 233.
431 O'Doherty & Waters v Minister for Health [2022] IESC 32.
432 Kyrtatos v Greece Strasbourg 22 May 2003, Fadeyeva v Russia (App No. 55723/00), (§97). Pavlov v Russia, no. 31612/09, 11 October 2022; Brincat and Others v Malta, [2014] ECHR 60908/11, 24 July 2014; Osman v United Kingdom (App No. 87/1997), 28 October 1998, §116., Hatton v UK Strasbourg 8 July 2003, López Ostra v Spain (App No. 16798/90), 9 December 1994, Guerra v Italy [1998] ECHR 14967/89, 19 February 1998, Kotov v Russia, no. 6142/18, 11 October 2022.

f. **Pullen**[433] is cited to the effect that, given the Convention is not domestic law and given the terms of the 2003 Act, certiorari is not available for breach of Convention rights.

g. **McD** and **Fox** are cited to the effect that the argument for a Convention right to a healthy environment impermissibly outstrips the case law of the ECtHR.[434]

G6 - EIA & Human Rights – Evidence & Comment thereon

226. The Coynes' evidence of risk to their personal rights is unusually presented. Mr Coyne's grounding affidavit states: *"I do not understand that the human rights consequences of climate change could be disputed by the Board but in the event that they are the Applicant reserves the right to adduce additional evidence as necessary."* However he does not state what those "*human rights consequences"* are. This averment is preceded by an assertion of intention to refer to certain document "*readily available online*" and which include the following

1.	EPA report "*A Summary of the State of Knowledge on Climate Change Impacts for Ireland" and "Climate Status Report 2020*"
2.	World Health Organization's "*Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s*"
3.	Climate Change Advisory Council Annual Report 2020, 2019, 2018, 2017.
4.	IPCC Summary for Policymakers AR5 (2014) and AR6 (2021).

227. This is not a satisfactory approach to proof of risk to the Coynes' personal rights, despite their reliance on the "scientific consensus" as to Climate Change (which consensus I do not doubt).

- First, and as will be seen in my consideration of the law of personal constitutional rights as they relate to climate change, the assertion that risk to the Coynes' personal rights could not even be disputed by the Board is an extraordinarily sanguine one. That assertion could not possibly operate, as seems to be suggested, to put an onus on the Board to dispute the issue before the Coynes would be put to the trouble of setting out their evidence.

- Second, that documents are available online (in other words, go get them yourself) is not a substitute for their exhibition. Formalities (which are important, not least the deponent's signature on the exhibit itself[435]) aside, various versions, editions and iterations of documents can be found in more, or less, reliable locations online, with the resultant potential for confusion and error. I do not suggest any particular difficulty in this case, but the practice is undesirable. I confess that in the planning list and for practical reasons I would make an exception for statutory planning guidelines, Development Plans and the like - to the extent parties wish to approach the matter in that way. But the exception should go no further and certainly the mere fact that a

433 Pullen v Dublin City Council [2009] 2 ILRM 484.
434 McD v L & M [2009] IESC 81; Thomas Fox v Minister for Justice and Equality [2021] IESC 61.
435 Delaney & McGrath on Practice & Procedure 4th edn §21.63.

document is available on the internet does not absolve a party from its exhibition if they wish to rely on it in evidence. And the text of the affidavit should draw specific attention to the relevant content of any such document. It is difficult to see what is the motivation for the mode of reference adopted. If it is to avoid the necessity for printing, and extracting the relevant content from, voluminous documents that simply defers the necessary identification and analysis of what is actually relevant and imposes those burdens on others later. Those observations amplify the next point.

- Third, even exhibition of documents, had it been done, is not a substitute for averment of facts, which must be set out in the body of an affidavit. In **Murphy v Greene**[436] Finlay CJ considered that "*Although no objection was taken … it seems necessary for me to emphasise that it is not an appropriate procedure" and in "any matter which … involves the submitting of affidavit evidence to the court for the purpose of it exercising a jurisdiction, the facts relied upon must be actually and clearly deposed to in an affidavit and not by reference to any other written document."* Citing Murphy v Greene, **Delaney & McGrath**[437] state: *"… it is important to note that a deponent is required to set out in the body of the affidavit the evidence which it is sought to put before the court and it does not suffice to simply incorporate by reference the contents of exhibits."*

- Fourth, the reason for the necessity of identifying on the affidavit the facts on which one relies – as opposed to merely generally referring to exhibits – is well-illustrated in this case. The 5 documents above together run to well over 1,000 pages of content. Either it is expected that the court will have regard to them, or they should not have been exhibited. Indiscriminately inviting the court to consider them at what is perceived to be its leisure is not a substitute for proper deployment of evidence. As it happens, the entire reference to the content of the three IPPC and WHO documents in the Coyne's written submissions consisted of the following, which could very easily have been stated in the affidavit:

> *"According to the IPCC Summary for Policymakers,[438] between 1 and 1.5°C of warming, the risk of extreme weather events such as heat waves, heavy rain, drought and associated wildfires and coastal flooding, which threaten human health, livelihoods, assets, and ecosystems increases from moderate to high. Per the WHO, based on a conservative estimate, 250,000 additional human deaths are estimated each year between 2030 and 2050 as a result of climate change."*

The same can be said of reliance on the two EPA documents, (though which is not specified)

436 [1990] 2 IR 566
437 Delaney & McGrath on Practice & Procedure 4th edn p798. One may also refer to Bean on Injunctions 13th ed'n §5.16 citing National Bank of Sharjah v Delborg [1993] 2 Bank LR 109: "the place to disclose the facts, .. is in the affidavit and not in the exhibits. … if the facts are not fairly stated in the affidavit, it will not assist the claimant to be able to point to some exhibit from which that fact might be extracted." Gee on Commercial Injunctions 5th Ed'n §9.003 cites National Bank of Sharjah v Delborg and also Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep. 428 in which Bingham J said that an applicant must "identify the crucial points for and against the application, and not rely on the mere exhibiting of numerous documents" Though again speaking of an ex parte application and the obligation of disclosure, the observation seems generally applicable. Though speaking in particular of the obligation of disclosure in ex parte applications, the observations in Bean and Gee seem generally applicable, save perhaps, depending on circumstance, the words "and against".
438 Which is not stated.

"The EPA has summarized the impact in Ireland on coastal areas, housing, and on human health and well-being including the risk from extreme weather of death, injury, ill health or disrupted livelihoods (p.26); hundreds of square kilometres of coastal land at risk of inundation due to sea level rise (p.26); "more extreme storm activity with the potential to bring the devastation of storm surges to the coast of Ireland" (p.26); a likely increase in heat-related mortalities and morbidity, a likely increase in food-borne diseases and infectious diseases, a possible increase in water-borne diseases, a probable increase in cases of skin cancer, and potential mental health effects (p.30).

228. The reference turns out to be to "*State of Knowledge on Climate Change Impacts for Ireland*" EPA 2017 – page 26 of which contains Table 3.7: *"Climate change impacts on coastal areas"*. The relevance to Clonee, Co Meath of "*risk of death, injury, ill health or disrupted livelihoods in coastal areas*" is not immediately apparent. I do not by any means rule out the possibility of such relevance, but it is for the applicant to elucidate, not for the court to infer.

229. Page 30 of that report is more apparently relevant, containing *"Table 3.11. Climate change impacts on human health and well-being."* The reference to "*potential mental health effects*" reads "*Some potential mental health effects*" and the potential is said to derive from "*Heavy precipitation: the annual number of very wet days (> 30 mm) is projected to increase by ~24% under the high-emission scenario by mid-century*". The remedy is said to be "*The public should be warned and advice about safety should be provided*". The full reference to skin cancer, is as follows: "*Heatwave events and warmer, drier summers are likely to invite more people to sunbathe, probably leading to more cases of skin cancer*." The remedy is said to be *"Education with respect to appropriate behaviour and prevention measures should be taken, particularly with respect to identified vulnerable groups and facilities."* These references should be borne in mind when considering in due course the application to the facts of this case of the requirements of the ECtHR of severity of effect before Article 8 of the ECHR will be engaged.

230. Though included in the Core Book, no-one referred at trial to the Climate Status Report 2020.[439] The specific reliance placed on the Climate Change Advisory Council Annual Reports was made explicit first only in the Coynes' written submissions in which they were cited as authority that *"Ireland has increased its emissions and entirely failed to meet its binding 2020 emissions reduction target"* and the 2018 report was cited to the effect that:

"Ireland's greenhouse gas emissions for 2016, and projections of emissions to 2035, are disturbing. Ireland's greenhouse gas emissions increased again in 2016. Instead of achieving the required reduction of 1 million tonnes per year in carbon dioxide emissions, consistent with the National Policy Position, Ireland is currently increasing emissions at a rate of 2 million tonnes per year;

439 Climate Status Report for Ireland 2020 – EPA Research Report 386, July 2021.

> *Climate change is already having an impact in Ireland. Recent extreme weather events revealed the vulnerability of many communities, services and utilities to disruption and highlight the need to prepare for, and invest in, becoming more resilient to current and future climate.*
>
> *Ireland is completely off course in terms of its commitments to addressing the challenge of climate change."*

231. One might observe that, as relevant to this case, the more recent exhibited Climate Change Advisory Council Report – that of 2020 – observed that *"Full decarbonisation of the Electricity sector will be required by 2050 to support ambitious mitigation across the sectors. Eirgrid's commitment to 70% renewable generation on the transmission network by 2030 is an important next step, which is challenging but achievable. While the share of renewable electricity generation, particularly wind, is increasing, the pace of decarbonisation of the sector needs to accelerate."*

G6 - EIA & Human Rights – Discussion & Decision

G6 - Introduction

232. The Coynes invoke personal rights derived from the Constitution and protected by the ECHR.[440] In both canons, those to life and bodily integrity are well-established. They also invoke a postulated unenumerated – or as it is now termed, "derived"[441] – personal right to a healthy environment. Or, as it was put in the **Dublin Airport Runway** case[442] a personal right to an environment that is consistent with the human dignity and well-being of citizens at large. I will use the term "right to a healthy environment" as encompassing both formulae. It is convenient to deal with both Constitutional and Convention rights together – though the distinction between their sources is important. As to the posited right to a healthy environment, the question arises whether such a right exists - whether by virtue of the Constitution or the ECHR.

233. Essentially, the Coynes argue that the CO_2 emissions from the generation of the electricity required to power the Data Centre will exacerbate climate change and its many deleterious effects such as to imperil their personal rights to a healthy environment, to life and to bodily integrity.

234. The Coynes' invocation of alleged breach of personal constitutional rights, by the grant of permission such that alleged CO_2 emissions will ensue from resulting power generation, is not pleaded as breach of a "have regard to obligation". They identify in their submissions an issue in light of the scientific consensus on climate change *"whether the Board has discharged its duty to vindicate*

440 European Convention on Human Rights and Fundamental Freedoms 1950.
441 Friends of the Irish Environment v Ireland [2020] 2 ILRM 233.
442 Merriman & Friends of the Irish Environment v Fingal County Council & Ors [2017] IEHC 695 (High Court, Barrett J, 21 November 2017).

fundamental rights by the granting of planning permission that will lead to a significant increase in GHG emissions." It amounts in substance, if I understand it correctly, to a dramatically far-reaching argument that the Board was obliged to refuse the applications before it in this case in vindication of the personal rights of the Coynes. If the Board is obliged to refuse this application on this account, one must ask by what standard is that risk to be assessed and by what standard – presumably the same standard - must the Board consider, as to any planning application for a project which will use electricity, at what point any resulting CO_2 emissions ensuing from resulting power generation will likewise require refusal of permission. The Coynes suggest no standard.

235. It seems to me that the Coynes conflate two linked but nonetheless quite distinct issues: the general facts and effect of climate change on the one hand and, on the other, the question whether the Data Centre – specifically the Data centre - will causatively result in breach of their personal rights. The fact of climate change and its present and foreseen deleterious effects, are not, ipso facto, evidence that the Data Centre will causatively result in breach of the Coynes' personal rights. The Coynes' reliance on that mode of reasoning amounts in reality to an extraordinary assertion that they have not merely standing to impugn, but entitlement to legally enjoin, any decision or action of any public or private body which would result in the development of a new project in Ireland which would in turn indirectly, by the consumption of electricity, generate GHG emissions of any degree. Indeed, the same logic would allow them to enjoin any development which would directly generate GHG emissions of any degree. That logic would even allow them to require the court to shut down by injunction existing and long standing developments by reason of their direct or indirect CO_2 emissions – again, of any degree – as imperilling their personal constitutional rights.

236. I say "*CO_2 emissions of any degree*" because the Coynes have not engaged at all with issues of causation or degree of causation as between the CO_2 emissions in question and the injury to themselves which they apprehend. Much less have they engaged with the many and complex causative links which lie between those two poles. They have simply asserted that the Data Centre by those CO_2 emissions, and by necessary implication in their quantum, poses a justiciable risk to their health. That is likely because a more sophisticated analysis of cause and effect is impossible (as was observed in **Pavlov**[443]). But their pursuit nonetheless of this ground forces them to cherry-pick decontextualised legal propositions such as that the right to life requires the State to take "*all steps capable of preserving it, save in exceptional circumstances"*[444] and that the Courts will *"prevent an act or omission of the Executive which, without justification, would expose the health of a person to risk or danger."*[445] For example, the facts and issues of the present case, such as they might be taken at their height for the Coynes, bear no comparison to the fact and issues in **In re a Ward of Court,** which related to the withdrawal of medical treatment from a patient who had been in a near-vegetative state for over 20 years with no hope of recovery.

443 Pavlov & Others V Russia: Application no. 31612/09; Judgment 11 October 2022. See below: "While there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effects in each individual case. As regards health impairment, for instance, it is hard to distinguish the effect of environmental hazards from the influence of other relevant factors, ..."
444 In re a Ward of Court (withholding medical treatment) (No. 2) 1996 2 IR 123.
445 Ryan v The Attorney General 1965 IR 294, State (C.) v Frawley 1976 1 IR 365.

237. The invocation of such propositions, undeniably sound though they are in their proper contexts, fails to recognise what must from the Coynes' point of view be the paradox that, while the Supreme Court has recognised the dangers to human beings posed by climate change, it has declined to recognise a justiciable personal right to a healthy environment. Similarly, and insofar as the ECtHR has vindicated personal environmental rights via Article 2 and 8 ECHR, it has declined to provide relief for general environmental degradation, even where it generally imperils public health and it has required proof of actual and severe harm specific to the claimants in question. That invocation also fails to recognise that there are no simple solutions to climate change and that – as Humphreys J has said – there are only trade-offs and it is for the Executive and Legislature to decide what those trade-offs should be and how climate change is to be addressed.[446]

238. None of this is to dispute the scientific consensus as to climate change or to dispute that climate change imperils public health or that the public is composed of individuals each of whom has personal rights protective of their individual health. It is rather to observe that litigation inter partes is typically capable of addressing relatively immediate, acute, serious and specific threats to those rights in respect of which specific cause and effect can be demonstrated. But it is far less suitable a vehicle for addressing issues requiring wide societal, long term, complex and nuanced response - as to which policy and programmatic decisions are required. In this regard I refer to the observations of Hogan J in **Kilkenny Cheese**, set out above, as to the proper role of EIA as it relates to climate change.[447]

G6 - Human Rights - New Arguments – M28, Highlands Residents, Reid, East Donegal

239. In **M28**[448] MacGrath J considered it

> *"………. particularly important for the court to be mindful that where there has been a failure to raise a particular issue that might have been more fully considered and assessed by the deciding authority, parties to the statutory procedure will not have had the opportunity to deal with the objection on a substantive basis. This must be considered in light of the role of the court on an application for judicial review. This court is not concerned with the merits of the decision and care must be exercised in the consideration of such "new" matters, lest the court is unwittingly led into an assessment of the merits of a particular point, where the body which is statutorily charged with the function of dealing with these matters, and recognised for its expertise in so doing, has not had the opportunity to address it."*

446 See above. An Taisce v ABP & Kilkenny Cheese [2021] IEHC 254.

447 [2022] IESC 8; [2022] 1 I.L.R.M. 281. "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."

448 M28 Steering Group v An Bord Pleanála [2019] IEHC 929.

240. In **Highlands Residents**[449] McDonald J observed that

"… a key aspect of the rationale for public participation in the planning process is to allow members of the public to bring to the attention of a planning authority all relevant issues which might bear on the decision to be taken by the planning authority in order that the authority can take a correct and fully informed decision. In such circumstances, it seems to me that, at least in cases concerned with standing to pursue points of domestic law, a full explanation should be required as to why an issue sought to be ventilated in judicial review proceedings was not previously raised by the applicant in the course of the proceedings before the relevant planning authority."

The Coynes have provided no such explanation.

241. In **Reid**[450] Humphreys J considered that an applicant in judicial review can present a new argument or new evidence that was not put before the decision-maker, inter alia if

"… the complaint relates to a disproportionate impact on constitutional or ECHR rights which might be assessed by reference to the overall fact-situation rather than just what was before the decision-maker (though this does not allow an applicant to complain that some identified constitutional or ECHR right wasn't considered at all when that right was never alluded to by the applicant before the decision-maker)"

It seems to me that the Coynes' present complaints that their personal rights are imperilled fall within the parentheses above and it is notable that in this passage Humphreys J was considering specifically "*constitutional or ECHR rights".*

242. On what has been described as "gaslighting" decision-makers by raising in judicial review points not raised before the decision-maker, Humphreys J has recently, in **NGGSPS**,[451] and in seeking to elucidate recent authority on this issue, recognised the difficulties of applying principle to complex facts but stated that:

"The basic inflection point in relation to situations of this kind is whether the point is one that has to be considered by the decision-maker autonomously or whether it only has to be considered only if and to the extent that it is raised in the process. Normally a point only has to be considered autonomously if it is an issue that the legal framework (whether constitutional, domestic, European or international and legally-applicable) requires the decision-maker to consider, or if it is an issue that a reasonable expert decision-maker would see as arising on the

449 Highlands Residents Association and Protect East Meath Limited v An Bord Pleanála [2020] IEHC 622.
450 Reid v An Bord Pleanála [2021] IEHC 230, §38(xiii).
451 North Great George's Street Preservation Society v An Bord Pleanála [2023] IEHC 241 (High Court (Judicial Review), Humphreys J, Ireland - High Court, 15 May 2023).

> *face of the materials (including what is evident on the ground in any case where the decision-maker is required to access, or actually accesses, any given location or physical item)."*

243. An applicant for judicial review could seek to call in aid the importance of substantive constitutional rights – human rights – in arguing that the protection of those rights falls on the autonomous obligation side of the inflexion point identified in **NGGSPS**. However, that is a double-edged sword and sharper against the Coynes than for. To whom are these substantive constitutional rights more important than to the person whose rights they are and who fears they will be breached? On that basis, is it not reasonable to expect that they will raise those issues before the Board if they want them to be considered by the Board? In my view, the answer is yes.

244. I do not consider that **East Donegal** obliged the Board to consider and vindicate the Coynes' personal rights as allegedly affected by climate change even though the Coynes did not raise those issues before the Board. A general principle of **East Donegal** is that statutory processes be conducted in a manner which respects substantive constitutional rights. But its primary focus was on constitutional justice – fair procedures – in that those who asserted that their substantive constitutional rights might be affected by a public law decision had a procedural constitutional right to be heard on that issue. Here, the Coynes did not avail of that procedural constitutional right – at least as concerns the substantive constitutional rights they now raise. They did not ask the Board to consider that granting permission for the Data Centre would, by reason of the CO_2 emissions of the generation of electricity to power it and their consequences in the form of climate change, imperil their specific and personal substantive constitutional rights. It is difficult to see that they can now in judicial review complain that the Board failed to have regard to an alleged threat to their constitutional rights to which they themselves did not have regard in making their submissions and so, impliedly, did not consider sufficiently weighty to bring to the Board's attention. It is no disrespect to the proper ingenuity of the Coynes' legal team to express the suspicion that the allegation of breach of substantive constitutional rights by reason of climate change was a lawyers' afterthought rather than a real, or any, concern of the Coynes' in their objection to the Data Centre. It is difficult to see that, absent lack of capacity or particular vulnerability,[452] the law or the Board, in this context, is obliged to help those who have not helped themselves and have given no explanation for why they did not do so.

245. I cannot see that justice (not least to EngineNode) requires that the Board be criticised, and its decision quashed, for failure to have regard to risks allegedly posed by the Data Centre to the personal human rights of specific individuals who, despite participating in the planning process, failed to bring those alleged risks to the Board's attention. And that those risks are allegedly sufficiently serious to justify refusal to permit an otherwise permissible development amplifies the point.

452 Any consideration of which must await another case.

246. Taking it, without so deciding, that the Board, in deciding a planning application or appeal, must have proper regard[453] to a prospect of breach of substantive constitutional rights raised by an objector, there is another reason why it does not seem to me to follow that the Board must, at least generally, have like regard to such rights of particular persons where they have not been raised by those persons. Such a requirement would impose an impossibly wide-ranging burden on the Board to identify the members of and to consider the particular substantive constitutional rights of each member of an indeterminate class of persons, including, but not at all limited to, objectors. And such an exercise would be carried out on a basis highly speculative as to the personal circumstances and desires of such persons, the factual engagement of their substantive constitutional rights and the likely effect of the development thereon. It would even have to consider the exercise of their personal rights of autonomy as to their attitude (if any) to a proposed development which they might, for example, favour for what others might consider good reasons, bad reasons, or none.

247. I reject any argument that the fact that climate change was raised before the Board suffices to allow the Coynes mobilise here their human rights arguments. There is a very great difference between general arguments as to general alleged effects of the Data Centre on GHG emissions and climate change on the one hand and, on the other, arguments that those effects will breach the constitutional rights to life and health of specific individuals. I agree with the submissions in opposition that the Coyne impermissibly conflate the two.

G6 - Human Rights - New Arguments - Decision

248. Given the reasoning set out above, it follows that the Coynes may not assert personal constitutional or convention rights which were not articulated before the Board. In this context I refer to the substance of the rights rather than their legal formulation or origin. But nowhere did the Coynes assert to the Board that the Data Centre, by the CO_2 emissions of the power generation required to power it would imperil their life, health or dignity. That was the proper forum in which to raise the issue – first at least. I do not see that they should be permitted to do so now.

249. This finding suffices to refuse relief on Ground 6. But lest I am wrong I will consider the Ground further.

G6 - Remedy for Breach of ECHR Rights - Pullen 2009

250. The Coynes directly ground a claim to certiorari in alleged breach of personal rights protected by the ECHR. That is fundamentally misconceived. Direct reliance on the ECHR as a basis for the grant of a remedy in Irish Law is impossible given the duallist approach to International Law

453 Ignoring for now the question of what such proper regard might consist.

adopted in **Article 29.6 of the Constitution**.[454] The ECHR is binding in Irish law only to the limited extent it is made so by the European Convention on Human Rights Act 2003. There are many authorities to this effect. See, recently, **Clare County Council v McDonagh**.[455]

251. **S.3(2) of the 2003 Act** provides for a remedy in damages to a person who has suffered injury, loss or damage as a result of a failure by an organ of the State to perform its functions in a manner compatible with the State's obligations under the Convention provisions. **Pullen**[456] is authority that damages are the only and exclusive remedy[457] available for injury, loss or damage caused by such a failure. The Court has no jurisdiction to grant any other form of relief (save for declarations under s.5 that a statutory provision or rule of law is incompatible with the State's ECHR obligations - which do not arise here).

252. It follows that in this case certiorari cannot issue even if breach of personal rights protected by the ECHR were found. I therefore reject the claim for relief under Ground 6 as to ECHR rights.

253. However, in deference to the arguments made, and given their overlap with the Constitutional arguments, I will, in considering the question of breach of constitutional rights, consider further the question whether there has been, or can be foreseen, any breach of personal rights protected by the ECHR.

G6 - Substantive & Procedural Human Rights – Introduction.

254. **Kingston et al**. writing in 2017 [458] noted *"numerous* (failed) *efforts over the years to assert a right to a decent environment into the ECHR"* and stated that the European Court of Human Rights (ECtHR) "*has consistently refused to recognise any right to a healthy or decent environment as such in the ECHR*" citing **Kyrtatos**[459] as addressing the issue "*head on in refusing to extend the scope of Article 8 ECHR to the protection of the environment as such in the absence of proof of interference with the applicant's private or family life*" and *"the crucial element in order for Article 8 to be applicable was the existence of a harmful effect on the person's private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other articles of the convention is specifically designed to provide general protection of the environment as such"*

454 Article 29.6 reads, "No international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas."
455 [2022] IESC 2 §§21 & 50.
456 Pullen et al v Dublin City Council [2009] 2 I.L.R.M. 484.
457 Other than declarations pursuant to ss.3(1) and 5(1).
458 Kingston et al, European Environmental Law, Cambridge, 2017. Generally p153 et seq.
459 See below.

255. **Kingston et al**. cite **Powell & Rayner**[460] - in which aircraft noise from Heathrow airport was found not to have violated Article 8 rights - as having "*laid the groundwork*" in applying a "*two-stage reasoning which remains characteristic of its analysis in these cases*":

- First, are the applicant's rights to private and family life sufficiently[461] adversely affected by the environmental degradation to mean that Article 8 applies?

- Second, if Article 8 applies, has it been violated? In that assessment regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and in both contexts the State enjoys a wide[462] margin of appreciation in determining the steps to be taken to ensure compliance with the convention.

256. **Kingston et al**. cite **Hardy & Maile**[463] to the effect that pollution must attain a certain minimum level if the complaint is to fall within Article 8. That minimum is relative and depends on all the circumstances of the case such as intensity and duration of pollution and its physical or mental effects - as to which States have a wide margin of appreciation. They cite **Taskin**[464] as summarising in 2004 the procedural requirements of Article 8, once engaged,[465] as follows

> *"Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake[466] ……. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question … Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process …"*

257. Kingston et al. cite **Hatton**[467] as epitomising the ECtHR's approach of "*consistently*" allowing states a "*wide*" margin of appreciation in cases involving "*balancing of competing interests*". In such areas the role of the ECHR was "*fundamentally subsidiary*". They suggest that "*Hatton shows clearly that States may legitimately take into account negative economic effects and balance economic interests against the interests of individuals*" and the ECtHR "*specifically declined to adopt a special approach to environmental protection by reference to any special status of environmental human*

460 Powell and Rayner v. the United Kingdom(1990) 12 EHRR 355 (judgment of 21 February 1990, Series A no. 172, p. 18.
461 Emphasis added.
462 The text says "certain" but later content of the text makes clear that the margin is wide.
463 Hardy & Maile v UK (App no 31965/07) [2009] Lexis Citation 4049.
464 Taskin v Turkey (Application No 46117/99) (2004) 42 EHRR 1127. This case concerned risk to aquifers by use a cyanide leaching process for gold prospecting extraction. Article 8 was found violated where a judgment quashing the prospecting permit was ignored and a new permit was granted without EIA being done.
465 Emphasis added.
466 Citing Hatton – see below.
467 See below.

rights". Kingston et al. conclude that *"After Hatton, therefore it is fair to conclude that general policy decisions involving balancing economic and environmental interests are unlikely to breach Article 8 ECHR save in exceptionally serious cases or where adequate procedures have not been followed."*

258. The **EU Charter of Fundamental Rights** as a source of environmental rights did not loom large in argument. So I will content myself with **Kramer's**[468] observation that the CFREU, and in particular Article 37 which relates to "*a high level of environmental protection*", "*did not create a right to a healthy environment*" – though procedural, as opposed to substantive, rights were derived from the Aarhus Convention. Indeed, Kramer states that, from academic discussions on a fundamental right to a clean and healthy environment, it is "*clear that a meaningful enforceable right to a clean environment could not be introduced into the constitutions of member states or into primary EU law and where some constitutions had tried nevertheless the contours of such a right remained unclear."* I am unclear whether these impediments seen by Kramer were political or legal or both but nothing now turns on that distinction.

G6 - Fox 2021

259. The Coynes properly draw my attention to the Supreme Court's insistence in **Fox**[469] that the suggestion is untenable that the Constitution must be interpreted to the greatest extent possible in line with the ECHR.[470] Clarke CJ said that the Irish Courts have "*frequently, had regard to the jurisprudence of the ECtHR in interpreting the same or similar rights and obligations arising under, respectively, the Constitution and the Convention. However, important though it may be, the ECHR has rarely been the sole source of persuasive authority relied on by this court in identifying the scope of rights guaranteed under the Constitution."* The Coynes note the observation by Clarke CJ that the Plaintiff had cited no decision of the Irish courts establishing the existence of the right for which he contended[471] *"or which even point towards the jurisprudence moving in such a direction".* This somewhat marshy ground was the Coynes' jumping-off point for a consideration, not of an Irish decision moving in the direction of a personal constitutional right to a healthy environment, but of the recent decision of the ECtHR in **Pavlov**.[472]

468 Kramer, EU Environmental Law, 8th Ed'n 2015 §4-02.
469 Fox v Minister for Justice and Equality, Ireland and the Attorney General: [2021] 2 I.L.R.M. 225 §12.
470 The court held that it was not appropriate, in defining the scope of rights conferred by the Irish Constitution, an autonomous human rights instrument with its own provisions, values and jurisprudential methodologies, to interpret it exactly as the ECtHR has interpreted the Convention. And, interestingly and no doubt by reference to the absence in the UK of a written constitution, Clarke CJ observed that, while its caselaw can assist "the principal focus of the courts of the United Kingdom in rights-based litigation is on the ECHR rather than on a national rights-conferring instrument."
471 That the right to life guaranteed under the Constitution encompassed a right to require the State to investigate an impugned Garda investigation into an historic murder even in the absence of any meaningful likelihood of further light being cast on the circumstances surrounding the murder.
472 Pavlov & Others V Russia: Application no. 31612/09; Judgment 11 October 2022.

G6 - Pavlov – 2022, Fadeyeva 2005 & Aarhus 1998

260. Pavlov et al complained that Russia's failure to take protective measures to minimise or eliminate the effects of air pollution in the city of Lipetsk by heavy industrial undertakings[473] violated their right to respect for their private life under Article 8 of the Convention. On the particular facts they succeeded before the ECtHR.[474] The ECtHR reiterated earlier caselaw to the effect that *"whether pollution can be regarded as adversely affecting an applicant's rights under Article 8 of the Convention depends on the particular circumstances of the case and on the available evidence"* and:

> *"… to fall within the scope of Article 8 of the Convention, complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained; in other words, whether the alleged pollution was serious enough to affect adversely, to a sufficient extent, the family and private lives of the applicants and their enjoyment of their homes ….. The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life ……*
>
> *While there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effects in each individual case. As regards health impairment, for instance, it is hard to distinguish the effect of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle. "Quality of life", in turn, is a subjective characteristic which hardly lends itself to a precise definition ..."*

261. The State and the Board rely on Pavlov, and the similar case of **Kotov**,[475] as illustrating that, to merit a finding of violation of Article 8, the impact of environmental pollution must be sufficiently severe, direct and serious. And they say, I think correctly, that the Coynes do not even attempt to demonstrate what impact the Data Centre will have on their human rights and that generalised assertions with regards to the overall impacts which may arise from climate change do not suffice.

262. **Ms Fadeyeva**[476] complained that Russia had authorised the operation of a large iron smelter in the middle of the densely populated town in which she lived. Due to the smelter's unsafe toxic emissions Russia had stipulated, but failed to effect by resettling residents outside it, a dwelling-free zone around the smelter. The Plaintiffs succeeded on the facts. The case is authority that

- Article 8 is not violated every time that environmental deterioration occurs.
- to raise an issue under Art 8, the interference should[477]
  - directly affect the applicant's home, family or private life.
  - attain a certain minimum level of severity.

473 Two steelworks, a tractor plant, a pipe plant and cement plant.
474 European Court of Human Rights.
475 Kotov v Russia (App No. 6142/18), 11 October 2022.
476 Fadeyeva v Russia (App No. 55723/00) - [2005] ECHR 55723/00.
477 By which is meant "must".

- A wide margin of appreciation is left to the State to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life.

The Court stated that *"The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, its physical or mental effects. The general environmental context should be also taken into account. There would be no arguable claim under art 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city."*

263. I observe that even if one accepted that the Coynes had shown (which I consider they have not) that the CO_2 emissions specific to the Data Centre's power supply would cause them more than negligible harm, there is no evidence whatsoever that such harm would set them apart from the general population in the general environmental context which will prevail when the harm occurs. While that is a rather bleak observation given its premise, it seems to me nonetheless to tend against a finding in their favour.

264. The Coynes rely on the concurring opinion of Serghides J in **Pavlov**, written *"to go deeper into the source or foundation of the environmental protection under Article 8 and to explain the relationship of such environmental protection with the right to respect for one's private life under Article 8."* Serghides J said, inter alia:

- "*In a real sense, all human rights are vulnerable to environmental degradation, in that the full enjoyment of all human rights depends on a supportive environment"*[478] *…. an unhealthy or generally degraded environment does not allow the right to respect for one's private life to be exercised and enjoyed effectively. Private life cannot be protected effectively if it is not shielded against environmental hazards. Stated even more accurately, a healthy environment is a "precondition" for the full enjoyment of the right to respect for one's private life, as is the case for almost any other substantive right protected by the Convention.*[479] *This immediately shows the close relationship and linkage between an environment that is unhealthy, non-viable or unsustainable and the right protected under Article 8. The protection of the environment and human rights are thus closely interconnected."* Serghides J cited many international sources in support including the CFREU.[480] (However, as I have noted, Kramer – a considerable authority on EU Environmental Law - says that Article 37 CFREU does not create justiciable substantive environmental rights.)

478 Serghides J cites paragraph 19 of the UN Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/22/43, 24 December 2012.
479 Serghides J cites paragraph 6 of "The Strasbourg Principles of International Environmental Human Rights Law – 2022", in Journal of Human Rights and the Environment, vol. 13, special issue, September 2022, 195 at p. 196. These Principles were drafted by a group of human rights and environmental law experts who were brought together by the Conference "Human Rights for the Planet" held in 2020 at the European Court of Human Right in Strasbourg and by the said Special Issue of the Journal of Human Rights and the Environment.
480 Article 37 of the Charter of Fundamental Rights of the European Union provides that: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

- While there was "*no explicit or independent or autonomous right to a healthy environment under the Convention …. A healthy environment could and should, however, be secured through the protection of the right to private life and other Convention rights in an indirect way.*" Serghides J says that Article 8 has been given an evolutive interpretation by the Court so as to encompass environmental protection, citing arguments that the Court "*de facto recognises the right to a safe and healthy environment*".[481] Serghides J cites **Pedersen**[482] to the effect that

  "... the Court's environmental case law now establishes that where acts of physical pollution attain a certain level of severity, to the extent that there is an 'actual interference with the applicant's private sphere'[483] application of the Convention is triggered."

- The overarching Convention principle of effective protection of human rights is not only a tool of interpretation – it is a norm of international law.

- From that norm of effectiveness flows a sub-right of Article 8, to a healthy environment which is indispensable for the exercise and enjoyment of the right to respect for one's private life, which is an implied or implicit or "emergent human right" of an environmental character. It is not yet a jus cogens norm[484]

  "… but it will not be too long before it is developed and becomes such a norm, considering the negative, sometimes cataclysmically negative, direct and indirect implications of climate change – and, of course, the other serious environmental hazards which plague the world – on the effective enjoyment of all human rights."[485]

- "*It must be underlined, however, that no new human right can be created under the Convention without the enactment of a new protocol and the jurisdiction of the Court is limited to interpreting and applying the rights guaranteed by the provisions of the Convention and its Protocols …. "it is obvious that the ECHR has its limits in that it does not stipulate a substantive right to a healthy environment and thus does not provide the Court with infinite jurisdiction …"*[486]. So the Court had rejected applications seeking general protection of the environment.[487]

- Consequently, despite the evolutive case-law of the Court, there is a need for the inclusion of a substantive right to a healthy, clean, safe and sustainable environment in the Convention, by

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481 Serghides J cites Irmina Kotiuk, Adam Weiss and Ugo Taddei, "Does the European Convention on Human Rights Guarantee a Human Right to Clean and Healthy Air? Litigating at the Nexus Between Human Rights and the Environment – The Practitioner's Perspective", in Journal of Human Rights and the Environment, vol. 13, special issue, September 2022, 122, pp. 131-134.
482 Pedersen, "The European Court of Human Rights and International Environmental Law", in John H. Knox and Ramin Pejan (eds), The Human Right to a Healthy Environment, cited above, 86, 88. The passage above is based on López Ostra v Spain, 9 December 1994, § 51, Series A no. 303-C.
483 Emphasis added.
484 Emphasis added. Jus cogens (from Latin: compelling law; from English: peremptory norm) refers to certain fundamental, overriding principles of international law. Serghides J cites, on whether a right to a healthy environment in international law is a jus cogens norm, Louis J. Kotsé, "In Search of a Right to a Healthy Environment in International Law: Jus Cogens Norms", in John H. Knox and Ramin Pejan (eds), The Human Right to a Healthy Environment, cited above, pp. 136 et seq.
485 Serghides J cites the United Nations General Assembly A/76/L.75 of 26 July 2022.
486 Serghides J cites Natalia Kobylarz, "The European Court of Human Rights: An Underrated Forum of Environmental Litigation", op. cit., at p. 118.
487 Serghides J cites Natalia Kobylarz, "International Conference on Human Rights and Environmental Protection" (Council of Europe, 2020), p. 19.

a way of a new protocol. The failure to secure such protection can only be resolved by an additional protocol to the ECHR.

- Notably, Serghides J recites that the Council of Europe's Parliamentary Assembly resolved that its Committee of Ministers draft a protocol in which a right to a healthy environment would be incorporated in the ECHR but the Committee had declined to do so and its decision on a second such resolution is awaited. For his part, Serghides J considers a protocol providing general protection of the environment as urgently necessary to provide broader and more complete Convention protection of the potential right secured by the Court.

- Serghides J on the same day, gave essentially the same judgment in **Kotov**.

- The Coynes also cite the concurring opinion of Krenc J in Pavlov which cites international law instruments as to environmental degradation and environmental human rights but, beyond noting it, having considered the judgment of Serghides J, I do not consider that for present purposes I need go further.

265. It seems to me clear that Serghides J considered that, as yet and even in the ECHR sphere, the recognition of personal rights to a healthy environment had not yet been reached and depended on the adoption of a protocol to the ECHR which the Committee of Ministers had, notably, declined to draft.

266. I note also the Coynes' citation of recitals of the **Aarhus Convention of 1998**[488] as follows:

> *"Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,*
>
> *Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations."*

267. It seems notable that these recitals, now a quarter of a century in existence, have not moved Irish law or the Supreme Court to recognise a personal constitutional right to a healthy environment. Also, not merely are they contents of an instrument of International law not justiciable here, they are recitals rather than operative elements of the Aarhus Convention. I do not ignore the interpretive assistance afforded by recitals but even in justiciable instruments they do not create rights. For example, the CJEU said in **Case C-429/07**[489] that "*whilst a recital in the preamble to a*

488 Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998.
489 Case C-429/07, Inspecteur van de Belastingdienst v X BV, 11 June 2009 – citing Case 215/88 Casa Fleischhandels [1989] ECR 2789, §31, and Case C-136/04 DeutschesMilch-Kontor [2005] ECR I-10095, §32.

regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule".

G6 - Outpacing the ECtHR - McD v PI, BPSG, & Fox

268. In effect, the Coynes ask me to discern in Pavlov a trend in the jurisprudence of the ECtHR and to outpace it in arriving at their preferred destination of a general Convention right to a healthy environment. That I cannot do.

269. First, just as one swallow does not make a summer, nor, at least generally, is one case a trend.[490] Not merely do the Applicants cite only Pavlov, but they rely on a concurring judgment in which the majority did not join. And even that concurring judgment goes no further in the end than to express the desirability of, but the absence of, a general Convention right to a healthy environment. And even it recognises that recognition of such a right requires a protocol to the ECHR which has not come to pass. It demonstrates no trend of the kind for which they argue. That alone suffices to allow me to respectfully reject the Coynes' invitation to recognise a general Convention right to a healthy environment.

270. Second, in **McD v PL**[491] Fennelly J made clear that it is primarily for the ECtHR to interpret the ECHR and is not for domestic courts, via the European Convention on Human Rights Act 2003 ("the 2003 Act"), to outpace them in that respect as the Coynes, in effect, invite me to do. **S.2 of the 2003 Act** requires a court "*in interpreting and applying any statutory provision or rule of law" to "in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the* [ECHR]". In so doing, and by virtue of **S.4**, the Court is to take judicial notice of a wide range of materials, including not merely the ECHR but also "*any declaration, decision, advisory opinion or judgment of the European Court of Human Rights…"* and courts shall "*take due account of the principles*" they lay down.

271. Fennelly J held that an Irish court may not anticipate further developments in the interpretation of the ECHR by the ECtHR in a direction not yet taken by the court. He agreed with Lord Bingham in **Ullah**,[492] when he said that the correct interpretation of the Convention can be authoritatively expounded only by the Strasbourg court and "*The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.*" Fennelly J said:

> *"It is vital to point out that the European Court of Human Rights has the prime responsibility of interpreting the Convention. Its decisions are binding on the contracting states. It is important*

490 Kotov was decided on the same day.
491 [2010] 2 IR 199; [2009] IESC 81; Supreme Court §318 et seq.
492 R (Ullah) v Special Adjudicator [2004] 2 AC 323.

that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence."

272. The High Court in **BPSG**[493] followed **McD v PL** to the effect that arguments *"that certain trends are evolving, or seem likely to evolve, which might result in a decision of the European Court of Human Rights adopting an approach that there exists a general right of access to information, and the corollary general obligation on a public authority to positively provide such information, is not yet an evolved principle, and not one which might inform my thinking".*

273. The Supreme Court (Clarke J) took a similar view in **Fox**[494] in which it was posited that the courts of the United Kingdom had outstripped the ECtHR in recognising a duty, derived from the ECHR, to investigate violent death - which duty the ECtHR had not recognised. Clarke CJ held that

"Insofar as it may be argued that the courts of the United Kingdom have gone beyond the jurisprudence of the ECtHR, … it is not, in accordance with the established Irish jurisprudence, appropriate to impose obligations in Irish law which follow that lead. In Irish law, in this context, the lead is to be taken by the ECtHR."

"There may be situations where the precise boundaries of a right arising under the ECHR have not been fully defined by the ECtHR but where the jurisprudence points reasonably clearly in a particular direction. A rigid approach which suggested that the Irish courts should not apply the ECHR save in circumstances which have been expressly dealt with by the ECtHR would, in my view, be unduly narrow. However, at the same time, it does not appear to me that it is appropriate, having regard to the jurisprudence in this jurisdiction, to seek to significantly expand on the jurisprudence of the ECtHR without there at least being a material indication in that jurisprudence as to the direction in which it is heading. Some degree of anticipation may be permitted where the signposts are clear but it is not for an Irish Court to unduly expand the scope of the ECHR into places or areas where the ECtHR has not itself ventured."[495]

274. I see no basis in the caselaw for a view that the ECtHR's signposts are clear to a right to a healthy environment. Indeed, the Coynes' primary reliance is on a lone judgment in Pavlov which clearly considers such a right desirable but equally clearly considers that it could derive only from an amendment of the ECHR and not from the caselaw of the ECtHR.

275. I respectfully decline the Coynes' invitation to outpace the ECtHR by recognising a personal Convention right to a healthy environment.

493 BPSG Limited trading as Stubbs Gazette v The Courts Service et al [2017] IEHC 209, [2017] 2 IR 343.
494 Fox v Minister for Justice and Equality, Ireland and the Attorney General: [2021] 2 I.L.R.M. 225 §12.
495 Emphasis added.

G6 - Articles 2 & 8 ECHR & Caselaw

276. The Coynes also plead Articles 2 and 8 ECHR. They protect, respectively, the right to life and the right to respect for private and family life and home. There are cases in which the ECtHR has, under the rubric of Articles 2 and 8 ECHR, held for claimants asserting what might be generally called environmental cases. **Pavlov** was one - a case of consistently severe air pollution and drinking water contaminated with toxic substances. However, the important point is that it was held in Pavlov that to fall within Article 8 environmental nuisances had to amount to actual and severe interference with the applicant's private sphere. The question was whether the alleged pollution was serious enough to affect adversely, to a sufficient extent, the family and private lives of the applicants and their enjoyment of their homes. The assessment of that minimum level was said to be relative and to depend on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life. The Court noted that while there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effects in each individual case. As regards health impairment, for instance, it is hard to distinguish the effect of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle. "Quality of life", in turn, is a subjective characteristic which hardly lends itself to a precise definition. Whether pollution could be regarded as adversely affecting rights protected by Article 8 of the Convention depended on the particular circumstances of the case and on the available evidence including reliable evidence of adverse effects on the applicants. Serghides J himself held that for the purpose of finding a violation of the right to respect for one's private life, there must always be a causal link between the environmental pollution or other environmental hazard and its harmful effects on an applicant's health.

277. In **Kyrtatos**[496] the applicants invoked Article 8 in complaining, first, that urban development had destroyed the swamp adjacent their home so that the area had lost all its scenic beauty. Second, they complained about the environmental pollution caused by the noises and night-lights emanating from the activities of the firms operating in the area. The Court held that no Articles of the Convention "*are specifically designed to provide general protection of the environment as such"* and *"the crucial element which must be present"* to activate Article 8 is "*harmful effect on a person's private or family sphere and not simply the general deterioration of the environment".*

278. Severe environmental pollution may suffice, but the disturbances complained of in Kyrtatos had not reached the requisite level of seriousness. There was no evidence that the environmental degradation in question "*was of such a nature as to directly affect their own rights under Article 8*" and any disturbances had *"not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8."* Even in dissenting on the facts as to breach of Article 8, Zagrebelsky J accepted that while a degradation of the environment could amount to a violation of a specific right recognised by the Convention, "*There is no doubt that the environment is not protected as such by*

496 Kyrtatos v Greece (App No. 41666/98) 22 May 2003.

the Convention" and *"the importance of the quality of the environment and the growing awareness of that issue cannot lead the Court to go beyond the scope of the Convention."*

279. **Brincat**[497] and his co-workers complained of asbestos exposure, relying on their Article 2 right to life. As a result, some had developed mesothelioma.[498] Others had not, though they did "*have respiratory problems and plaques in their lungs, together with some other complications related to exposure to asbestos*". Even so, those who had not been diagnosed with mesothelioma failed under Article 2 as not having shown a *"serious risk of an ensuing death"* and "*their conditions constitute an inevitable precursor to"* mesothelioma "*nor that their current conditions are of a life-threatening nature*". However, on the facts, those who had not been diagnosed with mesothelioma succeeded under Article 8.

280. Brincat seems to me a case in which the facts are at least to some degree illuminatory of the Coynes' situation – indeed perhaps to the situation of much of mankind. Notably, the Court described Budayeva[499] as a case of a *"natural catastrophe which left no doubt as to the existence of a threat to the applicants' physical integrity".* I confess to considering the situation of even those claimants considerably more acute and immediate than any evidence adduced by the Coynes' reveals – not least as harm had in fact occurred and was clearly causatively linked to the asbestos exposure.

281. **Osman**[500] is authority that an Article 2 and Article 8 complainant must show

- "*real and immediate risk*" to the life or "*physical integrity*" of the individual.
- failure by the authorities to do all that could reasonably be expected of them in circumstances to avoid such risk.

Guerra was a case of violation of Article 8. The facts are instructive. Gaseous emissions from a chemical plant hospitalised 150 people with severe arsenic poisoning and clearly constituted "*severe environmental pollution*". Though it was not articulated, the circumstances also clearly disclosed "real and immediate risk" to the life or "physical integrity" of the individual.

282. **Hatton**[501] was a complaint of night flights to and from Heathrow Airport, causing, inter alia, sleep disturbance. The Court noted that there is no explicit Convention right to a clean and quiet environment, but where an individual is "*directly and seriously affected*" by pollution, an issue may arise under Article 8 as to protection from severe environmental pollution and could arise from State failure to regulate private industry properly. The Court found that, in substance, the authorities had not overstepped their margin of appreciation by failing to strike a "*fair balance between the right of*

497 Brincat et al. v Malta [2014] ECHR 60908/11, 24 July 2014.
498 A form of cancer.
499 Infra.
500 Osman v UK (App No. 87/1997/871/1083) 28 October 1998.
501 Hatton and Others v. the United Kingdom [GC] (App No. 36022/97) 8 July 2003.

the individuals affected and the conflicting interests of others and of the community as a whole". The Court said

> *"In relation to the substantive aspect, the Court has held that the State must be allowed a wide margin of appreciation. In Powell and Rayner, for example, it asserted that it was "certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere", namely the regulation of excessive aircraft noise and the means of redress to be provided to the individual within the domestic legal system. The Court continued that "this is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation"*
>
> *"In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight …. "*

283. I have been referred also to **Budayeva v Russia.**[502] That was a right to life case under Article 2 ECHR. The court recognised the overlap with Article 8 such that the principles as to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life. The Coynes cite Budayeva for the relevance of the *"level of the potential risk to human lives*" to both the engagement of the positive obligations imposed on States by Article 2 and the assessment of State response to that risk: "*In assessing whether the respondent State had complied with the positive obligation,[503] the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue.*"

284. Notably, Budayeva concerned repeated destructive and dangerous mudslides imperilling the town in which Ms Budayeva and her co-applicants lived and as to which protective measures had not been taken. A slide in 2000, of which there was no advance warning (lookouts not having been put in place despite earlier slides), drowned at least one person and required emergency evacuation of the town – though there was doubt whether the evacuation order had been given. The Applicants alleged that "*there had been no rescue forces or other organised on-the-spot assistance at the scene of the disaster, which became a cauldron of chaos and mass panic*." The following day a second, more powerful, mudslide hit and destroyed the mud retention dam which had been damaged the previous year and not repaired. "*Mud and debris instantly descended on the town, sweeping the wreckage of the dam before them. … the mudslide destroyed part of a nine-storey block of flats, with four officially reported casualties. Several other buildings were damaged. It also caused the river to*

502 Budayeva v Russia [2008] ECHR 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02; Strasbourg 20 March 2008 - the applicants alleged that the national authorities were responsible for the death of Mr Budayev, for putting their lives at risk and for the destruction of their property, as a result of the authorities' failure to mitigate the consequences of a mudslide which occurred in Tyrnauz on 18-25 July 2000, and that no effective domestic remedy was provided to them in this respect.
503 To protect life.

overflow, flooding the residential quarters on the right bank." The town was hit by a succession of mudslides over the following 6 days. Eight people were officially reported dead. The applicants alleged that a further 19 persons went missing. While this dramatic description of immediate and serious danger to life does not necessarily set a minimum requirement of severity of risk to engage Article 2, it nonetheless illustrates the type and severity of risk which does so. It can, at least illustratively, be contrasted with the Coynes' apprehensions of risk due to climate change and as to criteria of imminence, severity, and particularity to the Coynes - as opposed to general risk to the entire population of Ireland, and, indeed the world. Again, none of this is to ignore or dispute the risks posed by climate change.

285. Unsurprisingly on the facts, the ECtHR in Budayeva found Russia in violation of its positive Article 2 obligation. But as to the law it had also observed that:

> *"As to the choice of particular practical measures …….. where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means .."*[504]

The court repeated that this wide margin of discretion exists especially in "*difficult social and technical spheres*".

286. Pausing here, I will assume arguendo (and incorrectly in my view) that the Coynes' apprehensions of risk due to climate change engage Articles 2 and 8, and that the State is required by the ECHR and by way of obligations justiciable by the Coynes in this court, to take positive measures to address CO_2 emissions by electricity generation. On even that assumption favourable to the Coynes, the foregoing cases suggest that the State's choice to address the issues as to GHG emissions of electricity generation via the ETS and transition to renewable generation, rather than by restricting demand for electricity via EIA and development consent processes (which, in any event would affect only demand from new EIA projects and leave unaffected increased demand by existing projects and demand by the great majority of new projects which do not require EIA), and to seek to reconcile those responses with economic growth generally and favouring data centres specifically, is within the State's margin of appreciation as to choice of means.

287. I am also referred to the following in Budayeva, with emphasis on imminence.

> *"1. In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting*

504 Citing, inter alia, Fadeyeva v Russia, no. 55723/00, § 96, ECHR 2005-IV.

a distinct area developed for human habitation or use (see, mutatis mutandis, Murillo Saldias and others, cited above). The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.

This passage is framed as to the sphere of emergency relief. I don't think this case is in that territory. That said, I generally accept that the absence of imminence may widen the State's margin of appreciation as to choice of means.

288. In my view, the Coynes have adduced no probative evidence of causal link between CO_2 emissions from powering the Data Centre and appreciable, identifiable and serious harmful effects on their health. As to factors identified in Pavlov, there is no evidence of or quantification of physical or mental effects on their health or quality of life. Nor is there any attempt to distinguish the effect of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle. Much less has there been any evidence of likelihood of effect on their health, caused specifically by the Data Centre by reason specifically of the CO_2 emissions caused by electricity generation to power it. All other difficulties with Ground 6 aside, it fails for lack of evidence.

G6 - Dublin Airport Runway case (Merriman) 2017 & Simpson 2019

289. Turning to the Coynes' case as to a Constitutional[505] right to a healthy environment, it derives appreciable support from the **Dublin Airport Runway** case.[506] That was a pair of judicial reviews of a planning permission for a new runway. "Case 1" was prosecuted by local residents who feared disturbance of their occupation of their homes by planes using the runway. "Case 2" was prosecuted by FIE.[507] FIE contended for an unenumerated personal constitutional right to an environment consistent with the human dignity and well-being of citizens at large – including its members. Barrett J upheld the existence of such a right in the following terms:

"A right to an environment that is consistent with the human dignity and wellbeing of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art.40.3.1° of the Constitution. It is not so utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable. Even so, every dimension of the right to an environment that is consistent with the human dignity and well-being of citizens at large does not, for the reasons identified previously above, require to be apprehended and to be described in detail before that right can be recognised to exist. Concrete duties and responsibilities will fall in time to be defined and demarcated. But to start

505 As opposed to a Convention right.
506 Merriman & Friends of the Irish Environment v Fingal County Council & Ors [2017] IEHC 695 (High Court, Barrett J, 21 November 2017)
507 Friends of the Irish Environment, a limited company.

down that path of definition and demarcation, one first has to recognise that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed. This the court does."[508]

290. However, Barrett J nonetheless refused relief to FIE as having failed to establish a breach of such constitutional right or any like right under the ECHR. Accordingly, no relief was granted on foot of the finding by Barrett J that the right existed and as his decision would have been the same (i.e. refusal of relief) if the existence of the right had been merely assumed for purpose of argument as opposed to found or , indeed, had he rejected the exitance of a right to a healthy environment. And remembering, if thought necessary, that Courts have a certain leeway to identify the ratio of a decision in hindsight – see **Clifford**[509] - one may properly view as obiter the finding by Barrett J, of the existence of the unenumerated, personal, environmental, constitutional right to a healthy environment which he identified. I accept the State's submissions in these regards.

291. The Coynes cite **Simpson**[510] for the uncontroversial proposition that Article 40.3 of the Constitution may be viewed as a source of *derived* as well as enumerated rights and suggest that the emphasis placed by MacMenamin J on the concept of dignity as "*a value which underlies all fundamental rights*" is cognate with the approach of Barrett J in the Dublin Airport Runway case as to the constitutional importance of dignity and bodily integrity. While I do not necessarily disagree with the Coynes' observations in this regard in a general sense, I do not see that they much advance their case. In any event they must, as to their application to the present case and the assertion of derived personal constitutional environmental rights, be viewed in light of the Supreme Court's decision in **FIE v Ireland**.[511]

292. **Simpson**[512] is also notable for its repetition that resort to constitutional remedies should take place only where strictly necessary - constitutional rights should not be seen as "*wild cards*" to be played at any time to defeat existing rules. Constitutional remedies are to be seen as the vindication of a wrong and therefore subject to the necessary limitations which apply within the constraints of tort law and civil liability. I would not rule out (or in) the possibility of certiorari to quash a decision permitting a development which could be shown to pose a real risk of *"clear and adverse effect … in a real and concrete way"* [513] on an applicant for judicial review. That said, it is useful, if only as a cross-check of the claim based on constitutional rights in this case, to ask the question in light of the prohibition on the use of constitutional rights as "wild cards" - would the Coynes, on the facts and evidence before me, have a stateable case in nuisance or any other tort to

508 §264.
509 Clifford v An Bord Pleanála [2022] IEHC 474 " … it is inherent in the doctrine of stare decisis that a subsequent court has a certain degree of latitude to classify a point as obiter that is not so classified by the original court itself."
510 Simpson v Governor of Mountjoy Prison [2019] IESC 81. Mr Simpson complained of the conditions of his detention in Mountjoy Prison as a "protection prisoner" in an overcrowded wing, which lacked adequate hygienic and sanitary facilities and in which he was confined to his cell for long periods.
511 Friends of the Irish Environment v Ireland [2020] 2 I.L.R.M. 233.
512 §135.
513 O'Doherty & Waters v Minister for Health [2022] IESC 32 – see below.

restrain by injunction the proposed development of the Data Centre on the basis of a risk allegedly posed by the CO_2 emissions of the generation of the electricity used to power it? One need only pose the question to answer it in the negative, not least for want of proof of probable actual injury sounding in damages and causal relationship of that injury to the CO_2 emissions specifically referable to the Data Centre. This analysis is entirely consonant, it seems to me with the approach taken, for example, to

- the citizen-plaintiffs in **Milieudefensie**[514] who lacked a *"sufficiently concrete individual interest" in "public interests, which cannot be individualized".*

- **O'Doherty & Waters**,[515] who were not clearly and adversely affected in their constitutional rights in a real and concrete way by the matters of which they complained.

G6 - FIE v Ireland 2020, Urgenda 2019 & Milieudefensie 2021

293. That brings us to **FIE v Ireland**,[516] in which the Supreme Court quashed the National Mitigation Plan[517] as failing to comply with the requirements of the 2015 Climate Act pursuant to which it had been adopted. Having taken that view, and a view that FIE, as a company, lacked standing to assert the personal rights of its members, Clarke CJ considered it unnecessary to rule on FIE's contention that the derived environmental right recognised by Barrett J in the Dublin Airport Runway case entitled FIE to relief. Nonetheless, he addressed that issue in terms which, while undoubtedly obiter, are expressed in forceful and clearly considered terms, at some length and on behalf of an unanimous Supreme Court of seven members. It was clearly given with the intent of expressing the view of the Supreme Court on an important issue. While it was explicitly not intended as the last word on the question of the interaction of personal constitutional rights with environmental issues, as a statement of the current state of the law in Ireland as to the existence of a specific unenumerated personal right to a healthy environment, and as obiter remarks go, it is at the strongest end of the spectrum.

294. The Supreme Court[518] said that:

514 Infra. .
515 O'Doherty & Waters v Minister for Health [2022] IESC 32 – see below.
516 Friends of the Irish Environment v Ireland [2020] 2 I.L.R.M. 233.
517 For which s.4 of the 2015 Climate Act then provided, but since the 2021 amending act no longer provides. Its full name was the "national low carbon transition and mitigation plan" and it was required to
(a) specify the manner in which it is proposed to achieve the national transition objective,
(b) specify the policy measures that, in the opinion of the Government, would be required in order to manage greenhouse gas emissions and the removal of greenhouse gas at a level that is appropriate for furthering the achievement of the national transition objective,
(c) take into account any existing obligation of the State under the law of the European Union or any international agreement referred to in section 2, and
(d) specify the mitigation policy measures (… "sectoral mitigation measures") to be adopted by the Ministers of the Government, …… for the purposes of—
(i) reducing greenhouse gas emissions, and
(ii) enabling the achievement of the national transition objective.
518 Clarke CJ.

- It was important to reiterate, as to constitutional claims, that under the separation of powers questions of general policy do not fall within the remit of the courts.

- However, if a person establishes that his/her personal Constitutional rights have been breached in a particular way, the court must vindicate such rights - even if an assessment of whether such rights have been breached may involve complex matters including policy. Constitutional rights and policy do not fall into separate hermetically sealed boxes. Where policy has been incorporated into law or may arguably impinge rights guaranteed by the Constitution, the courts do have a role.

- There may be environmental cases where constitutional rights and obligations may be engaged, and the Court would consider circumstances in which climate change measures (or the lack of them) might interfere with the right to life or the right to bodily integrity.

- It would not rule out the possibility that the interplay of existing constitutional rights with the constitutional values to be found in the constitution - such as Art. 10,[519] the right to property and the special position of the home, and other provisions - might impose specific obligations on the State in particular circumstances. Such possibilities would be addressed only in cases where they truly arise and may affect the result.

- It did not consider that a cogent case had been made out for the identification of a derived right to a healthy environment. Such a right was either an unnecessary addition (if it does not go beyond the rights to life and bodily integrity) or impermissibly vague (if it does). The ill-defined posited right to a healthy environment was either superfluous or imprecise and in neither case could such a right be derived from the Constitution.[520]

295. In the Supreme Court in **FIE v Ireland** "*there were significant references in the submissions of both parties*" from their opposing points of view,[521] to **Urgenda**[522] in which the Dutch Supreme invoked Arts 2 and 8 of the ECHR and considered it appropriate, as a matter of Dutch law, to make an order requiring the Dutch State to take measures against climate change. Though reciting the High Court's reasons for declining to follow Urgenda, the Supreme Court does not elaborate its own view in that regard and its decision does not seem to turn on any such view. It would seem therefore that the decision of the High Court remains good law, if not as implicitly endorsed by the Supreme Court, then at least on its own authority. Whether or not that is so, I respectfully agree with and

519 As to State ownership of natural resources.
520 Clarke CJ returned to the issue in summarising his conclusions (§9.5): "… I did not consider it appropriate to address the rights- based arguments put forward, but do offer views on the question of whether there is an unenumerated or, as I would prefer to put it, derived right under the Constitution to a healthy environment. While not ruling out the possibility that constitutional rights and obligations may well be engaged in the environmental field in an appropriate case, I express the view that the asserted right to a healthy environment is either superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or is excessively vague and ill-defined (if it does go beyond those rights). As thus formulated, I express the view that such a right cannot be derived from the Constitution. I would reserve the position of whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation to a case in which those issues would prove crucial."
521 See §5.12 et seq. for these submissions and the High Court's reasons for declining to follow Urgenda.
522 State of the Netherlands v Urgenda Foundation (C/09/456689/ZA) decision of the Hoge Raad (the Supreme Court of the Netherlands) on a cassation appeal.

follow the decision of the High Court. The Supreme Court[523] described the decision in the High Court in this regard[524] as based on the absence of evidence as to the constitutional order of the Netherlands, particularly in relation to the separation of powers in that jurisdiction and on distinguishing Urgenda on the basis that no particular statutory framework had been impugned in Urgenda.

296. As urged by the Board in the present case, one might readily add the observation that the Netherlands has a monist constitutional order such that international agreements are justiciable in its courts and were heavily relied on in Urgenda. In contrast, Ireland's constitutional order is duallist and, save to the extent the Oireachtas provides otherwise, international agreements are not justiciable in its courts.[525] That is a vital distinction which the Coynes ignore.

297. I would add, at this later remove from Urgenda than was the Supreme Court, that Urgenda proceeded on the basis that Articles 2 and 8 ECHR directly obliged the Netherlands[526] to take positive steps to mitigate climate change. Given the later decision of the ECtHR in **Pavlov** to the effect that personal rights to a healthy environment were not, at least yet, recognised as deriving from the ECHR, it seems, if only in hindsight, that Urgenda outpaced the Strasbourg court in breach of the principle identified by Fennelly J in **McD v PI**. I also accept the submission that as the ECtHR has not yet ruled on climate change, it is not for a national court to pre-empt ECtHR jurisprudence on that issue. Indeed, in **Urgenda,** the advisory opinion of its Procurator General to the Dutch Supreme Court was, inter alia, that "*obviously the manner in which the ECtHR itself would rule in a case like the present is uncertain*".[527] And the Dutch Supreme Court noted that"… *the ECtHR has not yet issued any judgments regarding climate change or decided any cases that bear the hallmarks that are particular to issues of climate change."*[528] Of course, the Dutch Supreme Court is not bound by **McD v PI**.[529] But I am.

298. Further, the Coynes' observe that in Urgenda the Dutch State was found to be in breach of its ECHR obligations in reducing emissions but not by enough. That seems to me an inherently State-level reasoning and inherently inapplicable to a particular project and a particular decision by a State body as to a planning permission. It is impossible to consider that such reasoning could place on a particular project the responsibility for the entire State's obligation, unless all particular projects bore the same burden and that would be impossible as it would in effect render all development all but impossible. That is, I must say, the crude implication of the Coynes' argument. That is not to say, of course, that the State could not make general decisions and impose regulations as to how planning applications should be affected by emission reduction obligations. But how meeting such

523 §5.17.
524 See §138.
525 See Jennings v An Bord Pleanála & Colbeam [2022] IEHC 249 §§47 & 48 as to the distinction between monist states (of which the Netherlands is one) and duallist states such as Ireland.
526 Given its monist legal order.
527 §6.7 & 6.15.
528 §5.6.3.
529 Though the Court noted in Urgenda at §5.6.1 that "Dutch courts must interpret those provisions as the ECtHR has, or interpret them premised on the same interpretation standards used by the ECtHR."

emissions obligations, as to the many and varied forms of development almost all of which require electric power, is to be advanced in addressing planning applications and reconciled with other, legitimate and competing, interests and policies is not for the Courts to decide.

299. **Milieudefensie**[530] was an action by NGOs and over 17,000 citizen co-plaintiffs. The NGOs got an order requiring Shell to reduce its CO_2 emissions - from its own operations and from the use of the hydrocarbons it produces - by 45% by 2030 compared to 2019 levels - in effect, extending the Urgenda decision[531] against the Dutch Government to private[532] and commercial companies. The decision of the Hague District Court is under appeal. The Coynes cite it for its description of climate change and its consequences.[533]

300. It is of some passing interest that in Milieudefensie the citizen co-plaintiffs were denied standing for want of a *"sufficiently concrete individual interest"* in addition to the interests already served by the class actions "*for current and future generations of Dutch residents*" which, of their nature in Dutch law*, "seek to protect public interests, which cannot be individualized because they accrue to a much larger group of persons, which is undefined and unspecified."*[534]. Though I must assume, absent evidence, that Dutch law as to class actions and locus standi may well differ markedly from Irish law, that approach to the citizen co-plaintiffs has much in common with that articulated as to standing in **O'Doherty & Waters**[535] which required a *"clear and adverse effect … in a real and concrete way".*

301. Assuming, arguendo, I were to adopt the view of the Hague District Court, mutatis mutandis to Ireland, that "*The serious and irreversible consequences of dangerous climate change in the Netherlands and … pose a threat to the human rights of Dutch residents …"* it still would not, even nearly, follow that the Data Centre will pose a "*sufficiently concrete individual"* threat to the human rights of the Coynes[536] or, as to those human rights, *"clear and adverse effect … in a real and concrete way".*

302. I can take judicial notice in broad and general terms of the size and business of Shell. It is one of the worlds' largest multinational hydrocarbon-producing companies. It is not for me to agree or disagree with the view of the Hague District Court, as to Shell's Scope 2 emissions to the extent not covered by the ETS, that *"… the CO_2 emissions for which RDS can be held responsible*[537] *by their nature pose a very serious threat, with a high risk of damage to Dutch residents … with serious human rights impacts."* I need only say that if that be true, it by no means follows that … the CO_2

530 Milieudefensie et al v Royal Dutch Shell – Hague District Court, 26-05-2021, C/09/571932 / HA ZA 19-379.
531 See e.g., Milieudefensie §4.4.9.
532 In the sense of not being governmental.
533 See generally §2.3.
534 §4.2 Emphases added.
535 O'Doherty & Waters v Minister for Health [2022] IESC 32 – see below.
536 I appreciate that the adoption of the view of The Hague court that climate change threatens the human rights of Dutch citizens does not imply the adoption also of the Dutch law standard of a sufficiently concrete individual threat. Nonetheless, the observation is seems to me illuminatory.
537 Emphasis added.

emissions <u>for which the Data Centre can be held responsible</u> by their nature pose a very serious threat, with a high risk of damage to the Coynes with serious human rights impacts. There is no evidence before me that that effect.

G6 - Conclusion - personal right to a healthy environment (and Articles 2 & 8 ECHR)

303. It seems clear to me that, the claim grounded in the ECHR fails for the reasons set out above and which I summarise:

- As yet at least, there is no personal ECHR right to a healthy environment.
- Were I to declare one, I would be outpacing the Strasbourg court in breach of the principle identified J in **McD v PI**, **Fox** and **BPSG.**
- Therefore, no question arises of a positive obligation of the State, by virtue of the ECHR and in vindication of a personal right to a healthy environment, to address climate change.
- Even if such a positive obligation existed, the State would have a very considerable margin of appreciation as to the means of fulfilling it and there is every reason to consider the State's approach to CO_2 emissions as lying well within that margin.
- Even if such a positive obligation existed, there is no evidence before me that the Coynes will suffer by the Impugned Decisions and, by reference to the criteria stated in **Pavlov** and **Fadeyeva**, actual and severe harmful effects of the Data Centre on them personally, identifiable, quantifiable and distinguishable from other causative factors, sufficient to attract a remedy either on foot of a posited personal right to a healthy environment or on foot of Articles 2 and/or 8 ECHR.
- The Coynes lack standing to raise these issues, not having raised them before the Board.
- Even if such a positive obligation existed and had been breached, any remedy under Irish law would be confined by the 2003 Act to damages: certiorari is not available – see **Pullen**.

304. As to the constitutional claim, theoretically as both the Dublin Airport Runway case and FIE could be considered obiter as to the posited personal constitutional right to a healthy environment, it is open to me to find one. But, as obiter remarks go, the Supreme Court's in FIE is of the highest possible authority (a unanimous court of seven). I see no reason not to follow it and every reason to do so.

305. Therefore, I respectfully decline to find that the Coynes have any justiciable personal right to a healthy environment – either on foot of the Constitution or the ECHR or have any entitlement to

certiorari by reference to alleged breach of rights under Articles 2 and 8 ECHR. It follows that Ground 6 must be rejected in these respects.

G6 - Constitutional Rights - Standing – Cahill v Sutton, Mohan, O'Doherty & Waters, Grace, FIE

306. I now turn to the question of alleged breach of personal constitutional rights other than an alleged right to a healthy environment. There is no doubt that, in the general sense, the Coynes have locus standi – standing – to seek certiorari of the Impugned Decisions. Not least, they participated in the planning process and live next to the Site - see **Grace**.[538] However their standing to argue specifically breach of their personal constitutional rights in furtherance of that claim is disputed. Particular rules attend standing to litigate constitutional rights.

307. **Mr Mohan**[539] complained that before the political party of which he was a member and for which he sought to contest the 2016 general election held its selection convention in his constituency, it directed that the candidate had to be female, which he was not. He was excluded from consideration and a female candidate was selected. This direction reflected the party's intent to comply with s.17(4B) of the Electoral Act 1997 which provided for reduction of State funding of political parties which did not run a slate of candidates at least 30%[540] of whom were respectively male and female. The plaintiff challenged s.17(4B) as unconstitutional. The State disputed his standing to do so.

308. The Supreme Court (O'Donnell J) held, following **Cahill v Sutton**,[541] that the primary rule of standing required that the Plaintiff "*show that they are adversely affected in reality.*" And ".. *it is necessary to show adverse effect, or imminent adverse effect, upon the interests of a real plaintiff. This has the further benefit, (of) …. giving concreteness and first-hand reality to what must otherwise be an abstract or hypothetical legal argument.*" "*Interest*" was a deliberately broad term and "*It is enough that the plaintiff is, or can plausibly claim to be, affected or likely to be affected in a real way.*" It was said that *"In general, it is at least a useful preliminary approach to ask if the Act affects the plaintiff as a matter of fact. Normally this will be enough to establish standing to challenge the Act, although it will not determine the range of arguments that may be deployed .."* This last reference to "*arguments that may be deployed"* is, inter alia, to a distinct but closely-related doctrine that a plaintiff may not argue a jus tertii.[542]

538 Grace & Sweetman v An Bord Pleanála, ESB Wind Development & Coillte [2020] 3 IR 286.
539 Mohan v Ireland [2021] 1 IR 293.
540 The threshold was specific to that election.
541 [1980] I.R. 269.
542 As to the latter O'Donnell J gave the example of the Norris v The Attorney General [1984] IR 36. Mr Norris, while permitted to challenge s.61 of the Offences against the Person Act 1861 (which criminalised certain homosexual acts), was not permitted to challenge it on the specific grounds that it infringed rights of marital privacy, as he was unmarried, and marriage, at that time, was reserved to a union between a man and a woman. Mr Norris was not in a position, therefore, to assert any claim of infringement of marital privacy and such a claim fell foul of the rule against reliance on a jus tertii. In Grace & Sweetman v An Bord Pleanála, ESB Wind Development Limited and Coillte, [2020] 3 IR 286, the intent behind requirement of actual or imminent "injury or prejudice" identified in Cahill v Sutton was stated to be to prevent a party from being "allowed to conjure up, invoke and champion the putative constitutional rights of a hypothetical third party".

309. As to whether an adverse effect on a Plaintiff's interest had occurred, O'Donnell J notably observed that *"Common sense should not be entirely expelled from these matters."* He considered that as "*the principle of locus standi is a threshold requirement designed to exclude those who have no real connection to the legislation which they seek to challenge*", it followed that standing should not be "*denied because the impact of the allegedly unconstitutional legislation on a person, though real, was deemed insufficient*." Though it did not arise on the facts of Mohan, O'Donnell J thought it *"conceivable that in some cases it might be found that the effect of legislation was so attenuated and remote as to be de minimis"* or *"oblique"* but *"Any approach which would suggest that there is a degree of effect that, at some level, though measurable, would nevertheless be insufficient to establish standing appears contrary to the general principle."*

310. On the one hand, it is clear that O'Donnell J was establishing a relatively liberal approach to standing. On the other, his words "*though real*", "*though measurable*" and "*so attenuated and remote"* can't be ignored: nor can the requirement that anticipated adverse effect "*in reality*", "*in a real way"* be "*likely*" and "*imminent*". And, of course, "*effect*" requires causation – "*that the disadvantage he suffered is linked with the operation of the Act in question*."[543]

311. The Supreme Court held on the facts that Mr Mohan had standing as his interests had been adversely affected or stood in real or imminent danger of being adversely affected by the operation of the statute. He was affected in his life as a matter of fact and in a real way. It should be noted that the exploration of standing in **Cahill v Sutton** and **Mohan** related to, and was informed by, specific aspects of, and the particular significance of, challenges to the constitutionality of legislation.[544]

312. **O'Doherty & Waters**[545] also concerned a challenge to the constitutionality of legislation. It was a failed application for leave to seek to quash laws made to address the recent Covid pandemic[546] by reference to their alleged infringement of personal constitutional rights. O'Donnell CJ observed that since **Cahill v Sutton**,

> *"….. it is clear that legislation should normally be challenged only by individuals who can establish that the provisions in question have had a <u>clear and adverse effect upon them in a real and concrete way</u>. This has two aspects. What justifies a court in declaring invalid a*

543 O'Donnell J citing Hogan et al, Kelly: The Irish Constitution (5th ed., Bloomsbury Professional, 2018) §6.2.144.
544 E.g. In Mohan O'Donnell J said: "The invalidity of legislation is therefore a very significant disruption of the legal order which operates in a blunt and, essentially, negative way. It simply removes a law or an aspect of the law, can put nothing in its place, and yet can throw into question transactions taken on foot of the provision. As Henchy J in the High Court put it more than a decade earlier in The State (P. Woods) v Attorney General [1969] IR 385, at p 399: "It unmakes what was put forth as a law by the legislature but, unlike the legislature, it cannot enact a law in its place. It is clear that if this power, which may seem abrogative and quasi-legislative, were used indiscriminately it would tend to upset the structure of government."
The step of permitting a challenge to the constitutional validity of a piece of legislation should not, therefore, be taken lightly, simply because someone wishes, however genuinely, to have the question determined, but rather should only be taken when a person can show that they are adversely affected in reality."
545 O'Doherty & Waters v Minister for Health [2022] IESC 32.
546 The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020 and the Emergency Measures in the Public Interest (COVID-19) Act, 2020 and Statutory Instruments 121/2020 and 128/2020.

provision of general application and which may be accepted and approved of by very many other citizens, is the necessity to do justice to perhaps the single individual who can show that his or her rights (and perhaps no one else's) have been invaded by the provision in question. But it is also considered important that where the validity of legislation is considered, that that should take place against <u>*real and tangible facts giving life and focus to the challenge*</u>*. As Henchy J. put it in Cahill v. Sutton "[w]ithout concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality" and without such reality a case loses immediacy, impact and focus.*

………. I do not think that leave could be granted in this case without some evidence establishing that an applicant had sought to exercise their rights in this regard and been affected by the existence of a relevant measure. I consider, for example, that it would be necessary to establish standing that a person would have to show that they had sought to protest about something (and not necessarily these measures), or had intended to do so, and had either been refused permission, or informed that they would be acting contrary to a specific provision of the Act or of the Regulations or at least had a reasonable apprehension that that was the case."[547]

O'Donnell CJ had earlier observed:

"I would expect, therefore, that at a minimum the evidence would indicate a specific occasion during the currency of the impugned regulations, the protest contemplated, and the circumstances in which it was said the Regulations had prevented such a protest from taking place – none of this is said. Instead, the statement made is one which is both general and generic."[548]

Citing Mohan, O'Donnell CJ considered it

"an important principle, that if a person seeks to challenge a measure they must show at a minimum, that they were adversely affected by it, or reasonably anticipated such adverse impact"[549]

313. While those cases related, as I have said, to challenges to the constitutionality of legislation, in **Grace**[550] Clarke and O'Malley JJ,[551] while recognising that context, observed that "*the general principle seems to be applicable, and to have been regularly applied, across the board in judicial review*" such that the "*starting point*" is that

"……. the decision or measure under challenge must be said to give rise to an actual or imminent "injury or prejudice" to the challenger or that the challenger has been or is in danger of being "adversely affected". … In order for a person to have standing to bring a judicial

547 §114. Emphases added.
548 §106.
549 §108.
550 Grace & Sweetman v An Bord Pleanála, & ESB Wind Development Limited and Coillte [2020] 3 IR 286.
551 Delivering a joint judgment.

> *review challenge, ordinarily the person concerned will need to be in a position to demonstrate that the decision or measure which they wish to challenge either has or is imminently in danger of having adversely affecting their interests so as to cause or potentially cause injury or prejudice."*

314. Clarke and O'Malley JJ went on to consider the standing rules particular to environmental cases as requiring a

> *"broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question." Furthermore, that broad assessment should have regard, in an appropriate case, to the legitimate interest of persons in seeking to ensure appropriate protection of important aspects of the environment or amenity generally.*

315. As I have said, there is no doubt that, in a general sense, the Coynes have standing in the present case. However to the extent that, in Ground 6, they seek to mobilise alleged likely breach of their own personal constitutional rights against the impugned public law decisions, it does not seem to me that the "*broad assessment*" envisaged in Grace[552] requires that standing on that specific issue be granted in the absence of demonstration of real and imminent danger to those rights, causatively related to the Proposed Development permitted by the Impugned Decision.

316. The Supreme Court in **FIE v Ireland**,[553] considered a challenge to FIE's standing. Significantly, though what was at issue was the quashing of the National Mitigation Plan and not the constitutionality of a statute, and though FIE succeeded for other reasons, the Court applied **Cahill v Sutton** in holding that FIE lacked standing to assert breach of rights to life and to bodily integrity or any personal constitutional or ECHR rights. The Court noted that Cahill v Sutton had established a general rule – of practice rather than law – that, to have standing, a claimant must show that his or her rights have potentially been interfered with or be in imminent danger of being interfered with. The rule can be waived or relaxed if, in the particular circumstances and given weighty countervailing considerations, justice requires.

In my view, no such circumstances or considerations have been disclosed, either on the evidence or in argument, in the present case.

317. Clarke CJ commented that Irish standing rules are flexible but not infinitely so:

552 §45.
553 Friends of the Irish Environment v Ireland [2020] 2 I.L.R.M. 233.

> *"There clearly is a risk of the distinction between rights-based litigation, on the one hand, and political or policy issues, on the other, becoming blurred in cases such as this. I would view the observations of Henchy J.,[554] which I have cited, as conveying a warning against an over-liberal use of the undoubted entitlement of the courts to relax the general rule."*
>
> *"I would accept, therefore, that there are circumstances in which an overly strict approach to standing could lead to important rights not being vindicated. However, that does not take away from the importance of standing rules in our constitutional order. The underlying position was reiterated in the recent decision of this court in Mohan, which re-emphasised the need, ordinarily, for a plaintiff to be able to demonstrate that they have been affected in reality or as a matter of fact by virtue of the measure which they seek to challenge on the basis that it breaches rights. That remains the fundamental proposition. The circumstances in which it is permissible to accord standing outside the bounds of that basic principle must necessarily be limited and involve situations where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted."*

318. Returning to Mohan, I agree the relevance of the State's invocation of O'Donnell J's observation that the Courts should not become a forum "*for those who have simply lost the political argument in the legislature to seek a replay of the argument in the courts, repackaged in constitutional terms*". That observation does not precisely apply in this case as the Coynes' agenda is not generally political. Their agenda is particular to what they allege to be their personal circumstances of risk to their personal rights. However, the observation does point up the consideration that, even though as a means rather than an end, there is a considerable degree to which the Coynes' case is a collateral challenge to policy decisions by Government as to the means of addressing GHG emissions and as to the general desirability or otherwise of permitting the development of data centres. That challenge is their chosen means to the end of frustrating the development of the Data Centre adjacent their residence. That the Coynes' case is in considerable degree a collateral challenge to Government policy is so not least as the scope of their case as mounted, if successful, would prevent all, or all but all, data centre development.

Standing - Carvalho 2019

319. While Irish law standing rules suffice to dispose of the standing issue, the State cites **Carvalho**[555] as of some interest. Mr Carvalho and his co-applicants, operators in the agricultural or tourism sectors, sought annulment of certain EU legislative acts as insufficiently ambitious as to measures to combat climate change by reducing GHG emissions and injunctive relief accordingly. They alleged current and future damage in that their living conditions were adversely affected, in particular in so far as climate change, to which GHG emissions directly contribute, curtailed their activities and their livelihoods and results in physical damage. They relied on undisputed World Bank

554 In Cahill v Sutton.
555 Case T-330/18, Carvalho v European Parliament, & Council of the European Union, 8 May 2019.

and UNICEF[556] reports that heatwaves are already causing damage to human health, in particular to children, and to persons whose professions are dependent on moderate temperatures, such as in the agriculture and tourism sectors.

320. Simplifying the decision somewhat, it can be said that the General Court of the EU rejected the action as inadmissible for failure to meet EU Law standing criteria. Article 263 TFEU,[557] requires that applicants be directly and individually concerned by impugned legislative acts. The applicants alleged infringement of their fundamental rights, from which they inferred that they were individually concerned, given that, although all persons may in principle each enjoy the same right (such as the right to life or the right to work), the effects of climate change and, by extension, the infringement of fundamental rights is unique to and different for each individual. The court denied them standing, holding that such reasoning would render the standing criterion of individual concern meaningless. The Court said:

> *"The applicants have not established that the contested provisions of the legislative package infringed their fundamental rights and distinguished them individually from all other natural or legal persons concerned by those provisions just as in the case of the addressee.*
>
> *It is true that every individual is likely to be affected one way or another by climate change, that issue being recognised by the European Union and the Member States who have, as a result, committed to reducing emissions. However, the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application."*

321. Without reasoning the matter too closely or over-pressing the analogy, the criterion of individual concern as illustrated above, seems to me broadly analogous to Irish rules of standing and its application to those damaged or fearing damage by climate change seems to me to lend some support the view that the application of Irish rules of standing to actions by those similarly situated should yield the same result as in Carvalho. Though I would have come to the same view without reference to Carvalho.

G6 - EIA & Breach of Constitutional rights - Conclusion as to Standing

322. Having regard to the authorities cited above, in my view and on the evidence they adduce, the Coynes lack standing to argue breach of their constitutional rights. My reasons could invoke various phrases used above, but it suffices to invoke the absence of evidence of imminent, clear and adverse effect upon the Coynes in a real and concrete way by reason specifically of the operation of

556 The United Nations Children's Fund.

557 Essentially and as relevant Article 263 TFEU governs the jurisdiction of the CJEU to review the legality of legislative acts of the EU. It provides for the standing to litigate such issues of Member States and various listed EU institutions. Otherwise, it provides that "Any natural or legal person" has standing to challenge an "act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

the Data Centre. Past the point of the fact and quantification of the Scope 2 CO_2 emissions of the Data Centre, there are no real and tangible facts giving life and focus to the challenge.

323. As a separate matter the Coynes also lack standing to raise these issues, having not raised them before the Board.

G6 - EIA & Breach of Constitutional rights – Standard of review – Burke 2022

324. Despite my finding on standing, and lest it is wrong, I will consider the Coynes' reliance on **Burke.**[558] The facts in that case were that the Minister for Education, responding to the necessity of cancellation of the Leaving Certificate exams of 2020 due to the Covid-19 pandemic, and in the exercise of the executive power of Government under Art.28 of the Constitution, created a "calculated grades" scheme in substitution for the exams, from which certain home-schooled pupils such as Mr Burke were excluded. He successfully relied on **Article 42.2 of the Constitution**[559] in alleging impermissible interference with his constitutional right to receive education at home.[560]

325. The Coynes rely on the Supreme Court's rejection of the State's argument that deference to the exercise of executive power required that the court should interfere with any exercise of such power only if there was a "*clear disregard*" of the Constitution. That raised *"the difficult question of the correct approach to a contention that an administrative decision is invalid because it amounts to an impermissible interference with a Constitutional right."*[561]

326. Counsel for the Coynes followed the reasoning in Burke, as far as the conclusion that **Meadows**[562] decided that whether an administrative decision breaches a constitutionally protected right is not assessed by reference to the law of irrationality in judicial review[563] and that the principle of proportionality could be employed in the analysis and resolution of cases raising issues as to the impact of such decisions on fundamental rights. However what followed[564] is also of interest: O'Donnell CJ stated *"a general proposition that constitutional rights are not absolute and are by the terms of the Constitution itself limited by considerations of public order, morality and/or practicality"*. He cited **Ryan v AG**[565] as follows:

558 Burke v Minister for Education and Skills [2022] 1 ILRM 73.
559 "Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State."
560 A right derived from his parents' guaranteed freedom to provide education in the home.
561 O'Donnell CJ §89.
562 Meadows v Minister for Justice, Equality and Law Reform [2010] IESC 3; [2010] 2 I.R. 701; [2011] 2 I.L.R.M. 157.
563 O'Donnell CJ said: "When it is alleged that an enactment of the Oireachtas breaches a constitutional right, it is not sufficient to establish that the provision could be considered rational or reasonable at some level, still less that it does not fly in the face of fundamental reason. The Constitution protects rights against invasions whatever the motive or reasoning. There is, in principle, no reason why a different test should be applied to the decision or action when it is taken as an administrative decision pursuant to the executive power, rather than pursuant to legislation."
564 §95.
565 Ryan v Attorney General [1965] I.R. 294; Kenny J. at 312.

> *"None of the personal rights of the citizen are unlimited; their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefits which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen."*

O'Donnell CJ continued:

> *"It has been found useful to approach the question of the validity of any action, legislative or otherwise, which affects constitutional rights by using the tool of proportionality. While I do not think that proportionality, as discussed in the case law to date, is necessarily a precise or a failsafe test, it is nevertheless a useful frame of analysis which can be employed in this context, where the issue is whether a provision which affects a constitutionally protected right is an impermissible interference with that right."*

327. So, to pick one example, it is entirely and regrettably, even tragically, predictable that people are killed and injured in road traffic accidents - including pedestrians who have not chosen to drive vehicles. In absolute terms, their rights to life and bodily integrity are interfered with – even nullified. Yet for entirely legitimate reasons of practicality and proportionality, viewed from a societal perspective, the driving of motor vehicles remains legal, though regulated. In my view, and as to such judgments, the decision is for the Oireachtas and the Executive acting in their respective spheres and that within a considerable margin of appreciation, the limits of which need not be explored here. Again, I am drawn back to the observation that, as to the reconciliation of policy favouring data centres with the necessity to reduce GHG emissions, with foresight of the threatened effects of climate change on the population, and as to a choice to resolve that tension inter alia by ETS-incentivised transition to renewable electricity generation rather than by curtailing data centre development, in a representative constitutional democracy such decisions are not, unless identifiably disproportionate (or, put otherwise, outside the margin of appreciation of the democratic organs of State) for the Courts to make. They are for the democratic organs of State to make. We are drawn back again to the reality that the Coynes' case as to human rights is in truth and necessarily a collateral challenge to Government policy favouring data centres as disproportionately exposing the Coynes to personal danger. I cannot see any basis in fact or in law for holding with the Coynes on this issue.

G6 - EIA & Human Rights – Conclusion

328. I reject Ground 6 and refuse relief on foot of it for the reasons stated above and which I very briefly and incompletely summarise here:

a. The Coynes have adduced no evidence of causal link between the operation of the Data Centre and anticipated breaches of personal rights which they assert.

b. The Coynes failed to argue before the Board the breaches of personal rights asserted in Ground 6 and so lack standing to do so in this court.

c. The Coynes have adduced no evidence sufficient to establish standing, by reference to Cahill v Sutton and later caselaw, to assert breach of personal constitutional rights causatively related to the Data Centre.

d. The Coynes have adduced no evidence sufficient to engage Articles 2 and 8 ECHR by reference to real and immediate risk of identifiable, actual, severe and quantifiable harmful effects of the Data Centre on them personally, distinguishable from other causative factors – or as it was put in O'Doherty, "*real and tangible facts*" and in Cahill v Sutton, "*concrete personal circumstances*". As to Article 2, and to paraphrase Brincat, they have not shown that the Data Centre constitutes an inevitable precursor to serious risk of their ensuing death. Even **Milieudefensie**,[566] on which the Coynes rely, declined standing to the individual plaintiffs for want of a *"sufficiently concrete individual interest"* in "*public interests, which cannot be individualized because they accrue to a much larger group of persons, which is undefined and unspecified."*[567] and did not hold Shell responsible for its Scope 2 emissions insofar as covered by the ETS and its "*indemnifying effect*".

e. If I am wrong in that regard, I hold that, assuming such standing, the Coynes have adduced no evidence sufficient to establish that such breach will occur or that any posited risk of danger to them or any of their personal ECHR or Constitutional rights by reason of the CO_2 emissions of electricity generation to power the Data Centre is disproportionate to the desirability, as determined by Government policy, of developing data centres.

f. There is, at least as yet, no free-standing Convention or Constitutional right to a healthy environment - nor a right infringed by "*general deterioration of the environment*" - which is the risk posed by climate change. To find such a Convention right would in impermissibly outpace the ECtHR in this regard and, on the Constitutional side, FIE v Ireland is against it.

g. Even if such a right existed, the State would have a very considerable margin of appreciation as to the means of vindicating it and the State's approach to reducing CO_2 emissions of electricity generation lies within that margin. The Coynes have not shown that the State's – indeed the EU's – choice of means (via the ETS and transition to renewables) of reducing CO_2 emissions of electricity generation is outside the margin of appreciation allowed by the

566 Milieudefensie et al v Royal Dutch Shell – Hague District Court, 26-05-2021, C/09/571932 / HA ZA 19-379.
567 §4.2.

Convention or, if it arises, the Constitution. Nor have they shown that reliance on that choice of means to mitigate additional CO_2 emissions of electricity generation consequent on State policy to encourage data centre development is outside that margin. Though it is not essential to my view as to margin of appreciation, comparing the factual and domestic policy issues at stake in **Hatton** (the operations of Heathrow Airport) to those in the present case, I have no difficulty concluding that the response to climate change and GHG emissions, as it interacts with national industrial policy such as that relating to data Centres as set out above, is in a "*difficult social and technical sphere*" in which the margin is especially wide.

h. Certiorari is not available in Irish law for breach of Convention rights.

<u>MODULE B - GROUND 3 - OMISSION OF ENERGY CENTRE & CONDITION 4</u>

<u>G3 - Omission of Energy Centre – Introduction</u>

329. In its response dated 12 August 2020 to the Appeals,[568] EngineNode requested omission of the 8,906m^2 Energy Centre. To that end, it enclosed the Data Centre EIAR Addendum and a revised layout drawing depicting the proposed omission. Given the Coynes' case in this regard, it will assist to contrast the original and revised layouts. Talking the Site as roughly triangular, the Energy Centre was to be in the northern apex, and it is notable that on both the north eastern and north western boundaries the adjacent development is commercial, not residential.

Figure 1 **Original Layout**

- DC 1 and DC 2 are Data Centre Buildings. DC 3 & DC 4 are not depicted. They lie to the East/Southeast of DC 2.
- EC is the Energy Centre.

568 John Spain Associates to An Bord Pleanála 12 August 2020 §4.3.

- The MV[569] Operations Building (sub nom "MV Distribution Centre") is just right of the Energy Centre and ancillary to it. The associated transformers lie between the MV[570] Operations Building and the Energy Centre.

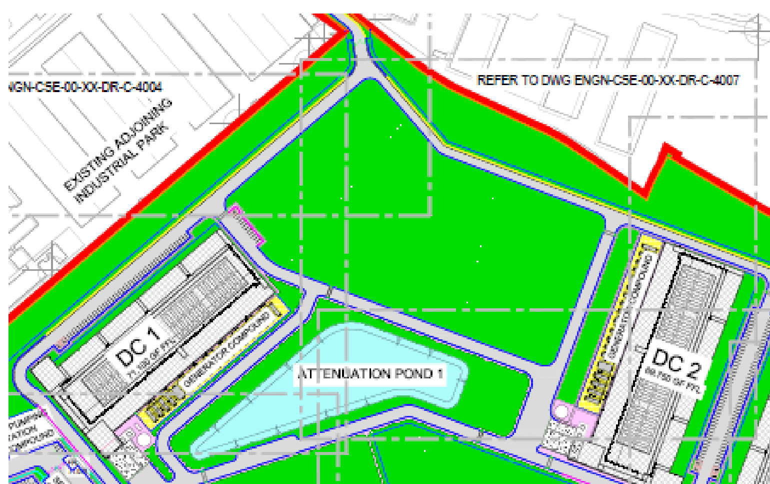

Figure 2 Revised Layout - Energy Centre Omitted

- It is very clear that the Energy Centre, the MV Operations Building and the transformers are to be omitted.
- The substation will lie south of the attenuation pond – see figure 3 below.

330. Condition 4 of the Impugned Data Centre Permission reads as follows:

> *"For avoidance of doubt, the energy centre shall be omitted from the development in accordance with the documents received by the Board on the 12th day of August 2020. Prior to commencement of the development, the developer shall submit to and agree in writing with the planning authority revised plans which describe the full extent of this omission, and the landscaping plans for the site.*
> *Reason: In the interest of clarity and orderly development."*

I observe that this condition makes clear that the area of the omission is to be landscaped.

G3 - Omission of Energy Centre - Inspector' Report

331. The Inspector recorded[571] that EngineNode requested the Board to omit by way of a planning condition the Energy Centre and associated c.40m high exhaust flues in the North East section of the Site. She considered the request acceptable and was not convinced that the omission would, on its own, warrant refusal of planning permission. The overall footprint of the project would

569 Medium Voltage.
570 Medium Voltage.
571 Planning Assessment - §7.1.2. Design, layout and visual amenity p37 and §7.1.7. Other issues, Climate change, energy demand & omitted energy centre p.50.

be reduced, as would the emissions of the Energy Centre (including noise, dust & NO_2), and there would be less construction traffic movement, and a corresponding reduction in environmental impacts.[572]

332. However, she considered that other elements of the Proposed Development, related to the Energy Centre, should also be omitted (including associated transformers, bunded areas and associated buildings and perimeter fencing). This could be addressed by planning condition in the interests of clarity. Condition 4 of the Impugned Data Centre Permission is a reworded version of her suggested condition to the same effect.

G3 - Omission of Energy Centre - The Coynes' Challenge

333. The Coynes make, essentially, 3 points:

a. Omission of such a significant element of the Proposed Development was ultra vires the Board. S.34(1)[573] PDA 2000 creates no jurisdiction to grant permission for
   - part of a development for which permission was sought - citing **Holborn Studios**,[574] **Murphy v Cobh TC**, [575] and **HH**[576] and contrasting other statutory provisions which explicitly allow such authorisations.[577]
   - a development as to which no public participation occurred for the purposes of the PDA 2000 and/or **Article 6(4) of the EIA Directive**.[578]

b. Condition 4 is void for uncertainty as to exactly what is to be omitted or ultra vires the Board in that the matters left for agreement with the Board as to exactly what is to be omitted exceed the scope for such conditions allowed by the **Boland** principles[579] as summarised in **Krikke**.[580]

572 Citing EIA §8.0.
573 34.—(1) Where —
(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and
(b) all requirements of the regulations are complied with,
the authority may decide to grant the permission subject to or without conditions, or to refuse it.
574 R (Holborn Studios Limited) v LB Hackney [2017] EWHC 2823 (Admin).
575 Murphy v Cobh Town Council 2006 IEHC 324 (§58): "In order for the Board properly to conduct its affairs there must be strict compliance with statutory procedure provisions. The Board is not entitled, as a creature of statue, to operate outside the four corners of the legislation which governs its powers."
576 HH v Medical Council [2012] IEHC 527 (§27): as the principle "… expressio unius exclusio alterius".
577 The Coynes contrast:
s.9(4)(d) of the Planning and Development (Housing) and Residential Tenancies Act 2016 which specifically allows permission "in part only"
s.175(9)(a)(iii) and s.177AE(8)(a)(iii) PDA 2000 Act as to, respectively, EIA and AA of certain types of local authority development, which specifically allow Board the power to "approve, in part only".
s.181A and s.181B(6) PDA 2000 as to approval of certain State development requiring EIA and s.182A and s.182B(5) PDA 2000 as to approval of electricity transmission lines. Note as to this entry that that the references to sections of the PDA 2000 in the Coyne's submissions are a little unclear though, given the confusing layout of the PDA 2000 by reason of multiple amendments, that is the mildest of criticisms. I have inferred what was intended. Nothing turns on the issue as the general point being made is perfectly clear.
578 4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.
579 Boland v An Bord Pleanála [1996] 1 IR 435.
580 Krikke v Barranafaddock Wind Farm [2021] IECA 217 (§59).

c. Condition 4 is void for uncertainty or ultra vires in that the matters left for agreement with the Board as to landscaping exceed the scope for such conditions allowed by the Boland principles.

334. The Coynes plead that

- The project permitted is fundamentally different to that for which permission was sought.

- The Energy Centre was a critical element of the planning application to, and permission granted by, Meath County Council[581] and its omission necessitated extensive revision, by way of the Data Centre Addendum EIAR, of Chapter 9 of the original EIAR to allow for the supply from the National Grid of all the energy for the Data Centre. Thereby, they say, the expectation was that the expected emission by the Energy Centre[582] of 0.54% of Ireland's annual CO_2 emissions[583] would, on the basis of its omission and power supply from the National Grid,[584] nearly double to 0.97%.[585]

- The proposed omission of the Energy Centre was notified only to those who had made submissions to the Board.

- The Coynes made submissions objecting to the omission. The Inspector noted their objections[586] but did not address them or the legality of the omission.

- It is unclear what, if anything, will be sited in the area vacated by the omission of the Energy Centre.

- In breach of Article 6(4) of the EIA Directive, the Coynes will have no right to make submissions as to the Developer's proposal for that area.

G3 - Omission of Energy Centre – The Board's & EngineNode's' Opposition

335. Given the view I take below, I do not find it necessary to recite the opposition papers and submissions in detail. However, EngineNode notably pleads that it submitted revised site layout plans with its response of 12 August 2020 to the appeals – which plans showed that the omitted Energy Centre area would be left undeveloped and landscaped. Condition 1 of the Impugned Data

581 The Coynes plead that the Meath CC Planners Report said it was required "… for reasons of commercial need in order to respond flexibly to the evolving energy market and to ensure the capacity to have future security of supply and also to respond to any future grid capacity constraints".
582 Assuming natural gas fuels the energy centre.
583 §9.8.2.2 of the original EIAR.
584 Assuming the 2018 national fuel mix.
585 §9.8.2.2 of the Addendum EIAR.
586 Inspector's report §7.1.7.

Centre Permission explicitly incorporates the documents of 12 August 2020 as plans and particulars in accordance with which the development must proceed and so there is no uncertainty as to what is to replace the omitted Energy Centre. I accept this characterisation of the position and refer to Figure 2 above in that regard. It appears to me to clearly depict what is intended as relevant to this issue.

336. The Board cites also Condition 8 of the permission which imposes requirements as to landscaping including the retention of hedgerows, the timing of planting and construction of berms and the replacement of failed planting.

337. The Board and EngineNode cite, inter alia, **Ashbourne Holdings**,[587] **Abenglen**,[588] **Dietacaron**,[589] **Kenny**[590] and **South West Regional Shopping Centre**.[591]

G3 - Omission of Energy Centre - Discussion and Decision

338. The question of the Board's jurisdiction under s.34 PDA 2000 to grant permission subject to the omission of a significant element of the development for which permission was sought was recently considered in **Shadowmill**[592] - as were the various authorities now cited on this issue. There, the omission was, if anything, more significant in planning terms than in the present case. It involved the omission of an entire block of apartments and the planning application had sought permission for only two blocks.[593] Here, though the Energy Centre is undoubtedly significant, it is equally undoubtedly ancillary to the main development consisting of the Data Centre blocks.

339. In Shadowmill, a similarly laconic provision as that made in the present case had been made by the Board for the landscaping of the area left vacant by the omission of the apartment block. Again, if anything, that issue was more significant than in the present case as, in Shadowmill, the grounds formed part of the curtilage of a protected structure in respect of much of which a sophisticated landscaping plan had been part of the planning application. And the area of the omitted block would form part of the grounds of a residential development. While it is a matter of planning judgement, and is not a warrant not to landscape properly in the present case, I think it would be pretending unrealistic ignorance not to acknowledge that the importance of, and requirements of, landscaping such a development as was at issue in Shadowmill are likely to have been appreciably more significant than those relating to the landscaping of a commercial development in a commercial area, so zoned, such as that at issue in the present case. Yet the

587 Ashbourne Holdings v An Bord Pleanála [2003] 2 IR 114.
588 The State (Abenglen Properties) v Dublin Corporation [1984] IR 381.
589 Dietacaron Ltd v An Bord Pleanála [2005] 2 ILRM 32.
590 Kenny v Dublin City Council [2009] IESC 19.
591 South West Regional Shopping Centre v An Bord Pleanála [2016] IEHC 84.
592 Shadowmill v ABP & Lilacstone [2023] IEHC 157.
593 That is a slight simplification as the development also involved the renovation of a pre-existing dwelling.

permission in Shadowmill survived challenge at least as to the issues of omission of the apartment block and a Boland condition as to landscaping the void left by the omission. Ceteris paribus and a fortiori one would expect in light of Shadowmill that the present permission would survive challenge in these respects.

340. I am conscious that Shadowmill was decided after argument in this case. But I do not think its deployment here requires further argument in the present case as, essentially, the arguments in both cases were the same and all the cases I have listed above as cited in this case were considered in Shadowmill. And counsel for the Coynes had been in Shadowmill and in the present case referred back to the arguments made in Shadowmill. So I adopt Shadowmill not a s binding me but by way of adopting its reasoning as a response to those arguments in this case. Nor do I think it necessary to re-tread in detail here the ground trodden in detail in Shadowmill.[594] Suffice it to say that it was held in Shadowmill that **s.34(1) PDA 2000** encompassed an implied power to grant a permission for part only of a development for which permission had been sought and that, in any event, the express power in s.34(1) to grant permission subject to conditions allowed a condition requiring the omission of part of the development for which application was made.

341. For completeness, I respectfully reject the Coynes' argument that seeks to distinguish **Dietacaron** on the basis that in that case the initiative for an amended development came from the Board whereas here it came from the developer. I do not see that, as the matter was argued before me, anything of consequence turns on who took the initiative in that regard.

342. I therefore reject the challenge based on want of jurisdiction to omit the Energy Centre – save as it relates to Article 6(4) of the EIA Directive. That issue can be conveniently addressed after considering the Boland Condition.

G3 - Omission of Energy Centre & Landscaping - Boland Conditions - Discussion and Decision

343. The Boland principles[595] governing conditions leaving matters over for later agreement with the Planning Authority need not be recited in full here. Suffice to say that they allow for matters of detail to be left over to such agreement.

344. As to the issue of what exactly is to be omitted, the Coynes rely on the Inspectors' observation that other elements of the Proposed Development related to the Energy Centre should also be omitted (including associated transformers, bunded areas and associated buildings and perimeter fencing). However, they do not identify any feature of the Proposed Development as to the removal of which, or not, they are unsure. Much less do they identify that question, as to any

594 §189 et seq.
595 Boland v An Bord Pleanála [1996] 3 IR 435.

such feature, as exceeding one of detail. Their case is abstract and deficient for that. What are matters of detail within the Boland principles is a question of degree and context. What might be detail in one proposed development might not be detail in another. In my view, and in the context of this particular Proposed Development, and in particular interpreting Condition 4 in light of the two drawings set out above, it is acceptably clear what is to be omitted, such that the issues raised by the Inspector and addressed in Condition 4 are, indeed, matters of detail. I hold that, in this respect, Condition 4 is intra vires the Board.

345. As to landscaping, again, what might be detail in one proposed development might not be detail in another. Different considerations might, or might not, arise or prevail in, say, a residential development or a development in a residential area, an amenity area or an area characterised by natural beauty. And, as I have said, such a condition passed muster in Shadowmill as to an area in the curtilage of a protected structure which, once landscaped would form part of the grounds of a residential development. In my view, on this commercial Site, on which a data centre is to be built, in which the area to be landscaped is surrounded on all sides by commercial development, it was intra vires the Board to leave to agreement with the planning authority the detail of landscaping the area from which the Energy Site is to be omitted. In such an area, while landscaping is required, its precise form is, it seems to me, a matter of detail. That is especially so in the context of this Proposed Development in which the application in its original form had proposed landscaping, inter alia, of the areas around the Energy Centre. Those landscaped areas will remain, notably on the north eastern and north western boundaries. In my view, it is readily to be inferred that Condition 4, understood in context, requires that the landscaping of the area of the omitted Energy Centre will be broadly compatible with the landscaping of those surrounding areas (a similar view, mutatis mutandis, was taken in Shadowmill) and the commercial character of the development on the Site and the commercial character of the lands on the north eastern and north western boundaries. Accordingly, the principles on which agreement is to be made are acceptably clear. I refer both as to principle and by analogy on the facts, to the decision in **Shadowmill**[596] on this issue. Though, as to the facts, as the landscaping condition survived in Shadowmill, a fortiori it will do so here as to a development in something akin to a light industrial/commercial park.

G3 - Omission of Energy Centre - Article 6(4) of the EIA Directive

346. Returning to **Article 6(4) of the EIA Directive**, which guarantees rights of public participation in EIA, the Coynes' challenge is specifically that they will have no right to make submissions as to the EngineNode's proposal for the area from which the Energy Centre is to be omitted. In considerable degree, the premise of that case, which I have deemed mistaken, is that there is uncertainty as to what is now permitted in that space and that it may exceed a matter of detail. It is clear that all that is permitted there is landscaping and that was plain on the revised drawings of August 2020 – see figure 2 above. The Coynes had the EngineNode submission of August 2020, including those drawings, and took the opportunity to make submissions on that submission – including as to GHG

596 §310 et seq.

emissions of off-site electricity generation and supply via the National Grid.[597] They could have then, but did not, raise any issues as to the scope of omission of the energy centre or the landscaping of the void left by that omission. They have been deprived of no opportunity of public participation to which they were entitled. And they may not invoke any deficiency in public notification of the proposal to omit the Energy Centre as that invokes a jus tertii given the Coynes participated and were not prejudiced. Nor do I see that the circumstances here are at all similar to those in **SPUC v Coogan**[598] on which the Coynes relied for standing in this regard.

347. Also, there is no suggestion that the landscaping details left over for agreement with the Council raise any possibility of significant effect on the environment. As a general proposition, Boland conditions may be applied in cases in which EIA has been done. That such conditions are limited to matters of detail renders it inherently unlikely that they risk significant effect on the environment which has escaped EIA – though, certainly, a weather eye must be kept to the possibility in each case. In **Donnelly**,[599] Barr J rejected an argument that **Holohan**[600] all but forbids Boland conditions in cases in which AA[601] was required and done, though he accepted that it had reduced the "wriggle room" for such conditions. By analogy and a fortiori his reasoning must also apply to EIA cases. In any event, and as the Court of Appeal said in **Krikke**[602] *"there is at the heart of this case no evidence that these conditions left anything more than technical details to be agreed between the planning authority and the developer and thus the argument in relation to the EIA Directive simply does not arise on the facts of this case."*

348. Accordingly, I reject the case as to omission of the Energy Centre as it is grounded in Article 6(4) of the EIA Directive.

G3 - Omission of Energy Centre - Conclusion

349. For the reasons set out above, I respectfully reject the challenge to the Impugned Permissions as to the omission of the Energy Centre and Condition 4 of the Impugned Data Centre permission.

597 Ignoring, in the Coynes' favour and for argument's sake, the view that such emissions are not indirect emissions of the Data Centre.
598 The Society for the Protection of Unborn Children (Ireland) Limited, v Coogan [1989] IR 734.
599 Donnelly & Anor v An Bord Pleanála [2021] IEHC 834.
600 Holohan v An Bord Pleanála (Case 461/17).
601 Appropriate assessment within the meaning of the Habitats Directive.
602 Krikke v Barranafaddock Sustainable Electricity Ltd [2021] IECA 217 (Court of Appeal (civil), Donnelly J, 30 July 2021) §120 et seq & at §126.

MODULE C - PROJECT-SPLITTING - GROUND 1 OF BOTH JUDICIAL REVIEWS

G1 - Project-Splitting – Introduction, An Taisce Data Centre Appeal & EngineNode's Response

350. As noted earlier, this "project-splitting" ground is the only ground now for decision on which the Grid Connection is impugned. The essential allegation is that the Grid Connection and the Data Centre are one project for EIA purposes but EIA of them was impermissibly split into separate EIAs of each. An Taisce's appeal asserted that, as the Data Centre and Grid Connection were to be subject to separate planning applications, the principle in **Ó Grianna #1**[603] as to project-splitting was breached.

351. EngineNode's response of 12 August 2020 to the appeals to the Board[604] prefigured its application on 7 September 2020 to the Board under **s.182A PDA 2000** for approval of the Grid Connection.[605] It identified that intended s.182A application, and the EIA which would inform its decision, as statutorily-mandated parallel authorisation processes.[606] It distinguished the present case from Ó Grianna - in which there was no certainty of a separate approval process applicable to the grid connection and no certainty that it would be subjected to EIA. EngineNode stated "*Thus, the data storage development and the electricity infrastructure development will both be subject to the appropriate planning process and will undergo full Environmental Impact Assessment that will cover the interrelated and cumulative impacts*."[607] EngineNode argued that it is open to the Board to regard planning permission for the Data Centre and its s.182A approval for the Grid Connection as together forming the 'development consent' for the purposes of the EIA Directive and as related to the single project consisting of the Data Centre and the Grid Connection.

G1 - Project-Splitting – Grid Connection Approval Application

352. On foot of a pre-application consultation and by letter dated 18 June 2020, the Board determined[608] that EngineNode's intended Grid Connection would be strategic infrastructure within the meaning of s.182A PDA 2000. In consequence, approval had to be sought for it directly from the Board under s.182A – as was done. Given one of the bases of challenge, it is of some importance to note that the completed s.182A application form described the Grid Connection as including a "220 kV GIS[609] substation" south of the proposed Data Centre and two 220 kV underground transmission cables – the 2km "Gunnocks[610] - Woodland circuit" and the 1.7km "Gunnocks - Corduff circuit" - connecting the substation to existing 220 kV overhead transmission lines to the north (i.e. to the National Grid). The routes of those cables to the connection points on the transmission lines are

603 Ó Grianna v An Bord Pleanála #1 [2014] IEHC 632.
604 §5.152 et seq.
605 Much of the response defends the use of the S.182A process – not at issue here.
606 i.e. a s.34 planning application for the data centre and a S.182A approval application for the grid connection each accompanied by EIA.
607 §5.163.
608 ABP-305657-19. See EngineNode Planning Report (Spain September 2020) for Grid Connection S.182A Approval Application §3.5 & Appendix 1.
609 Gas insulated substation.
610 Gunnocks is one of the townlands in which the Substation site lies.

described in some detail in the application form, and they are depicted in accompanying drawings as follows:

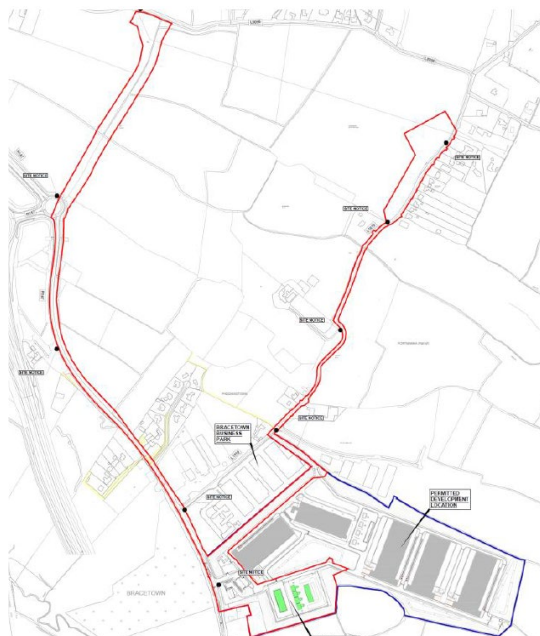

Figure 3 Grid Connection – Substation & Cable Routes

- This drawing appears in both the Grid Connection Planning Report[611] and the Grid Connection EIAR[612] as depicting the Cable Routes.
- The "green" buildings at the bottom of the drawing lie in the Substation Site.
- The 2km Gunnocks - Woodland circuit lies generally west and northwest of the Substation Site.
- The 1.7km Gunnocks - Corduff circuit lies generally north of the Substation Site.
- The Energy Centre, which the Substation would replace, is depicted as EngineNode's application for approval of the latter was contingent on a condition in the Data Centre Appeal omitting the former.

353. The S.182A application form was accompanied by, inter alia,

- A planning report by John Spain Associates. ("Grid Connection Planning Report").
- The Grid Connection EIAR – to which an AA Screening Report was appended.
- Various drawings.

354. The Grid Connection Planning Report recorded, inter alia, that:

- Each of the two circuits will terminate in a cable–overhead interface compound containing air-insulated electrical equipment mounted on concrete plinths and an adjacent 21m high overhead line tower to facilitate the connection to the National Grid.[613]

611 Extract from Figure 2.2, EngineNode Planning Report (Spain September 2020) for Grid Connection S.182A Approval Application.
612 Extract from Figures 1.1 & 2.1 EngineNode EIAR (AWN Consulting September 2020) for Grid Connection S.182A Approval Application. Figure 7.1 is a projection of the routes onto an aerial photograph, to the same effect.
613 Indicative drawing at Grid Connection EIAR, Figure 2.2 Example of Interface compound.

- The works will be effected by EngineNode but handed over the EirGrid for final commissioning and energisation and will thereafter comprise EirGrid infrastructure.

- As the Data Centre application included the Energy Centre (and the Board may grant permission for the development proposal including the Energy Centre), the drawings accompanying the S.182A Grid Connection application illustrate the Data Centre application including the Energy Centre. Likewise, the Grid Connection EIAR *"takes into consideration the cumulative impact of the concurrent data storage facility development including the energy centre."*

- As to the Policy Context and inter alia,
  - the Data Centre Statement is quoted to the effect that *"A consistent and supportive whole of government approach will be brought to the realisation of the transmission and distribution assets required to support the level of data centre ambition that we adopt."*
  - the RSES is quoted, as favouring strengthening the National Grid, to the effect that *"This is particularly important if the Region is to attract high technology industries that depend on a reliable, high quality, electricity supply."*

<u>G1 - Project-Splitting – Grid Connection EIAR, Data Centre Addendum EIAR & AA Screening Reports</u>

355. The Grid Connection EIAR clearly,

- describes the function of the Grid Connection as enabling electricity supply to the Data Centre - as to which there is a "*concurrent application*".

- at Figures 1.1, 2.1 and 7.1, and as noted above, depicts the location of the cable routes at the same locations as those depicted in the Grid Connection Planning Report.[614] It likewise provides a narrative description of those routes.[615]

- describes the "*primary*" other developments requiring consideration in the EIAR as including *"the proposed EngineNode (concurrent application) and Runways data storage developments (under construction)."*[616]

356. Chapter 2 of the Grid Connection EIAR generally describes the Grid Connection and its likely effects. §2.8 is headed "*Related Development and Cumulative Impacts*" and states the purpose of the Grid Connection as being to power the Data Centre. The following is stated:

> *"The cumulative impact of the proposed development with the concurrent application*

614 Figure 2.2, EngineNode Planning Report (Spain September 2020) for Grid Connection S.182A Approval Application.
615 Ch2 p3.
616 §2.3.5.

for an EngineNode data storage development and nearby data storage development (currently in construction) have been considered within the cumulative impact section of each chapter. The author of each chapter has considered the cumulative impact (both construction and operation phases) of the grid line development and current and planned developments (construction and operation phases). Where relevant, modelling of construction and operation emissions has been undertaken to fully assess the cumulative impact on the receiving environment. With mitigation for each environmental aspect, it is concluded that there are no predicted significant cumulative effects."

It is clear that the EIAR purports to assess the cumulative effects of the Grid Connection and the Data Centre.

357. Consideration of specific potential cumulative effects of the Grid Connection with the Data Centre are reassuringly considered in the relevant chapters of the EIAR.[617]

358. §11 of the Grid Connection EIAR considers Landscape and Visual impacts and §11.1 introduces the topic directly in the context of the Data Centre. So too the Site Description at §11.3.2 and "*Figure 11.3 Proposed Site Area and immediate context*." And it states that "*The proposed site area will be partly internal to the data storage development.*" And "*the landscape berm and planting of the data storage development is proposed to be set back from the rear property boundaries*" of two private residences on the western boundary. It is stated that the proposed developments are in an area rated as High Sensitivity lowland agricultural lands in the Meath County Landscape Character Assessment 2007 - of which it is said:

"The southernmost extent of this area, where the proposed development is to be located, has and continues to attract significant development activity by virtue of its proximity to the Dublin metropolitan area. Recent, ongoing and emerging high tech industrial developments have substantially altered the former agricultural character of the lands in this area, and the current

617 Human Health & Populations at §5.11 - The subsurface grid connection line and substation would have no post-construction impacts on human health. Therefore there is no potential for cumulative effects. There is not anticipated to be any cumulative impacts during operations. The overall cumulative impact is therefore concluded as negative and not significant with respect to human health. §6.8 as to Hydrology refers to the Data Centre in concluding that cumulative impact will be of imperceptible significance with a neutral impact on water. As to potential cumulative impacts on the land, soils and geological and hydrogeological environment, the data centre is explicitly cited at §7.8 and the cumulative impact is considered imperceptible/neutral. Similarly, §8.8 as to cumulative effect on the ecological environment cites the "concurrent data storage development proposal" and concludes that there will be no cumulative impacts. The Discussion of Noise impact at §10 includes noise maps of the Data Centre and includes it in the noise model (see also Appendix 10.3 Noise Modelling Details & Assumptions and table 10.3.2 and figure 10.3.1.) §10.9 considered cumulative impact of the Grid connection with "the main site with the proposed data storage and energy centre" and deems it moderate, negative, and long-term. As to Archaeology Figure 12.6 showed that the geophysical survey encompassed the sites of both the Data Centre and the Grid Connection and cumulative impact on archaeological, architectural and cultural heritage is explicitly considered at §12.9 in the context of "the concurrent data storage Development". The same can be said for §13.9 as to cumulative impacts on traffic and transport, as to which the cumulative impact of the operational phase is considered long-term, neutral and imperceptible. Likewise §14.7 as to cumulative impact on material assets refers to the "concurrent development". As to Waste Management §15.4.1 states that "Once operational, it is anticipated that very small amount of waste will be generated at the GIS substation from ESB networks staff during their inspections and maintenance works. These wastes may include organic/food waste, dry mixed recyclables (waste paper, newspaper, plastic bottles, packaging, aluminium cans, tins and Tetra Pak cartons) and non-recyclable waste. Waste fuels/oils, waste printer/toner cartridges, waste electrical and electronic equipment (WEEE) and waste batteries may also be generated infrequently." In that light the prospect of "major" environmental effects (see Shadowmill v ABP & Lilacstone [2023] IEHC 157) must be so remote that the absence of an explicit cumulative assessment can be overlooked. And no-one has suggested otherwise.

land use zoning anticipates further expansion and intensification of such uses. It is considered therefore that the High Sensitivity of the agricultural lands rating identified in 2007 is no longer appropriate to the local land use, and that the capacity of the area to accommodate high tech industrial facilities has been clearly established. It is however considered that integration of such development within the wider agricultural landscape is an important consideration in designing and planning for such development."[618]

359. §11.9 considers Cumulative landscape and visual effects with, inter alia, the "*concurrent development*" – i.e. the Data Centre – and concludes that effects will be long term and not significant. Notably, the accompanying photomontages are marked *"Showing Concurrent Data Storage Development*" or "*Showing Proposed Substation Development together with Concurrent Data Storage Development*" or similar and the Data Centre is visible in many.

360. §9.8.1 of the Grid Connection EIAR considers cumulative impact on Air Quality and Climate. Assuming the construction phase coincides with any other permitted developments within 350m (which would include the Data Centre) dust mitigation will avoid significant cumulative impacts on air quality and "*Due to the relatively small scale of the proposed development and the short-term construction stage significant cumulative impacts to climate are not predicted.*" And overall cumulative impacts on air quality and climate are deemed short-term and not significant. As to the operational phase and notably, the assessment of cumulative impact on climate more briefly states the conclusion of the Data Centre Addendum EIAR to the effect that *"the cumulative CO_2 emissions from electricity to operate the data centre facility will not be significant in relation to Ireland's national annual CO_2 emissions."* That issue is put in the context also of the RISL/Facebook data centre and the conclusion is drawn that cumulative impact to air quality and climate as a result of the Proposed Development will be *negative, long-term* and *imperceptible*.

361. It seems to me useful to observe at this point that as,

- assuming omission of the Energy Centre, operation of the Data Centre is impossible without the Grid Connection,
- the only posited effect on climate is by way of Scope 2 GHG emissions from electricity generation elsewhere on the National Grid to power the Data Centre via the Grid Connection,

it necessarily follows that any assessment of such effects is inevitably and necessarily an assessment of cumulative impacts of the Data Centre and the Grid Connection. As has been seen earlier in this judgment, such an assessment is found in the Data Centre Addendum EIAR.[619] Also, the Data Centre Addendum EIAR noise assessments clearly modelled the cumulative noise outputs of both the Data Centre and the Grid Connection Substation.[620] The Data Centre Addendum EIAR, in considering

618 Grid Connection EIAR §11.3.5 Landscape Character Assessment; Data Centre EIAR §11.3.5 Landscape Character Assessment.
619 §9 Air Quality & Climate – In particular §9.2 amending the original §9.8.2.2, Which examines the implications of omission of the Energy Centre and consequent power supply from the National Grid.
620 Updated Figures 10.10 to 10.13. & §10.2 amending the original §10.9.2 which considers cumulative noise impact "including proposed substation and grid options".

cumulative emissions from standby generators,[621] noted that none would be associated with the Grid Connection.

362. Given the case made by the Coynes, as to uncertainty regarding the cable route locations, it is necessary to note that Chapter 3 of the Grid Connection EIAR considered alternative cable routes, one of which, Option C, ran south from the substation to the Woodlands-Clonee overhead line. Option C is clearly recorded as having been rejected. The Data Centre Addendum EIAR and the Grid Connection EIAR each incorporates an AA Screening report. That for the Data Centre is an amended version of that submitted with the original EIAR and contemplates[622] that the Site will be serviced by one of three modelled Grid Connection options.[623] These options include the 1.7km Gunnocks - Corduff circuit generally north of the Substation Site but not the 2km Gunnocks - Woodland circuit generally west and northwest of the Substation Site. It does seem clear that the amended Data Centre AA Screening Report was not updated to reflect the decision as to Grid Connection routes evident in the Data Centre Addendum EIAR. The list of projects considered with the Data Centre in the amended Data Centre AA Screening Report for purposes of assessment of cumulative effect[624] does not include the modelled Grid Connection options but that is explicable in that those Grid Connection options are "screened out" for AA purposes earlier in the report.[625] More generally, AA of the Data Centre is screened out by the report and by an appended "Finding no significant effects report". However, and importantly, the AA Screening report for the Grid Connection very clearly does reflect the final decision as to Grid Connection routes and specifically the 1.7km Gunnocks - Corduff circuit and 2km Gunnocks - Woodland circuit contemplated in the S.182A approval application[626] and they are "screened out" for AA purposes.[627]

363. In the Grid Connection approval application the Coynes alleged project-splitting and EngineNode disputed[628] the allegation. Both did so in terms generally reflected in the pleadings and submissions made at trial[629] so I need not replicate them here.

621 §9.3 - cumulative with the RISL/Facebook Data Centre.
622 P6.
623 Depicted in Figure 4 "Showing potential grid connection options." and described, in part, as follows:
1. An underground 220 kV loop-in connection highlighted as Pink to the existing Corduff-Woodland 220kV circuit (highlighted as Green). ..
2. An underground 110 kV loop-in highlighted as Navy on the Corduff-Mullingar 110kV circuit (highlighted as Black). …
3. An underground 220 kV loop-in highlighted as Cyan on the Woodland - Clonee 220kV circuit (highlighted as Brown). .. Also described in Appendix A Finding of No Significant Effects Report.
624 §5.2. p15 et seq. Also described in Appendix A Finding Of No Significant Effects Report.
625 §5.1 p15 & §6 & Appendix A Finding Of No Significant Effects Report.
626 Figure 2. Showing the proposed Project on recent aerial photography.
627 §4.1 p9, §5.1 & Appendix A Finding Of No Significant Effects Report.
628 John Spain Associates to the Board 8th April 2021.
629 See below.

G1 - Project-Splitting – Inspector's Reports 28 May 2021 & Board EIAs

364. First, and despite the content of Figure 4 of the AA Screening report in the Data Centre Addendum EIAR showing potential Grid Connection Options, the Inspector's Grid Connection Report unambiguously identified the proposed Grid Connection development as consisting primarily of the Substation and underground cables to the Corduff-Woodland overhead line (c.2km) and the Gunnock-Corduff overhead line (c.1.7km).

365. It is clear that the Inspector's Grid Connection Report is to be read with her Data Centre Report.[630] Equally, her Data Centre Report[631] notes that "*The data centre would be connected to the national grid via the concurrently proposed substation and transmission lines ….*" As for the Data Centre, the Inspector recommended that permission for the Grid Connection be granted[632] and she recommended[633] reasons and considerations and a proposed decision[634] later echoed in the Impugned Decisions.

366. The Inspector recorded[635] the Coynes' objection to the Grid Connection approval application as alleging "*Project-splitting (separate s.34 data centre & s.182 SID applications)*". She recorded[636] that EngineNode's reply denying project-splitting and pointing out that both applications include EIARs, which assess the cumulative and in-combination impacts/effects of each other and surrounding projects and both are now before the Board for EIA. The Inspector's Grid Connection Report policy analysis cross-references her analysis in her Data Centre report and repeats some of it. The Inspector's Grid Connection Planning Assessment[637] includes the following:

> ***"Cumulative impacts:*** *The concerns raised by Mannix and Amy Coyne in relation to the consideration and assessment (EIA & AA) of the separate data centre and substation applications are noted, however this is the planning framework within these types of development must be considered (S.34 & S182A). I am satisfied that that the assessment of cumulative impacts in-combination with each other, and other plans and projects in the surrounding area is appropriate.*
>
> ***Energy demand:*** *The concerns raised by Mannix and Amy Coyne in relation to the energy demands of data centres relative to Government commitments under the Paris Agreement and related legislation are noted, however the proposal relates to the transmission of energy as opposed its generation or usage."*

630 E.g. § 6.0 Planning Assessment "This assessment should be considered in conjunction with Section 7.0 of R307546 for the proposed data centre under ABP-307546-20." See also §7.4 as to EIA.
631 Inspector's Data Centre report #7.1.7.
632 Inspector's Grid Connection report #2 §9.
633 Inspector's Grid Connection report #2 §10.
634 She does not by name identify it as such but that is what it is.
635 Inspector's Grid Connection report #2 P5.
636 Inspector's Grid Connection report #2 P7.
637 Inspector's Grid Connection report #2 §6 – p17.

367. As to EIA, the Inspector stated that her treatment at §7 of her Grid Connection report should be read in conjunction with §6 (Planning Assessment) of that report and with §8.0 (EIA) of her concurrent report as to the Data Centre. As to "Air and Climate" and the Coynes' concern regarding "*Energy demand & climate change*" in the form of "*Potential for long terms impacts on achievement of Climate Change & carbon emission reduction targets (EU & National)*", the Inspector observed[638] that "*this is an energy transmission project as opposed to an energy use or energy generation project. A balance will be achieved as Ireland moves towards achieving the 70% renewable energy target by 2030.*"

368. As to cumulative effect on "*Air and Climate*", the Inspector said that the Grid Connection "*would give rise to some minor cumulative impacts in-combination with the construction of the proposed data centre … with no significant cumulative impacts predicted during the operational phase."* She concluded: *"I have considered all the written submissions made in relation to air and climate, in addition to those specifically identified in this section of the report. I am satisfied that they have been appropriately addressed in terms of the application and that no significant adverse effect is likely to arise."* Her more general consideration of cumulative impacts[639] echoed that in her Data Centre report.[640]

369. The Board's EIA in the Data Centre Appeal recorded that the documents before it, including the EIAR and Addendum EIAR, identified and described adequately the direct, indirect, secondary and cumulative effects of the Proposed Development on the environment and it agreed with the Inspector's examination of that information and adopted her report and conclusions in deciding that the effects of the proposed development on the environment, by itself and in combination with other plans and projects in the vicinity, would be acceptable. The Board's EIA in the Grid Connection Approval Application is in all but identical terms.

G1 - Project-Splitting – the Coynes' case & the Opposition

370. The Coynes plead 'project-splitting' for the purposes of the EIA Directive on the basis that

- the Data Centre and the Grid Connection are integral parts of the same overall project within the meaning of **O'Grianna**.[641]
- there is no single assessment of the environmental impacts of the entire project in EngineNode's EIARs - for example, as to visual, construction and noise impacts, or as to flora and fauna. Nor, even if this were an adequate approach, is there any consideration of the cumulative impacts of the two parts of the project.

638 Inspector's Grid Connection report #2 P28.
639 Inspector's Grid Connection report #2 §7.5.
640 See above.
641 Ó Grianna v An Bord Pleanála [2014] IEHC 632.

371. It is not easy to clarify exactly what elements of the EIA Directive are pleaded. Core Ground 1 pleads Articles "2(1), 2 and 4". The last paragraph of the particulars pleads "Articles 1, 2 and 4" but the particulars actually address only Article 2(1) and Annex IV. I take these latter elements to be those actually relied upon. In the end, the gravamen of the plea is adequately clear. Article 2(1) states the Directive's "*fundamental*"[642] requirement – that EIA be done.[643] Annex IV prescribes the necessary content of an EIAR in terms, inter alia, of the "*whole project*". There is no plea of project-splitting by reference to any requirements of the Habitats Directive.

372. Though they formerly raised an issue in that regard, the Coynes now accept that the Data Centre and the Grid Connection had to be the subject of separate applications, for planning permission and s.182A approval respectively, and they accept that such a process is not inconsistent with the EIA Directive.

373. The Coynes nonetheless argue that the Board was obliged to carry out a single EIA, as opposed to EIA of each of the Data Centre and the Grid Connection concurrently and in cumulation with one another. They did not point in any real way to resultant substantive deficiencies in the information before the Board or the EIAs done by the Board – so the ground is somewhat theoretical. They assert that by relying on the Board's consideration of the cumulative effects of the Data Centre and the Grid Connection in answer to the project-splitting allegation, the Board and EngineNode conflate the concepts of EIA of the whole project with the concept of cumulative effect which, by the terms of the EIA Directive, relates to the cumulative effect of the whole project and <u>*other*</u> relevant plans or projects. They say that the EIA Directive requires both an assessment of the whole project and an assessment of the cumulative effects of the whole project with other relevant plans or projects.

374. The Coynes also plead that the Inspector asserts[644] that

> *"Having regard to the nature and scale of the various projects and the E2/E3 zoning objective (incl. employment/light industrial/warehousing uses), and agreed Master Plan for the overall lands, I am satisfied that adverse cumulative effects can be avoided, managed and mitigated by the embedded measures which form part of the proposed development as amended by the omission of the energy centre, mitigations measures, and suitable conditions. There is, therefore, nothing to prevent the granting of approval on the grounds of cumulative effects."*

This, it is pleaded, is simply a statement and not an identification, description or assessment of the environmental effects of the whole project.

642 Case C-411/17, Inter-Environnement Wallonie ASBL, Conseil des ministers, Electrabel SA, Opinion of AG Kokott; Case C-416/10 Križan v Slovenská inšpekcia životného prostredia, Opinion of AG Kokott.
643 Article 2(1) requires that "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment 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."
644 Inspector's Report #2 – Data Centre - §8.5 Cumulative Impacts.

375. It is also pleaded that no such assessment could have been done as EngineNode's' revised AA Screening Report, at Figure 4, Page 11, makes clear that the proposed grid connection route had not been identified.[645] (That Figure 4 depicts three *"potential grid connection options"*.) It is for this reason that I teased out above the issue of the identification of the cable routes in the relevant documents.

376. Beyond traverses, the Board's and EngineNode's Opposition and Submissions essentially plead and argue that

- what is required is EIA "of the overall project", which was done.

- both the Grid Connection and the Data Centre have been the subject of full EIARs and public consultation.

- both files were considered and decided together by the Board and were the subject of cross-referenced reports by the Inspector.

- each EIA is to be read in light of the other. In each EIAR and EIA the connection between the Grid Connection and the Data Centre has been considered and each considered the cumulative effect of the Grid Connection and the Data Centre.

- the EIAs of the Data Centre and Grid Connection assessed the total environmental impacts of both as a whole, overall, project.

- having accepted that it was correct to consider the Data Centre and Grid Connection in different forms of planning application, the Coynes have been driven in substance to an attack on the EIA on its merits, which is impermissible in judicial review.

377. All parties cite caselaw which I will address below.

G1 - Project-Splitting – Discussion & Decision

378. The Coynes essentially say there should have been one EIA not two and that the cumulative assessments of the two applications/elements of the overall Data Centre and Grid Connection project is insufficient for the purposes of Article 2(1) of the EIA Directive. For reasons which I will explain, I disagree.

645 An amended AA Screening Report is at Appendix A to the Addendum EIAR of August 2020.

G1 - Project-Splitting – Cable Routes Depiction Error

379. In view of the foregoing content of the EIARs and the AA Screening reports it is clear to me that the Coynes' plea that the AA Screening report in the Data Centre Addendum EIAR makes clear that the Grid Connection route had not been identified is unreal. I have no hesitation in finding that the intelligent layperson, reading the application documents as a whole, would readily identify an error in the AA Screening report in the Data Centre Addendum EIAR in that it had not been updated to reflect the finalisation of the Grid Connection routes. That error and its correction are obvious - not least as the AA Screening report in the Grid Connection EIAR had been so updated and the cable routes clearly described and clearly depicted.[646] Not only was the error obvious but the papers before the Board provided the means of its ready correction and it is impossible to conclude that anyone was left in doubt, much less misled, by the error.

380. The Coynes' submission is also incorrect in saying that, after Figure §7.1, the Grid Connection EIAR "*describes a number of grid connection route possibilities*". What in fact follows[647] is a narrative description of the Gunnocks-Woodland and Gunnocks-Corduff routes which is entirely consistent with both their depiction in Figure §7.1 and the text of the S.182A application form and planning report. The Coynes' submission is correct in saying that Figure §7.1 identifies a different red-line boundary to that in the Data Centre application – but that reference to the Data Centre application is presumably a reference to the obvious error in the AA Screening report in the Data Centre Addendum EIAR, which I have addressed above.

381. I reject this aspect of the Coynes' case.

G1 - Project-Splitting – Was Assessment of Cumulative Effects done?

382. I am also amply satisfied, given the explicit terms of the documents before the Board in both processes as recited above, and the Board's reference to them and adoption of the Inspector's reports, that any suggestion that cumulative effects of the Data Centre and the Grid Connection were not considered in the EIARs taken together, and in turn in the EIAs, is untenable.

383. Also, and even before making its application on 7 September 2020 to the Board under s.182A PDA 2000 for approval of the Grid Connection, EngineNode had, by its Response of 12 August 2020 to the appeals to the Board[648] acknowledged and brought to the Board's attention, the necessity of EIA of "*the interrelated and cumulative impacts*" as they related to the Data Centre and

646 See also EngineNode Planning Report (Spain September 2020) for Grid Connection S.182A Approval Application §2 & §5.
647 §7.3.1.
648 §5.163.

the Grid Connection. In its reply[649] in the Grid Connection Approval process to the Coynes' allegation of project-splitting, EngineNode explicitly cites the Board's duty to perform EIA "*of the overall project*", covering all of the physical interventions and operational elements across the project as a whole - including connection between the Grid Connection and the Data Centre and their cumulative effects. While not impossible, it would have been at very least surprising if, thus alerted, in the ensuing EIAs the Board had failed to address these issues. In any event they did not so fail.

384. The Coynes' plea that the Inspector's consideration of cumulative effects[650] is no more than a statement and not an identification, description or assessment of the environmental effects of the whole project suffers from two fatal defects. First, and inexplicably, it is cited shorn of its immediate context. The previous paragraph of the Inspector's report reads as follows:

> *"There are several existing, permitted or proposed plans and projects within a 20km radius of the proposed development that have the potential to result in-combination effects with the proposed development on the receiving environment. These are addressed in each of the EIAR chapters and the Addendum EIAR. However, the main project relates to the concurrently proposed substation and transmission cables (ABP-208130-20) which would serve the proposed development, and the recently permitted data storage facility on a nearby site to the S (Facebook/Runways), and to a lesser extent the existing business and warehouse developments to the immediate N and NE of the site (Bracetown & Hub Logistics)."*

Not only does this specifically identify the concurrent application for the Grid Connection, more importantly in the context of the Coynes' plea, it explicitly refers to the treatment of cumulative effects in the EIARs. Given they were considered by the Inspector and the Board as part of a single administrative process, it seems also legitimate in this context to refer to the Inspector's report in the Grid Connection application, certain of the content of which I have recited above, and which is also grounded in the EIARs. I am happy that, taking the relevant documents as a whole, in which context the Inspector's reports must be read, there was ample and proper basis for the passage criticised by the Coynes.

G1 - Project-Splitting – EIA of the Project as a Whole and Distinct Processes

385. It was not disputed, and I agree, that for EIA purposes the Data Centre and the Grid Connection constitute a single project requiring assessment as a whole. From that requirement, it follows and is clear that it is impermissible to split off an element of a project requiring EIA and to say of it that, considered alone, such element does not require EIA[651] and, on that basis say in turn

649 John Spain Associates to the Board 8th April 2021.
650 At §8.5 of his 2nd Data Centre Report - Cited above and by the Coynes "Having regard to the nature and scale of the various projects and the E2/E3 zoning objective (incl. employment/light industrial/warehousing uses), and agreed Master Plan for the overall lands, I am satisfied that adverse cumulative effects can be avoided, managed and mitigated by the embedded measures which form part of the proposed development as amended by the omission of the energy centre, mitigations measures, and suitable conditions. There is, therefore, nothing to prevent the granting of approval on the grounds of cumulative effects."
651 Perhaps, for example, because taken in isolation it is not a project of a type listed in the Annexes to the EIA Directive, or because it is "sub-threshold" and, considered in isolation, is unlikely to cause significant effects on the environment.

that EIA of the remainder of the project suffices. It appears to me that the three **Ó Grianna** judgments[652] **Daly**[653] and **Sweetman/Ballycumber**,[654] taken together, are authority for these propositions. But those requirements were not breached here.

386. Importantly, in Sweetman/Ballycumber, Quinn J, citing Ó Grianna and Daly, observed that "*it will not always be necessary for a unitary application to be made in respect of each separate phase of a development …. each case must be considered on its own facts. It is correct to say that there are different ways and different sequences and stages in which development consent can be granted".* This seems to me an observation as applicable to simultaneous development consent procedures (as in this case) as to successive such procedures. Indeed the case – as to the substantive adequacy of EIA - for upholding simultaneous development consent procedures conducted in effect as one, is, if anything, greater.

387. Those cited cases involved issues of failure to perform EIA on grid connections associated with wind farms. They are not to be distinguished here on the basis that they considered wind farms as opposed to a data centre – nor was that suggested. What sets this case apart from those cases is that EIA of the Grid Connection has been done here - and done before any development consent issued from the Board in respect of any part of the Proposed Development. It is true that the procedures adopted resulted, as to form, in the distinct EIA of each of the Data Centre and the Grid Connection. I accept the Board's and EngineNode's submission that this was appropriate in that **Fitzpatrick**[655] establishes that "*The EIA Directive requires an EIA to be carried out of the project or proposed development for which the planning permission is sought*". The same must apply to s.182A approvals. And but for the appeal to the Board, it would inevitably have applied to each process had the Data Centre planning application been finally decided by the planning authority, with the s.182A approval of the Grid Connection being decided by the Board. The EIAs may (arguably must) be distinct but may not be parallel[656] - the relationship between them must be such as to ensure that the obligation imposed by the EIA Directive to perform EIA of the whole project comprising both the Data Centre and the Grid Connection has been met.

388. But in the present case the two EIAs are closely linked in two ways: first, administratively and in substance they were investigated and reported by a single Inspector and in turn conducted simultaneously by the Board; second, the cumulative effects of the Data Centre and the Grid Connection, taken together, were considered. And each EIA preceded both the Board's grant of permission for the Data Centre and its approval of the Grid Connection.

652 Ó Grianna v An Bord Pleanála [2014] IEHC 632; [2015] IEHC 248 & [2017] IEHC 7.
653 Daly v Kilronan Windfarm Ltd [2017] IEHC 308.
654 Sweetman v An Bord Pleanála & Ors [2023] IEHC 89 (High Court (General), Quinn J, 17 February 2023).
655 Fitzpatrick v An Bord Pleanála [2019] 2 ILRM 247, [2019] I.E.S.C. 23 - Finlay-Geoghegan J. for a unanimous Supreme Court §22.
656 In the sense that the defining characteristic of parallel lines is that they never meet. Understood more loosely, the word parallel is unobjectionable in this context.

G1 - Project-Splitting - the Concept in EIA – what does the EIA Directive Require?

389. As the preceding analysis notes, it can occur, for a variety of reasons, that projects associated with each other in greater or lesser degree, or parts of the same project, will be the subject of distinct development consent applications. It can occur that one, some, or all of those projects will be subjected to EIA. While circumstances vary appreciably, generally a question can arise whether objectionable project-splitting has occurred. Given the very wide range of factual possibilities, the general subject can be a difficult one.[657] Project-splitting is not mentioned in terms in the EIA Directive. It is a concept of EIA law necessarily inferred in the caselaw from Article 2.1 of the EIA Directive. So, it is particularly important to keep in mind the underlying purpose of that concept, which is to ensure that, as is required by Article 2.1 of the EIA Directive as its "fundamental objective"[658], all projects of the kinds listed in the EIA Directive which are likely to have a significant effect on the environment are subjected to EIA before development consent is given.

390. The concept is part of a regime that fundamentally seeks to ensure that nothing escapes EIA which must be subject to it. As **Scannell** says,[659] "*project-splitting is a device to avoid the obligation to*" do EIA. **Browne** cites[660] - without comment - a **Sweetman** case[661] in which Hedigan J considered it to be the correct approach to consider "*whether project-splitting had occurred for the purpose of avoiding the requirement to have an EIA. … The question is not whether there has been project-splitting simpliciter, but whether it was done for the purpose of avoiding the need to have an EIA*." While the law has likely moved on since then and the focus is on the substance and effect of alleged project-splitting rather than the motive for it, the case usefully emphasizes that what is at issue is the avoidance of EIA which ought to be done. Similarly, in **Sweetman/Ballycumber**,[662] Quinn J recently described project-splitting as *"the avoidance of EIA by subdividing a project into different phases each of which may not on its own require EIA".*[663]

391. I note in particular Browne's concluding view,[664] citing Scannell[665] and which seems applicable to this case, that

> *"… it is legitimate to seek a series of development consents, and for there to be a series of separate EIAs in this regard. Of course, each individual EIAR would have to include some information on the cumulative effect of the project with other projects. The mischief of project-splitting really only arises where development is carved up in such a way as to avoid* any *requirement for EIA; for example, application might be made for a series of sub-threshold development consents."*

657 See generally, Simons on Planning Law (3rd Ed'n, Browne) §14-280 et seq.
658 Umweltanwalt von Karnten v Karntner Landesregierung [2010] All ER (D) 31 (Jan) C-205/08.
659 Scannell on Environmental Law, 2006, §5-61.
660 Simons on Planning Law (3rd Ed'n, Browne) §14-290.
661 Sweetman v An Bord Pleanála [2016] IEHC 310 (High Court, Hedigan J, 10 June 2016).
662 Sweetman v An Bord Pleanála & Ors [2023] IEHC 89 (High Court (General), Quinn J, 17 February 2023) §148 et seq.
663 Citing cases C-508/03 Commission v United Kingdom; Case C-227/01 Commission v Spain; Case C-392/96 Bond Naturschutz; Case C-142/07 Ecologistas; and C-201/02 Wells.
664 Simons on Planning Law (3rd Ed'n, Browne) §14-375.
665 Scannell on Environmental Law, 2006, §5-61 et seq.

This is notable not merely in its focus on cumulative effect and on the mischief of project-splitting as being that of avoiding EIA, but for its acknowledgement that *"it is legitimate … for there to be a series of separate EIAs".*

392. Notably in the present case, no element of the Data Centre and Grid Connection has evaded EIA and in each EIA the cumulative effect of each with the other is considered. It is also clear that both development consent applications and both EIAs were considered together - by both the Inspector and the Board - and that, in very considerable degree, the practical and substantive consideration of both files, including the EIAs, was unified. There is here no question of any project "escaping" EIA and the issue of project-splitting simply does not arise in that aspect.

393. The only conceivable complaint, which is made by the Coynes, is that the EIA of the Data Centre and Grid Connection taken together is in some way deficient because their interaction was considered by way of consideration of their cumulative effects as distinct projects as opposed to consideration as a single project. Perhaps in another case, on other and particular facts, such an argument could be more forcefully mounted. But here, no flesh has been put on the bones of that assertion – by way either of evidence or argument. The assertion is of deficiency of form not of substance. Borrowing, I think legitimately, a concept of interpretation of EU law, and putting it to work as to the application of EU law, I cannot see, from a purposive point of view, that the obligation imposed by Article 2.1 of the EIA Directive has been in any way undermined in this case.

394. I am bolstered in my view in this regard by the manner in which the CJEU chose to express, in **Abraham**,[666] the mischief which is the object of the rule against project-splitting. The CJEU frames the concept in terms of cumulative effect. The court said:

> *"…… the objective of the legislation cannot be circumvented by the splitting of projects … failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) …"*

That formula was repeated in **Umweltanwalt von Karnten**[667] and the **Brussels Airport** case.[668] The court in Abraham cited **Commission v Ireland**[669] in which the point was made, if anything more clearly, as to the need to ensure "*that the objective of the legislation would not be circumvented by the splitting of projects*", the issue being, "*whether account is to be taken of the cumulative effect of several projects whose impact on the environment must be assessed globally."* The court in that case said:

666 Case C-2/07 Abraham and Others [2008] ECR I-1197.
667 Umweltanwalt von Karnten v Karntner Landesregierung [2010] All ER (D) 31 (Jan) C-205/08 §53.
668 Brussels Hoofstedelijk Gewest and others v Vlaams Gewest (Case C-275/09).
669 Case C-392/96 Commission v Ireland [1999] ECR I-5901, §76.

"Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive."

395. In **Ecologistas**[670] – the Madrid Ring Road case - the CJEU[671] said that

"…… the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects[672] must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment …….

As regards the projects at issue in the main proceedings, it is clear from the order for reference that they are all part of the larger project …. It is for the referring court to verify whether they must be dealt with together by virtue, in particular, of their geographical proximity, their similarities and their interactions."[673]

396. In **Salzburger Flughafen**[674] the referring German court was even more explicit:

"Furthermore, in order to avoid misuse of the European Union rules by splitting projects which, taken together, are likely to have significant effects on the environment, it is necessary to take into account the cumulative effect of such projects which have an objective and chronological link between them."

The CJEU did not demur and itself noted that *"it can be necessary to take account of the cumulative effect of projects in order to avoid a circumvention of the objective of the European Union legislation by the splitting of projects which, taken together, are likely to have significant effects on the environment"* – citing the **Brussels Airport** case.

Ó Grianna

397. In **Ó Grianna #1**[675] Peart J records the applicant's complaint of project-splitting in that case as being expressed in terms of cumulative effect: the complaint was that

670 Case C-142/07, Ecologistas en Acción-CODA v Ayuntamiento de Madrid.
671 Citing Case C-392/96 Commission v Ireland and Abraham.
672 In context, the reference here to "several projects" is to be understood as a reference to several parts of what is, properly for EIA purposes, a single project.
673 §§44 & 45.
674 Salzburger Flughafen GmbH v Umweltsenat (Case C-244/12) [2013] PTSR 910. – the Salzburg Airport case.
675 Ó Grianna v An Bord Pleanála [2014] IEHC 632 §15 et seq.

> *" …. the cumulative effect of the entire development on the environment should have been the subject of the Board's EIA, and that an impermissible 'project-splitting' has occurred thereby invalidating the decision-making process. They make the point that the connection to the national grid is a fundamental part of the overall development as, without such connection, the wind farm cannot operate, and that the two stages should be considered as a single project and be assessed as such on a cumulative basis before it can be seen as complying with the EIA Directive.*
>
> *…. because the EIS did not contain any information as to the environmental impact of the second stage relating to the connection to the national grid, the Board was prevented from giving any consideration to that factor, or the cumulative effect of both stages of the development, as is required under the Directive.*
>
> *….. it is quite possible that the connection to the national grid would constitute exempted development …… and therefore there may well be no opportunity available for an EIS to be submitted in relation to the cumulative effects of the development under challenge and its connection to the national grid, as no further planning application would be required."*

398. Peart J distinguished a Scottish case[676] which had been cited to him and in which borrow pits had been identified as an integral part of the wind farm development such that normally their cumulative impact should have been considered as part of the EIA. It was also said in that case that "*It is consistent with Advocate General Gulmann's approach in Bund Naturschutz[677] that the court should look at the particular circumstances of each case in deciding whether a cumulative assessment is needed to fulfil the purposes of the Directive*." Peart J distinguished Bund Naturschutz as not "*authority for any general proposition that even though one development is integral to a second there is nothing illegal about separating one from the other, and thereby avoid a cumulative assessment of significant environmental effects of both. Each case will have to be considered in the light of its own specific facts …*". On the specific facts before him, Peart J considered that "*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*." He later said:

> *"Presumably at some future date all of the grid connection details will be ascertained, so that a decision can be made as to whether there will or will not be any significant environmental impact either on its own, or cumulatively with the wind turbine development itself. The question is whether that cumulative assessment, or even a decision as to whether any such cumulative assessment is required at all, should be made prior to permission being granted for the first stage of the development (i.e. the construction of the turbines), or whether the construction of the turbines can be allowed to proceed, and then in due course when the details of the connection to the national grid are known, a cumulative assessment of the environmental impact of both can be carried out – running the risk from the developer's point*

676 Skye Windfarm Action Group Limited v Highland Council [2008] C.O.S.H. 19.
677 Bund Naturschutz in Bayern v Freistaat Bayern (Case C-396/92) [1994] ECR I-3717.

of view, that in the event that he proceeds with the construction of the turbines, it would be all in vain should there be a negative cumulative assessment when it comes to considering the connection to the national grid."

And:

"……….. it is difficult to see any real prejudice to the developer by having to wait until the necessary proposals are finalised by ESB Networks so that an EIS for the entire project can be completed and submitted, and so that a cumulative assessment of the likely impact on the environment can be carried out in order to comply with both the letter and spirit of the Directive."

399. Peart J later, in a judgment which I will call "**Ó Grianna #1.2"**,[678] considered whether to remit the case to the Board for re-decision. He described his earlier judgment as having decided *"that the construction of the wind turbines themselves and the connection to the national grid is a single project, and not two separate projects, and that before granting planning consent for the former, it was necessary that the cumulative effects of the combined or single project ought to have been carried out."* He noted that the Board was satisfied that on remittal *"an EIA can be carried out by the Board which will meet the requirements for a cumulative assessment in line with the findings of this Court …",* whereas the applicants argued that that what was required was a new EIS "*which takes account of the cumulative effects of both stages of the development*" and *"an entirely new EIA which addresses the cumulative effects on the environment of both stages of this proposed development, and that the EIS as lodged already cannot now simply be revisited ..".* Peart J did not disagree with both sides' framing his earlier judgment as based on the need for cumulative assessment of the wind farm and the grid connection, and he remitted the case.

400. On remittal, the Board again granted permission[679] and **Ó Grianna #2**[680] ensued. McGovern J took the view[681] that *"the EIA Directive should be given a purposive interpretation and should not be used to strike down consents where there has, in reality, been substantial compliance with its requirements, having identified with precision what those requirements are."* And he considered that *"The EIA Directive is not about formalism. It is concerned with providing effective EIAs for all major projects; and, in its amended form, with ensuring adequate public participation in the decision making process. The principle of effectiveness is not a mandate for construing the Directive in the most onerous manner possible. This involves the courts being astute to ensure the objectives of the Directive are met but not in an overly pedantic way."* McGovern J described the principal point raised before Peart J as having "*related to the absence of information on the grid connection to enable a cumulative assessment to be carried out …"* and the judgment of Peart J. as having determined *"that for an E.I.A. to be completed at this stage of the development, it was required to assess the cumulative impacts of the grid connection and the wind farm."*

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678 [2015] IEHC 248. The numbering of such judgments and their underlying cases can be a little confusing and inconsistent. Here "Ó Grianna #1.2" signifies the second judgment in the first Ó Grianna case.
679 For a slightly altered wind farm, which alterations informed the grounds of challenge in that case.
680 Ó Gríanna v An Bord Pleanála [2017] IEHC 7 (High Court, McGovern J, 18 January 2017).
681 Citing Lord Hoffman in Berkeley v Secretary of State for the Environment [2001] 2 A.C. 603 and Advocate General Sharpston in Antoine Boxus and Ors. v Région wallonne C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and 135/09.

401. In **Daly**[682] Baker J, and in the recent case of **Sweetman/Ballycumber**[683] Quinn J, in similar vein, characterised the decision of Peart J in **Ó Grianna #1**[684] as holding *"that before granting planning consent for the wind farm it was necessary that the assessment of the cumulative effects of the combined or single project ought to have been carried out."* Quinn J noted that Peart J (in Ó Grianna #1.2[685]) had remitted the Ó Grianna decision to the Board so that by EIA on remittal the "*requirements of a cumulative assessment*" could be met. Quinn J, noted[686] that in **Ó Grianna #2**[687] McGovern J had upheld the Board's decision on remittal, in which the Board had, as Quinn J put it, *"noted that the EIA as revised and submitted took account of the cumulative effects of the wind farm and the proposed grid connection works."* It seems to me, that without ignoring its other elements, the core of Quinn J's summary of his decision on the EIA issue (which, as it happens, was obiter[688] but I gratefully adopt it), is that *"The windfarm EIA did not assess the cumulative effects of a proposed grid connection."* And in **Hickwell**,[689] Humphreys J identified, as amongst the principles of the rule against project-splitting, that in the context of a development consent for part of a project, the whole project must be assessed because "*EIA/AA must in all cases consider cumulative effect of the project as a whole*".

402. It is striking that, in all of the foregoing **Ó Grianna** judgments, and in the other judgments considered above, the mischief of project-splitting is framed in terms of the need for, and absence of, cumulative assessment of the distinct parts of the project – such cumulative assessment being requisite to comply with the EIA Directive.

403. The Coynes are correct in stating that the EIA Directive requires that an EIAR describe "*the cumulation of effects with other existing and/or approved projects*"[690] – they emphasise the word "other" - and that such cumulative effects must be considered in EIA. But they are incorrect in arguing that the Board incorrectly conflates the concept of cumulative effect "*with other … projects"* with that of EIA of the whole project. There seems to me no reason why, where different parts of a project are subjected (as the EIA Directive permits) to distinct development consent processes, perhaps by different competent authorities, and hence distinct EIAs, the concept of cumulation should not also be deployed as the tool to ensure that the whole project has been subjected to EIA. One might say that, as to EIA of the whole project, the concept of cumulation – cumulative effect - is deployed in a context or manner different to that explicitly envisaged by the Directive. But I don't see that as a useful objection if the concept is put to good use as an effective tool for achieving the purposes of the Directive. It seems to me that the European and Irish cases I have cited amply and consistently confirm the usefulness and the adequacy of that tool to that end. Indeed, **Tromans**[691]

682 Daly v Kilronan Windfarm Ltd [2017] IEHC 308 (High Court, Baker J, 11 May 2017) §§21 & 22.
683 Sweetman v An Bord Pleanála & Ors [2023] IEHC 89 (High Court (General), Quinn J, 17 February 2023) §148 et seq.
684 Ó Grianna v An Bord Pleanála [2014] IEHC 632.
685 Ó Grianna v An Bord Pleanála [2015] IEHC 248.
686 §157 et seq.
687 Ó Grianna v An Bord Pleanála [2017] IEHC 7.
688 The case was decided on other grounds as to collateral challenge.
689 Hickwell Ltd v Meath County Council [2022] IEHC 418 (High Court (General), Humphreys J, 12 July 2022) §90.
690 Annex IV §5(e). A similar phrase appears in Annex III as to EIA Screening criteria at §1b and §3g.
691 EIA, 2nd Ed'n 2012, p201.

cites UK guidance as distinguishing two types of cumulative effects as requiring assessment in EIA – intra-project and inter-project. It seems to me that the evasion of consideration of the cumulative effects of parts of a project requiring EIA is a central concern of the doctrine of project-splitting and that allegations of project-splitting can, at least usually, be met by demonstrating that such cumulative effects have been subjected to EIA. At least usually,[692] by a combination of EIAs considering discretely each part of a project and considering also the cumulative effects of those parts, EIA of the whole project is achieved, and the fundamental requirement of the EIA Directive is satisfied. The Coynes have not demonstrated any unusual particulars of this case as requiring disapplication of that usual approach to EIA.

404. Indeed, given the clear differences between the nature of, and likely environmental effects of, the Data Centre and the Grid Connection respectively, it is readily predictable that a single EIAR and EIA considering both would, as a practical approach, assess the effects of each discretely and then assess the cumulative effects of both. It is difficult to see that such an approach could, at least usually, be successfully impugned as failing to assess the whole project or as failing to meet the obligations of Article 2(1) of the EIA Directive. It is also difficult to see how, in substance and as to adequacy to meet those obligations, such an approach would in reality differ from that taken in the present case. If, as I consider, these views are correct, the Coynes' objection is reduced to one of form only.

405. Notably as to issue of form, Baker J in **Daly**[693] took the view that ".. *there may be a number of ways in which an assessment of the entire project can be dealt with by a planning authority …..*". She said that "*Whether a particular development divided into a series of projects or sub-projects can be regarded as impermissible project-splitting depends on the facts…..*" and that what was required was "*a reading that best achieves the aims and objectives of the EIA Directive"*[694] and *"The general principle must be that the project must be considered as a whole .."*[695]

406. Accepting, as I do, that the Data Centre and the Grid Connection constitute a single project requiring EIA, and as each has been subjected to EIA in the respective development consent process applicable to each, it follows that the necessarily implicit premise of the project-splitting challenge is that the EIA Directive requires a single EIA of the Data Centre and the Grid Connection taken together. That seems to me to be a variation of the "*fundamental misconception*"[696] identified in two **Harrington**[697] cases in which the argument was rejected that the entire of Corrib gas field had to have been the subject of a single integrated EIA. The facts of the failed challenge in **Harrington** are too complex and lengthy to recite here[698] but illustrate the nature of the fundamental

692 By which phrase I am allowing for the possibility of, rather than suggesting the existence of, exceptions.
693 Daly v Kilronan Windfarm Ltd [2017] IEHC 308 (High Court, Baker J, 11 May 2017) §§44 & 48.
694 Baker J §54 - She was there considering a question which does not arise in the present case – "whether the grid connection works can be treated as exempted development".
695 Baker J §59.
696 MacGrath J §128.
697 Harrington v Minister for Communications [2018] IEHC 821 (MacGrath J); Harrington v Environmental Protection Agency [2017] IEHC 767 (Binchy J).
698 For a summary see §24 et seq of Harrington v Minister for Communications [2018] IEHC 821.

misconception. The development consent impugned was that to operate the "*Corrib upstream pipeline*" from the offshore Corrib gas field wellhead to an onshore gas refinery at Glengad, County Mayo. It was the last in time of a plethora of consents and licences, as to different aspects of a clearly complex project, in which repeated EIAs had been done. Binchy J. cited the Supreme Court in **Martin**[699] and **Commission v Ireland**[700] as making it "*very clear*" that it is not required that the entire project be the subject of a single, integrated EIA and that Member States may entrust the task of EIA to several competent authorities if they consider it appropriate. McGrath J cited those cases and, in particular Murray C.J. in Martin, to the effect that:

- *"… nowhere in the directive is it in any sense suggested that one competent body must carry out a 'global assessment' nor a 'single assessment' of the relevant environmental factors and the interaction between them. Those terms simply do not appear in it."*

- *"… the directive specifically envisaged that more than one authority may be responsible at different stages for exercising obligations arising from the directive."*

- Article 2(2) expressly acknowledged that the EIA *""may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this directive". In so stating, it is manifestly clear that the directive did not envisage that that so called integrated assessment, that is to say the interaction between the various factors, could only be carried out by one competent authority with global responsibility for that."*

- *"… it would be absurd to interpret the directive so as to suggest that in permitting two or more competent bodies to carry out an EIA of the factors referred to in article 3, including the interaction between them, by each body at the relevant stage of the process with which it was concerned, that nonetheless it was intended that there must be one body only that carries out an assessment of all the factors as if there was only one stage in the process and it was the only body making the assessment."*

On these authorities, MacGrath J concluded that *"any grounds for challenge by the applicant in this case, which seek to rely, as a fundamental premise, and without more, on the stated requirement for an overarching single integrated assessment, must fail."* **Sweetman v EPA**[701] may be cited to similar effect. I have above cited Browne to similar effect.

407. Of course, the issue described above can take various forms: it may be that the entirety of a project requires multiple development consents; it may be that (as in the present case) discrete physical elements of a project require separate development consents. I see no reason why the principles described above should not apply equally in such cases.

699 Martin v An Bord Pleanála [2008] 1 I.R. 336.
700 Case C-50/09 Commission v Ireland ECLI:EU:C:2011:109.
701 Sweetman v Environmental Protection Agency & Nurendale Ltd [2018] IEHC 156.

408. It bears observing in passing here that when the EIA Directive refers to integration,[702] it contemplates the integration of EIA into the development consent process, rather than an "integrated" internal quality of the EIA itself. That is not to say, of course, that incomplete EIA is acceptable, but citing in that regard the concept of integration as derived from the express terms of the EIA Directive may confuse rather than illuminate.

409. **Martin**, importantly, draws attention to the fact that the EIA Directive does not in any general way seek to supplant or alter domestic development consent processes.[703] It requires that EIA precede, and be taken account of in, those processes and as an option (generally taken in Ireland) allows that EIA be integrated in the development consent processes. Applying that observation to the present case, EIA law in no way implies that the legal structure whereby the Data Centre went through the "ordinary"[704] planning process and the Grid Connection went through the s.182 PDA 2000 process is in breach of the EIA Directive. In the end no-one suggested otherwise, but the observation has consequences which a simple thought experiment will illustrate.

410. Assume that the original proposal in this case had not included the Energy Centre but had from the start, taken its present form of the Data Centre plus Grid Connection and take it that they are properly viewed together as a single project for EIA purposes. It is accepted that it was proper to seek the Grid Connection authorisation directly from the Board under s.182 PDA 2000. Yet, inevitably, the planning permission for the Data Centre would have been made to the Council in the first instance. Assume further that the Council's decision to permit the Data Centre was not appealed. The net position would have been that a project comprising the Data Centre plus Grid Connection required EIA to inform development consent consisting of a s.182 approval by the Board and a planning permission by the Council. It seems very clear from the decisions cited above that each of the Board and the Council could properly perform EIA as relevant to the development consent which each was considering, as long the cumulative effects of the entire project were assessed in EIA. Yet the Coynes' challenge the Impugned Decisions even though both EIAs were done, not by different bodies but by a single body, the Board. And they were done, administratively and contemporaneously, in a single process – albeit one which lead to two EIAs, one in each development consent process. If, as I believe, the thought experiment I have described meets the requirements of the cases cited above, a fortiori the Board's processes in the present case did so also.

411. In **Fitzpatrick**,[705] Apple had adopted the course, in effect taken here,[706] of a planning permission application to the planning authority as to the data centre and a s.182A approval application to the Board for the grid connection. The planning application came to the Board on appeal. The Board appointed the same inspector to both files and held a joint oral hearing as to both. The inspector prepared separate, but contemporaneous, reports in relation to the data centre

702 Recital (21**), Article 1(2)(g)(v), Article 2(2).
703 The plural is deliberate as more than one authorisation may combine to constitute the development consent for a given project.
704 Under s.34 PDA in the Council and s.37 PDA in the Board.
705 Fitzpatrick v An Bord Pleanála [2019] 3 IR 617, [2019] 2 ILRM 247, [2019] I.E.S.C. 23.
706 Ignoring for this purpose of analysis, the application for permission for the Energy Centre.

appeal and the grid connection application. The Board recorded EIA in the data centre appeal in cumulation with, inter alia, the adjoining grid connection proposal and recorded EIA in the Substation approval application in cumulation with, inter alia, the adjoining proposal for a data centre that would be served by the grid connection. The process adopted by Board in that case is not far off on all fours with the present case.

412. Having found the data centre and grid connection to be functionally interdependent and hence[707] to comprise a single project for EIA purposes, Finlay Geoghegan J in the Supreme Court observed: *"The environmental impacts of those two applications were correctly considered together in a cumulative assessment. No objection has been taken in the proceedings to the manner in which that was done."* The case focussed on other issues[708] and a point not argued is a point not decided. Nonetheless, it is notable that there was no suggestion that the separate development consent procedures and EIAs considering cumulative effect of each part of the project on the other were insufficient in that case and that Finlay Geoghegan J was content to observe that the "*two applications were correctly considered together".* Indeed, the High Court[709] had noted, in expressing its satisfaction with the EIA, that ***"****The Inspector considered that an assessment had been made of the cumulative impacts which were likely to arise from the development of the datacentre application and the power supply development in combination"*. And *"The documentation clearly establishes that the Inspector and the Board assessed the cumulative impacts which were likely to arise from the completion of the two projects under consideration in combination …"*

413. Taking the foregoing cases together, it seems to me that, far from asserting the insufficiency of cumulative assessment for EIA purposes, it is the very avoidance of cumulative assessment which is the mischief which the rule against project-splitting seeks to address. On the facts in the present case, that mischief does not arise.

G1 - Project-Splitting – Adequacy of Information and Conclusion

414. On that conclusion all that is left in this Ground is what the Board describe, correctly I think, as a challenge to the EIAs on their merits, especially by reference to the alleged inadequacy of the EIARs and other information before the Board. Not only that, but the Coynes mount that challenge on an abstract basis devoid of identification or evidence of any actual likely significant environmental effect which had not been considered. The Board is entitled to curial deference to its view of the adequacy of the information before it and, as to such adequacy, is reviewable only for irrationality. Of the many and ample authorities to such effect, I cite only **Browne**,[710] **People Over**

707 Finlay Geoghegan J does not explicitly draw the conclusion but it is clearly her point.
708 Whether the EIA should have encompassed "project" including a masterplan for future development.
709 Fitzpatrick v An Bord Pleanála [2017] IEHC 585 §§96 & 97.
710 Simons on Planning Law, 3rd Ed'n (Browne) §14-791.

Wind,[711] **M28 Steering Group**[712] and **Kemper**.[713] From across the water one may add the recent case of **Finch**[714] and cite **Tromans**[715] on "*Difficulties In Successful Challenges On Inadequacy Grounds*". He cites cases to the effect that the courts have "*actively discouraged*" challenges to the quality of EIARs[716] and have required a "*high standard*" to successfully do so. Irrationality was not pleaded in this case. Had irrationality been pleaded, the plea would have failed. The account of the evidence set out above demonstrates that there was before the Board material capable of supporting its view of the adequacy of the information before it (**O'Keeffe**[717]) and this is far from a case in which the Board's decision in this regard has been shown to be "*fundamentally at variance with reason and common sense*" (**Keegan**[718]).

415. For these reasons I dismiss the project-splitting challenge – Ground 1. The project '*as a whole'* - both Data Centre and Grid Connection - was subjected to EIA to the extent required by the EIA Directive as elucidated in the caselaw.

CONCLUSION

416. As, for the reasons I have stated, I have rejected all the grounds on which judicial review was sought, I respectfully dismiss the claim. I will list the matter, for mention and orders, on 28 July 2023.

David Holland
21/7/23

711 People Over Wind v An Bord Pleanála [2015] IEHC 271.
712 M28 Steering Group v An Bord Pleanála [2019] IEHC 929.
713 Kemper v An Bord Pleanála [2020] IEHC 601. Allen J cited M28 and People Over Wind v An Bord Pleanála to the effect that

- Subject to review for irrationality (O'Keeffe v ABP [1993] 1 I.R. 39) it is for the deciding authority to determine whether the EIS and the information contained therein satisfies the requirements of the Regulations and is adequate.'
- The court is not to conduct an appeal on the merits of the Board's decision or any elements of it. The court cannot interfere with that decision merely on the grounds that it is satisfied that (a) on the facts as found it would have raised different inferences and conclusions, or (b) the case against the decision made by the authority was much stronger than the case made for it.
- To show that the Board acted irrationally, the applicant must establish that the Board had before it no relevant material which would support its decision.
- Judicial review proceedings are adversarial. The applicant bears the onus of proof. That burden will not be met by mere assertion. The applicant must submit, or more usually in a judicial review, point to, evidence to establish the validity of the challenge.

714 R (Finch) v Surrey County Council et al [2022] All ER (D) 93 (Feb) [2022] EWCA Civ 187. The headnote records that establishing what information should be included in an EIAR, and whether that information is adequate, is for the planning authority. Citing Sullivan J. in R. (Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin); [2004] Env LR 29, §§32, 33 and 41. Sir Keith Lindblom, Senior President of Tribunals, said that "where a public authority has the function of deciding whether to grant planning permission for a project calling for an environmental impact assessment under the EIA Directive and the EIA Regulations, it is for that authority to decide whether the information contained in the document presented as an environmental statement is sufficient to meet the requirements of the Directive, and its decision is subject to review on normal ["Wednesbury"] principles"." (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680 was the case in which English law on irrationality was authoritatively stated. Though that law has developed since the use of its name as shorthand for this area of law persists.)
715 EIA, 2nd Ed'n 2012, p209.
716 Tromans refers to "environmental statements" - the terminology then used in the UK.
717 O'Keeffe v An Bord Pleanála [1993] 1 I.R. 39.
718 The State (Keegan) v Stardust Compensation Tribunal [1986] I.R. 642.